

Federal Court



Cour fédérale

**Date: 20150115**

**Docket: IMM-4732-14**

**Citation: 2015 FC 51**

**Montréal, Quebec, January, 15, 2015**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS**

**Applicant**

**and**

**NAJEEB BASHIR**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application by the Minister of Public Safety and Emergency Preparedness (the applicant or the Minister) for a judicial review of a decision rendered on May 14, 2014 by the Refugee Protection Division of the Immigration and Refugee Board (the Board). In its decision, the Board rejected an application made by the Minister to cease the refugee protection of Najeeb Bashir (the respondent) pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Board found that the respondent had not reavailed

himself of the protection of his country of nationality, Pakistan, when he applied for and obtained a Pakistani passport. For the reasons that follow, the application is dismissed.

I. **Background**

[2] The respondent is a citizen of Pakistan. He arrived in Canada in June 2000 and claimed refugee protection which was granted to him in September 2001. On November 13, 2001, he applied for permanent residency, and he is still waiting for a decision.

[3] When the respondent arrived in Canada, he held a Pakistani passport which had been issued to him in 1998. Since then, he has had his Pakistani passport renewed three times (in 2004, 2010 and 2012). The respondent also holds a new Pakistani National Identification Card that he obtained in 2012 for the purpose of renewing his national passport.

[4] On August 6, 2013, the respondent attended a security interview with an immigration officer (the Officer) for the purposes of his application for permanent residency. During the interview, the Officer asked him whether he held a valid passport. The respondent replied that he had a Pakistani passport and had applied for its renewal at the Pakistani Consulate in Montreal. He explained that he wanted to have a valid passport because he was hopeful he would eventually be able to travel to a third country such as Dubai to see his parents. He also confirmed that he never applied to obtain a travel document from the Canadian authorities. The officer requested that the respondent forward copies of his valid and expired passports.

[5] The next day, the respondent sent copies of his Pakistani passports as well as a copy of his Pakistani National Identity Card. In a cover letter to these documents, he indicated that he was carrying a valid Pakistani passport because he had been informed he would need to present a valid passport to Citizenship and Immigration Canada (CIC) before he could obtain his “permanent residence papers”.

## II. Proceedings before the Board

[6] On August 26, 2013, the Minister filed an application pursuant to paragraph 108(1)(a) of the IRPA to cease the respondent’s refugee protection on the basis that by applying for and obtaining Pakistani passports, he had voluntarily reavailed himself of the protection of his country of nationality.

[7] Subsection 108(2) of the IRPA provides that the reasons set out in subsection 108(1) of the IRPA for rejection of a claim of refugee protection also constitute causes for cessation of the protection. Paragraph 108(1)(a) of the IRPA, which is at play in this case, refers more specifically to the situation where “the person has voluntarily reavailed themselves of the protection of their country of nationality.”

[8] The respondent’s evidence can be summarized as follows :

- He did not know that refugees are not supposed to hold a national passport;
- He never intended to return to Pakistan, and he did not want to travel outside of Canada before obtaining his permanent residency;
- He obtained and renewed his Pakistani passport for two reasons. First, because a friend told him he would need to submit a valid passport to CIC before he could be landed in

Canada as a permanent resident. Second, as soon as he obtained his permanent residence, he wanted to meet his parents in a third country where they could easily obtain a visitor visa, such as Dubai or Saudi Arabia;

- Regarding his belief that he would have to provide a valid passport to CIC in order to obtain permanent residence, the respondent acknowledged that he relied on what a friend told him, he did not consult his lawyer, and he did not receive a form or letter from CIC requiring him to produce a valid Pakistani passport;
- He never requested a Canadian travel document. He stated that he knew “a little bit” about such a document, but he added that he did not know anyone who had gotten one. Furthermore, he stated that he did not know that permanent residents could obtain Canadian travel documents;
- He believed that the only way he could travel to see his parents once he became a permanent resident was by obtaining and traveling with a Pakistani passport.

### III. The Board's Decision

[9] The Board concluded that the respondent's refugee protection had not ceased as it found that the respondent's actions did not demonstrate on his part an intention to voluntarily reavail himself of the protection of his country of nationality.

[10] The Board found the respondent credible, and it believed the two reasons he advanced to explain why he renewed his Pakistani passport. The Board concluded that the respondent had obtained and renewed his Pakistani passport because he was under the impression he would need to submit it to CIC for landing purposes and because he wanted to use it to travel to a third country to see his parents once he became a permanent resident.

[11] The Board referenced and relied on several provisions of the United Nations High Commissioner for Refugees' *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the*

*Status of Refugees*, UN Doc HCR/1P/4/ENG/REV. 3 (December 2011, reissue), online: <http://www.unhcr.org/3d58e13b4.html> [UNHCR Handbook].

[12] The Board referenced and applied more specifically the three requirements described at paragraph 119 of the UNHCR Handbook which need to be met to conclude that refugee protection should cease in accordance with the cessation clause set out in Article 1C(1) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the Convention). Paragraph 119 reads as follows:

119. This cessation clause implies three requirements:

(a) voluntariness: the refugee must act voluntarily;

(b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;

(c) re-availment: the refugee must actually obtain such protection.

[13] Regarding the first requirement, voluntariness, the Board concluded that the respondent had acted voluntarily in obtaining and renewing his Pakistani passport. Despite its finding, the Board underscored, on the one hand, that the information provided by CIC regarding the need to present a valid passport for landing purposes appeared to be contradictory and confusing. The Board also noted that the respondent had no idea that he could have asked for a Canadian travel document. On the other hand, the Board acknowledged that the respondent never received a letter from CIC requesting that he provide a valid passport. It also found that the respondent was not necessarily diligent in enquiring about other options allowing him to travel besides obtaining a Pakistani passport. Nevertheless, the Board accepted that the respondent was really under the

impression that he needed a valid passport to present to CIC in order to obtain his permanent residence, but it still concluded he had acted voluntarily.

[14] The Board then turned its mind to the second requirement, i.e. the intention of the respondent when he applied for the renewals of his passport, and it noted that it was the most important element of the test.

[15] The Board found that by obtaining a passport because he believed he would need one in order to obtain his permanent residence documentation and because he wanted to travel to a third country to see his parents, the respondent did not intend to reavail himself of the protection of Pakistan.

[16] The Board cited paragraph 121 of the UNHCR Handbook, which creates a refutable presumption of intention of reavailment when a person applies for and obtains a passport from his country of nationality:

121. In determining whether refugee status is lost in these circumstances, a distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply – such as a birth or marriage certificate – or similar services, cannot be regarded as a re-availment of protection.

[Emphasis added]

[17] The Board also referenced paragraph 122 of the UNHCR Handbook which discusses the third requirement, i.e. actual reavailment of the protection of one's country of nationality. This paragraph reads as follows:

122. A refugee requesting protection from the authorities of the country of his nationality has only "re-availed" himself of that protection when his request has actually been granted. The most frequent case of "re-availment of protection" will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand, obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status.<sup>16</sup> This does not, however, preclude assistance being given to the repatriant – also by UNHCR – in order to facilitate his return.

[footnotes omitted]

[18] The Board understood from these paragraphs that "[t]he UNHCR considers that voluntarily obtaining a national passport with the intention to avail oneself of the protection of this country will normally terminate the refugee status of a refugee" (paragraph 14 of the Board's decision).

[19] The Board indicated that in this case, paragraph 122 of the UNHCR Handbook could be applied *a contrario*. Accordingly, the Board found that since the respondent did not have the intention of returning to Pakistan, he did not have the intention to reavail himself of the protection of his country of nationality. The Board insisted on the fact that the respondent's intention was to travel to a third country to see his parents. Accordingly, the Board concluded that the second requirement of paragraph 119 of the UNHCR Handbook had not been met.

[20] The Board ended its analysis at that point, and it did not comment on the third requirement set out in paragraph 119 of the UNHCR Handbook.

[21] Based on its finding regarding the respondent's intention, the Board concluded that the respondent had not voluntarily reavailed himself of the protection of his country of nationality and that the Minister had not satisfied his burden of establishing, on a balance of probabilities, that the respondent had reavailed himself of the protection of Pakistan. Therefore, the Board rejected the Minister's application and concluded that the refugee protection granted to the respondent had not ceased under subsection 108(2) of the IRPA.

#### IV. Issues and standard of review

[22] The applicant raises three issues, but in my view, they all amount to determining whether the Board's decision is reasonable.

[23] Both parties submitted, and I agree with them, that the Board's decision is reviewable according to the reasonableness standard of review.

[24] In order to dispose of the Minister's application to cease the respondent's refugee protection, the Board was required to interpret subsection 108(1) of the IRPA and more particularly, paragraph 108(1)(a). The Board's assessment also involved the interpretation and application of certain provisions of the UNHCR Handbook which provide guidance regarding the interpretation of the cessation clauses included in the Convention which are essentially reproduced at subsection 108(1) of the IRPA. Finally, the Board was required to assess the



evidence and determine whether the respondent had an intention to avail himself of the protection of Pakistan.

[25] These questions involved the interpretation of the Board's home statute, the IRPA and the UNHCR Handbook, with which it has particular familiarity and considerable expertise (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654). Further, the issue before the Board raised questions of mixed fact and law concerning the interpretation and application of section 108 of the IRPA and such questions are generally reviewed according to the reasonableness standard of review (*Dunsmuir*, at para 53). This principle has been applied by this Court in the context of an application for the cessation of refugee protection in *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 9, [2008] FCJ No 689 [*Nsende*].

## V. Submissions of the parties

### A. *The applicant's arguments*

[26] The applicant submits that the applicable test for cessation of refugee protection is the three-part test described at paragraph 119 of the UNHCR Handbook, and he relies on *Nsende* at paras 12-15 and on *Cadena v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 67 at para 19, [2012] FCJ No 86. He recognizes that the Board correctly stated the requirements of the test enunciated at paragraph 119 of the UNHCR Handbook, but he argues that it erred in applying them.

[27] The applicant contends that the Board's assessment of the second criterion of the test – the respondent's intention to avail himself of the protection of Pakistan – was unreasonable. The applicant insists that in accordance with paragraph 121 of the UNHCR Handbook, once the respondent obtained a Pakistani passport for the purposes of travelling outside Canada, he was presumed to have had the intention of availing himself of the protection of Pakistan. The applicant argues that the respondent did not adduce evidence that could serve to rebut this presumption, and he further contends that the Board's reasoning operates a reversal of the burden of proof by requiring him to demonstrate why the presumption of intention of availment should not apply.

[28] The applicant submitted specific arguments in relation to each of the two reasons advanced by the respondent to explain why he renewed his Pakistani passport.

[29] The applicant contends that the respondent's evidence regarding his belief that he would need a valid Pakistani passport to obtain his permanent residency was weak. The applicant insists on the fact that the respondent was never asked by CIC to obtain and provide a valid Pakistani passport, he never consulted his lawyer on that matter, and he did not enquire about the possibility of obtaining a Canadian refugee travel document. In any event, the applicant contends that the mere wrongful belief that a passport is necessary without checking with legal counsel is not a reasonable explanation, since ignorance of the law is not a defence. The applicant also insists that this reason for applying for the renewal of his national passport was added by the respondent after his interview with the Officer.

[30] Furthermore, the applicant submits that the Board's reasoning is contradictory since it dismissed the respondent's "false belief that he needed a valid passport" argument with regard to the first criterion of the test, while it later accepted it with respect to the second criterion. Thus, the Board committed an error in its assessment of the evidence and arrived at contradictory and irreconcilable findings.

[31] In addition, the applicant contends that renewing a national passport based on a false belief that it will be required for landing purposes is not a reason that is sufficient to rebut the presumption created by paragraph 121 of the UNHCR Handbook.

[32] Moreover, the applicant submits that the second reason advanced by the respondent for obtaining a passport – to travel to a third country – cannot serve to rebut the presumption either. On the contrary, the applicant contends that by obtaining a Pakistani passport with the intention of using it to travel, the respondent established that he intends to represent himself abroad as a Pakistani citizen, and he would likely be perceived as such. Furthermore, he could, while traveling, seek the protection of the Pakistani authorities. Therefore, in the applicant's view, the act of obtaining a Pakistani passport with the intention of using it as a travel document is *per se* sufficient to demonstrate an intention of reavilment of the protection of one's country of nationality and cannot constitute a valid explanation to rebut the presumption of intention of reavilment. The applicant adds that the fact that the respondent intends to travel to a third country rather than to Pakistan is of no relevance.

[33] For the reasons above, the applicant argues that it was unreasonable for the Board, in light of the evidence, to conclude that the respondent did not have the intention to reavail himself of the protection of the Pakistani authorities, and that it should have concluded that the second requirement was met.

[34] The applicant also contends that the Board committed an error of law in failing to conduct an assessment of the third requirement set out at paragraph 119 of the UNHCR Handbook (actual reavailment of the protection of the country of nationality), thereby failing to complete the required analysis and giving inadequate reasons.

**B. *The respondent's arguments***

[35] The respondent argues that the Board applied the correct test for reavailment of the protection of one's country of nationality and that its decision is entirely reasonable and should not be interfered with.

[36] The respondent argues that the jurisprudence makes it clear that the most important requirement to be analyzed in determining whether a refugee has reavailed himself of the protection of his country of nationality is the refugee's intention. The respondent submits that the Board's conclusion that he did not intend to reavail himself of the protection of Pakistan was reasonable in light of the evidence he adduced.

[37] The respondent insists that cessation of refugee protection is an exception and the circumstances which could trigger the cessation must be looked at closely. He asserts that this is

exactly what the Board did, and he contends that it was reasonably open to it to conclude that he had no intention of reavailing himself of the protection of the Pakistani authorities.

[38] He advances that the Board found him credible and that the two reasons for which he obtained and renewed his Pakistani passport were sufficient to rebut the presumption of intention of reavailing. On that point, the respondent argues that the reasons for which he renewed his Pakistani passport - to submit it on demand to CIC for landing purposes and to travel to a third country to see his parents - clearly show he had no intention of reavailing himself of the protection of Pakistan.

[39] Replying to the applicant's argument that the Board's findings are contradictory, the respondent submits there is no contradiction between the Board's conclusion that he acted voluntarily when he applied to obtain a Pakistani passport and its finding that by doing so, he had no intention of reavailing himself of the protection of Pakistan. He contends that voluntariness and intention are two separate criteria and the fact that a refugee acted voluntarily does not necessarily imply he was acting with the intention of reavailing himself of the protection of his country of nationality.

[40] Finally, the respondent submits that, in the circumstances of this case, the Board was not required to conduct an analysis of the third requirement of the test because its finding regarding his intention when he renewed his Pakistani passport was unequivocal. Thus, considering that conclusion and the fact that the three-prong test is cumulative, there was no need for the Board to pursue its analysis further.

## VI. Analysis

[41] In my view, the Board's interpretation of paragraph 108(1)(a) of the IRPA, and its application to the facts of the case at bar, is reasonable and should not be interfered with.

[42] The Board relied on the UNHCR Handbook to interpret paragraph 108(1)(a) of the IRPA and to determine whether the respondent had reavailed himself of the protection of his country of nationality. There is no contention between the parties that relying on the UNHCR Handbook to interpret paragraph 108(1)(a) of IRPA does not constitute an error and reflects the current state of the law. I agree with the parties on that point.

[43] The UNHCR Handbook provides guidance in the interpretation of the Convention cessation clauses, including cessation of refugee protection due to the refugee's reavilment of the protection of his country of nationality. Paragraph 108(1)(a) of the IRPA essentially reproduces Article 1C(1) of the Convention, and this Court has recognized the relevance of relying on the UNHCR Handbook as an interpretative guide to assess the meaning of reavilment. I endorse Justice Lagacé's comments on that point in *Nsende*, at para 12:

12 In order to determine what is meant by "reavilment" paragraph 108(1)(a) of the *Act*, it may be useful to examine the interpretation that has been given to its source article in the *1951 Convention relating to the Status of Refugees (the Convention)*. Article 1C(1) of the *Convention* reads: "This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily reavailed himself of the protection of the country of his nationality [...]." Paragraphs 118 to 125 of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees of the United Nations High Commission*

*for Refugees* (the UNHCR Handbook) provide some interpretative guidance as to the meaning of reavilment.

[44] According to the UNHCR Handbook, the cessation clauses should be interpreted restrictively given their negative formulation and exhaustive enumeration. They should also be restrictively interpreted to ensure that refugee status will not be the subject of constant review in light of merely temporary changes. It is useful to cite the following paragraphs of the UNHCR Handbook which provide guidance on the interpretation of the cessation clauses:

111. The so-called “cessation clauses” (Article 1 C (1) to (6) of the 1951 Convention) spell out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified.

112. Once a person’s status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses.<sup>15</sup> This strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin.

[...]

116. The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status. Needless to say, if a refugee, for whatever reasons, no longer wishes to be considered a refugee, there will be no call for continuing to grant him refugee status and international protection.

[footnotes omitted]

[45] Paragraph 118 provides context for paragraph 119 and outlines that the refugee protection of a person who has reavailed himself or herself of the protection of his or her country of

nationality ceases because that person is no longer in need of international protection or no longer wishes to benefit from it:

118. This cessation clause refers to a refugee possessing a nationality who remains outside the country of his nationality. (The situation of a refugee who has actually returned to the country of his nationality is governed by the fourth cessation clause, which speaks of a person having “re-established” himself in that country.) A refugee who has voluntarily re-availed himself of national protection is no longer in need of international protection. He has demonstrated that he is no longer “unable or unwilling to avail himself of the protection of the country of his nationality”.

[46] Paragraph 119 of the UNHCR Handbook provides that the voluntary reavailment of the protection of one’s country of nationality implies three criteria. The refugee must: (1) act voluntarily; (2) intend by his action to reavail himself of the protection of the country of nationality; and (3) actually obtain such protection.

[47] The interpretation principles referenced above need to be kept in mind in the application of the requirements set out in paragraph 119.

[48] With respect to the first requirement, the Board concluded that the respondent had acted voluntarily when he applied to renew his Pakistani passport. Although the Board went on and elaborated on the fact that the CIC information regarding the necessity to provide a valid passport in order to obtain permanent residency was unclear or contradictory, these comments were no more than an *obiter* as it is clear that the Board concluded that the respondent had acted voluntarily. The evidence clearly supports this finding, which was admitted by the respondent himself.



[49] This particular conclusion of the Board regarding the first requirement of the test is not challenged by the applicant. However, the applicant contends that the Board's findings are contradictory because it rejected the respondent's explanation that he believed he needed a valid passport for landing purposes in relation to the first requirement of the test, while it accepted that same argument with respect to the second requirement of the test. With respect, I disagree.

[50] The applicant's argument appears to be based on the premise that since the Board had found that the respondent genuinely believed he was required to have a valid passport for the purposes of his permanent residency application, it should then have concluded that his act was not voluntary. In my view, such a finding would have been open to the Board in light of the evidence, but the finding that the respondent had acted voluntarily was also open to it in light of the fact that no authority had asked or required that the respondent obtain a Pakistani passport. That said, the fact that the respondent voluntarily requested renewals of his Pakistani passport does not necessarily entail that, by doing so, he had the intention of reavailing himself of the protection of Pakistan. The two criteria are different and the same factual matrix can have a different impact depending on the criterion being assessed.

[51] I also consider that the Board's finding regarding the second requirement, namely that the respondent did not intend to reavail himself of the protection of Pakistan when he applied to renew his passport, has an evidentiary basis and is reasonable.

[52] First, the Board assessed the evidence and made factual findings regarding the reasons for which the respondent renewed his national passport and, in my view, these findings regarding the respondent's explanations are reasonable.

[53] The respondent indicated that he applied for the renewal of his passport for two main reasons. First, he intended to use it to travel to a third country to meet his parents once he obtained his permanent residence. On that point, the respondent explained that he did not know he could obtain a Canadian travel document as a permanent resident and he thought the only way he could travel abroad once he became a permanent resident was by using his Pakistani passport. Second, the respondent was under the impression that he would need to provide CIC with a valid passport in order to obtain his permanent residency. He also stated that he had no intention of returning to Pakistan. The Board found the respondent credible, and it believed his explanations as being the genuine reasons for which he renewed his Pakistani passport.

[54] The applicant argued that the evidence regarding the respondent's belief that he needed a valid national passport to be landed in Canada as a permanent resident was weak. With respect, this amounts to a mere disagreement with the Board's assessment of the evidence.

[55] The Court's role is not to re-assess the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61, [2009] 1 SCR 339) and the Board is in a much better position than the Court to assess the respondent's credibility (*Aguebor v Canada (Minister of Employment and Immigration)*(1993), 160 NR 315 at para 4, [1993] FCJ No 732 (FCA)). The Federal Court of Appeal recently warned the Court against re-weighing the evidence in

*Kanhasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99, [2014] FCJ No 472, where Justice Stratas made the following comments:

In conducting reasonableness review of factual findings such as these, it is not for this Court to reweigh the evidence. Rather, under reasonableness review, our quest is limited to finding irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction, such as a complete failure to engage in the fact-finding process, a failure to follow a clear statutory requirement when finding facts, the presence of illogic or irrationality in the fact-finding process, or the making of factual findings without any acceptable basis whatsoever: *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at paragraphs 44-45; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644 at page 669.

I therefore accept the Board's factual findings regarding the respondent's reasons for obtaining and renewing his Pakistani passports.

[56] The Board then found that the reasons for which the respondent applied for the renewal of his Pakistani passport did not indicate an intention on his part to reavail himself of the protection of the Pakistani authorities. I consider that this conclusion is also reasonable in light of the evidence.

[57] First, it is difficult to see how the renewal of a national passport for the purpose of submitting it to CIC to finalize the permanent residency process can be seen as indicating an intention on the part of the respondent to reavail himself of the protection of his country of nationality.

[58] Second, in my view, it was also open to the Board, in light of the evidence, to conclude that by renewing his passport with the intention to use it to travel to a third country to see his parents, the respondent did not intend to reavail himself of the protection of the Pakistani authorities.

[59] Paragraph 121 of the UNHCR Handbook creates a presumption of intention of reavailing of the protection of a refugee's country of nationality when the refugee applies for and obtains a national passport or its renewal. In this case, the presumption applied to the respondent. However, paragraph 121 also expressly mentions that this presumption can be rebutted with "proof to the contrary", that is to say, if the refugee shows that he did not request a passport with the intention of reavailing himself of the protection of his country of nationality. Although the applicant contends that the Board did not effectively apply this presumption and reversed the burden of proof, I respectfully disagree. The Board acknowledged that there was a presumption of intention to reavail, but it was satisfied that the respondent's explanation was sufficient to rebut it.

[60] The Board was tasked with analyzing the respondent's motivation when he renewed his passport and that is exactly what it did. In *Chandrakumar v Canada (Minister of Employment and Immigration)*, [1997] FCJ No 615 (QL) at paras 5-6, 1997 CanLII 5161 [*Chandrakumar*], the Court concluded that the Board erred in assuming that the simple action of renewing a passport, without exploring the applicant's motivation in applying to renew his national passport, was sufficient to establish reavailing. In *Nsende*, the applicant had sought the renewal of his Congolese passport with the intention of using it to travel to Thailand for business purposes. The

Court found that the Board's decision was unclear as to why it found the applicant's explanations insufficient to rebut the presumption. The Court, at paragraph 23, refused to accept an implied inference that the simple fact of possessing a passport constituted proof of an intention on the part of the applicant to reavail himself of the protection of his country of nationality.

[61] In this case, it is clear that the Board assessed the totality of the respondent's evidence, and it was satisfied that his explanations were credible and showed he did not have the intention of reavailing himself of the protection of the Pakistani authorities. In my view this finding is reasonable in light of the respondent's evidence that he intended to use his national passport as a travel document to travel to a third country to see his parents, he did not intend to travel or return to Pakistan, and he believed that his Pakistani passport was the only travel document he could use to travel outside Canada with a status of permanent resident. In these specific circumstances, I consider that it was reasonable for the Board to conclude that there was no indication that the respondent intended to ask for any substantive protection from Pakistan while traveling abroad. It was also open to the Board to conclude that the presumption of intention of reavilment created by paragraph 121 of the UNHCR Handbook had been rebutted by the respondent's explanations. The Board's findings have an evidentiary basis and its reasoning is not unjustified, irrational or arbitrary.

[62] I also consider that it was reasonable for the Board to make a parallel with paragraph 122 of the UNHCR Handbook and apply it *a contrario* to the respondent's circumstances. Paragraph 122 deals with the third requirement of the test – the refugee actually obtained the protection of his country of nationality – and creates a presumption of actual reavilment when a refugee

obtains a passport for the purpose of returning to his country of nationality. It is useful again to cite paragraph 122:

122. A refugee requesting protection from the authorities of the country of his nationality has only “re-availed” himself of that protection when his request has actually been granted. The most frequent case of “re-availment of protection” will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand, obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status.<sup>16</sup> This does not, however, preclude assistance being given to the repatriant – also by UNHCR – in order to facilitate his return.

[footnotes omitted and emphasis added]

[63] According to this paragraph, in the absence of proof to the contrary, by obtaining a national passport for the purpose of returning to his country of nationality, a refugee is deemed to have obtained the protection of his country of nationality, and thus, he satisfies the third requirement for reavailment. However, the presumption is refutable and only operates where the refugee’s motivation for obtaining a passport is to return to his country of nationality. If a refugee obtains a national passport with no intention of returning to his country of nationality, he will not be deemed to have had obtained the protection of his country of nationality. A parallel can be drawn from this principle in relation to the requirement dealing with the refugee’s intention as there is a link between having the intention of reavailing oneself of the protection of one’s country of nationality and actually obtaining such protection.

[64] It is not unreasonable to apply this principle by analogy to the criteria relating to intention of the refugee, and to conclude that in certain circumstances, obtaining a passport with the intention of traveling abroad, but not in one’s country of nationality, does not indicate an

intention of reavilment of the protection of one's country of nationality. In this case, the respondent intended to use his national passport to travel to a third country, not to Pakistan, and he was under the impression that his Pakistani passport would be the only document that would allow him to travel outside Canada as a permanent resident. These circumstances were considered by the Board in its assessment of the respondent's intent.

[65] The applicant contends that even if the respondent had no intention of returning to his country of nationality, the fact that he requested a passport with the intention of using it to travel abroad constitutes in itself proof of reavilment, because he would then present himself as a citizen of Pakistan and could, if needed, avail himself of Pakistan's protection. In other terms, obtaining a passport with the intention of using it as an identity document to travel outside of Canada, even with no intention to enter one's country of nationality or to otherwise seek the protection of one's country of nationality, cannot rebut the presumption of intention to reavail and entails cessation of refugee protection.

[66] With respect, I disagree for several reasons.

[67] First, I consider that the applicant's assertion would have the effect of introducing an additional, irrebutable presumption of intention of reavilment as soon as a refugee intends to travel abroad with a national passport, without any regard to the specific circumstances of each case. Such a presumption is not provided for in the UNHCR Handbook. Furthermore accepting the applicant's assertion would be contrary to the strict approach to the cessation clauses outlined in the UNHCR Handbook.

[68] The UNHCR Handbook creates a presumption when the refugee obtains a passport, but otherwise leaves it to the Board to assess, in the circumstances of each case, the adequacy of the explanations provided by the refugee to rebut the presumption. In light of the restrictive interpretation of cessation clauses and the principles underlying the cessation clauses, this Court should not read in an additional presumption that when the refugee's stated intention is to travel to a country other than his country of nationality, this necessarily entails that he or she intends to seek the protection of his country of nationality. If such an extreme consequence had been intended, I would expect this would have been expressly provided for in the UNHCR Handbook.

[69] In my view, the applicant's assertion usurps the Board's mandate under subsection 108(1)(a) of the IRPA and paragraph 119 of the UNHCR Handbook to assess the refugee's motivation in order to determine whether he intended to avail himself of the protection of his country of nationality when he renewed his national passport for the purpose of traveling. In my view, the fact that a refugee did not intend to travel or return to his country of nationality may be relevant to the assessment of his intention. This does not imply that a refugee who does not intend to use his passport to travel to his country of nationality could never be found to have had the intention of availing himself of the protection of his country of nationality. However, in my view, this assessment must be made by the Board in light of the circumstances of each case. In this case, the respondent intended to use his national passport because he was under the impression that his permanent resident status would not allow him to obtain a Canadian travel document.



[70] I also consider that the necessity of not circumventing the Board's discretion to assess the specific circumstances of each case is re-enforced by Professor James C. Hathaway's comments about the absence of a direct link between using a passport as a travel document and a guarantee that protection of the country of nationality would be granted. In that regard, in *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 193-195, he offered these useful observations:

Second, the diplomatic request must be made as an act of re-availment or protection, thus implying an intention to have one's interests defended by the issuing state.[...]

[...] These decisions fail to come to grips with the *real* reasons which cause refugees to contact the diplomatic authorities of their country of origin. In particular, the decision-makers have often relied on an inaccurate assumption that receipt of travel documentation is inherently a means of securing national protection:

... it seems high time to dispel an idea that is all too prevalent – and, what is more, false – of exactly what a passport is. A passport is no more, in fact and in law, than a travel document issued by a country's proper authorities to allow one of its nationals to travel abroad and, if necessary, to call upon the services of its consular authorities in the foreign countries visited to provide the holder of the document with proper protection. The fact of holding a passport, even if it is valid and issued legally, in no way constitutes a guarantee that protection will be provided...<sup>35</sup>

[...] Since there is no automatic linkage between the issuance or renewal of a passport and the granting of protection, it is critical that the real reason it is being sought form part of the determination authority's considerations. Unless the refugee's motive is genuinely the entrusting of her interests to the protection of the state of her nationality, the requisite intent is absent.

Therefore, in my view, there is no logical reason to irrefutably presume that as soon as a refugee states that he intends to travel abroad with a national passport, he is deemed to have had the intention of reavailing himself of the protection of his country of nationality. Each situation must turn on its own circumstances and it falls on the Board to assess these circumstances.

[71] For all these reasons, I conclude that the Board's conclusion that the presumption had been rebutted and that the respondent did not intend to reavail himself of the protection of Pakistan constitutes an acceptable possible outcome in light of the law and of the evidence (*Dunsmuir*, at para 47).

[72] I will now turn to the applicant's contention that the Board erred by failing to conduct an analysis of the third requirement set out in paragraph 119 of the UNHCR Handbook. With respect, I do not think the Board was required to proceed to the third prong of the analysis given its conclusion on intention. It seems clear to me that the requirements set out in paragraph 119 of the UNHCR are cumulative and conjunctive. The cumulative nature of these requirements appears from the wording of paragraph 119. It has also been recognized by this Court in *Nsende*, at para 13 and by the applicant himself, at paragraph 25 of his memorandum. Therefore, if one of the criteria is not met, the refugee status cannot be deemed ceased. Thus, since the Board concluded that the respondent did not have the intention to reavail himself of the protection of the Pakistani authorities when he renewed his Pakistani passport, it was not necessary for it to pursue its analysis any further.

[73] For all of the above reasons, I conclude that the Board's decision is reasonable and that the Court's intervention is not warranted.

## VII. Certification

[74] The applicant submits that the case at bar raises serious questions that have yet to be answered by the Court and proposes that the Court certify the following three questions:

1. In the context of an application for cessation under paragraph 108(1)(a) of the IRPA, does the Board have the duty to provide reasons for each part of the three-step analysis found at paragraph 119 of the UNHCR Handbook?
2. Is the possession of a valid passport and its renewal sufficient to conclude that a refugee has reavailed himself of the protection of his country of nationality if he has never used it to travel outside Canada?
3. In the negative, what constitutes reavilment by a refugee of the protection of his country of nationality?

[75] The applicant contends that the questions he proposes meet the requirements established by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 176 NR 4 (FCA) [*Liyanagamage*] as they are questions of broad significance that transcend the interests of the parties, they are determinative of the issues, and no Canadian court has yet decided on what constitutes reavilment under the Act.

[76] The respondent contends that the proposed questions should not be certified as the application of paragraph 108(1)(a) of the IRPA is fact-driven.

[77] Paragraph 74(d) of the IRPA sets out the circumstances under which a judgment of this Court may be appealed:

#### Judicial review

74. Judicial review is subject to the following provisions:

[...]

(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

#### Demande de contrôle judiciaire

74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire :

[...]

d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[78] The Federal Court of Appeal clarified what could constitute a "serious question of general importance" in *Liyonagamage* at para 4, where Justice Décaré stated that the question must be one which transcends the interests of the parties, contemplates issues of broad significance or general application and is determinative of the appeal. He added that the certification process is neither "to be equated with the reference process ... nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case".

[79] In *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 11, [2004] FCJ No 368, the Federal Court of Appeal reiterated that, in order for a question to be certified, it must be a serious question of general importance that would be dispositive of the appeal.

[80] In my view, the first proposed question does not raise a serious question of general importance. Moreover, this question would not be dispositive of an appeal either. As I indicated earlier, it seems clear to me that in order to conclude that a refugee has reavailed himself of the protection of his country of nationality, the three requirements enumerated in paragraph 119 of the UNHCR Handbook must be met. The cumulative nature of these requirements appears both from the wording of paragraph 119 and from the jurisprudence of this Court in *Nsende*, at para 13. Therefore, if the Board concludes that one of the requirements has not been established, then the test to conclude that the refugee protection has ceased is not met. Therefore, once the Board concludes that one of the three requirements has not been established, it is not required to continue the analysis further to assess the remaining requirements. Since the Board in this case

concluded that the respondent did not intend to reavail himself of the protection of Pakistan when he applied and was issued renewals of his passport, an analysis of the third criterion would not have been determinative of its decision.

[81] I am also of the view that the second proposed question, as framed by the applicant, does not raise a serious issue either because the UNHCR Handbook implicitly responds negatively to this question. Paragraph 121 of the UNHCR Handbook clearly provides that the presumption of intention of reavailment stemming from the act of applying for and obtaining a national passport can be rebutted with proof to the contrary (see also *Nsende*, at para 15). Therefore, the mere fact of possessing a national passport is not sufficient, in every circumstance, to conclude that the refugee has reavailed himself of the protection of his country of nationality. This provision commands an assessment of the individual circumstances of each case and of the refugee's real motivation for applying for a national passport. This Court has also decided on two occasions (in *Chandrakumar* and in *Nsende*) that the possession of a passport, without more, was not necessarily sufficient to conclude to an intention to reavail.

[82] The fact that the refugee has never used his national passport is one of several elements that could be relevant in the assessment of the real intention of the refugee. Therefore, I do not consider that the second question proposed by the applicant qualifies for certification.

[83] I also find that the third proposed question is framed in a manner that is too general to be certified.

[84] However, I agree that one issue raised by the applicant constitutes a serious question of general importance which could be dispositive of an appeal. The main argument raised by the applicant is that because the respondent applied for the renewal of his Pakistani passport with the intention of using it to travel outside Canada, even if he did not intend to travel to Pakistan and did not know he could obtain a Canadian travel document, he must be deemed to have had the intention to reavail himself of the protection of his country of nationality. The applicant based his assertion on the fact that by travelling with a Pakistani passport, the respondent would represent himself as a Pakistani citizen and could, if he needed to, while travelling abroad, seek the protection of the Pakistani authorities.

[85] In my view, this issue raises a question that is serious and that is of general importance and which could be of a more general application because it has an impact on the interpretation of paragraph 108(1)(a) of the IRPA and more specifically on the interpretation of the second requirement enumerated at paragraph 119 of the UNHCR Handbook. Further, there is little precedent regarding the interpretation of that provision. Accordingly, I am willing to certify two questions in relation to that issue:

1. Does applying for and obtaining a passport from one's country of nationality with the intention to use it to travel outside Canada, but not in one's country of nationality, constitute, in all circumstances, irrefutable proof that the refugee had the intention of reavailing himself of the protection of his country of nationality?
2. Does applying for and obtaining a passport from one's country of nationality with the intention to use it to travel outside Canada, but not in one's country of nationality constitute, in all circumstances, a circumstance that can never serve to rebut the presumption created at paragraph 121 of the UNHCR Handbook?

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed and the following questions are certified:

1. Does applying for and obtaining a passport from one's country of nationality with the intention to use it to travel outside Canada, but not in one's country of nationality, constitute, in all circumstances, irrefutable proof that the refugee had the intention of reavailing himself of the protection of his country of nationality?
2. Does applying for and obtaining a passport from one's country of nationality with the intention to use it to travel outside Canada, but not in one's country of nationality constitute, in all circumstances, a circumstance that can never serve to rebut the presumption created at paragraph 121 of the UNHCR Handbook?

"Marie-Josée Bédard"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4732-14

**STYLE OF CAUSE:** THE MINISTER OF PUBLIC SAFETY AND  
PREPAREDNESS v NAJEEB BASHIR

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

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**JUDGMENT AND REASONS :** BÉDARD J.

**DATED:** JANUARY 15, 2015

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