

Federal Court



Cour fédérale

**Date: 20151008**

**Docket: IMM-1687-15**

**Citation: 2015 FC 1154**

**Vancouver, British Columbia, October 8, 2015**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Applicant**

**And**

**NISREEN AHAMED MOHAMED NILAM**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Minister of Citizenship and Immigration seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board dismissing the Minister's application for the cessation of Nisreen Ahamed Mohamed Nilam's refugee status. The Board rejected the Minister's application on the basis that it had not been shown that Mr. Nilam had voluntarily re-availed himself of the protection of his country of nationality.

[2] I have concluded that the Board's findings with respect to the circumstances relating to Mr. Nilam's trips to Sri Lanka did not constitute re-availment of that country's protection were made without regard to the evidence. As a result, the Minister's application for judicial review will be granted.

## **I. Background**

[3] Mr. Nilam is a Muslim citizen of Sri Lanka who was granted refugee protection in Canada in 2009 based upon his alleged fear of persecution at the hands of the Liberation Tigers of Tamil Eelam. He became a permanent resident of Canada on January 24, 2011.

[4] In July of 2011, Mr. Nilam renewed his Sri Lankan passport. Mr. Nilam had previously advised Canadian immigration officials that the purpose of his upcoming trip to Sri Lanka was to get married and to visit his mother. However, he testified before the Board that he decided to return to Sri Lanka because he wanted to visit his mother in Sri Lanka, who he believed was near death, and his counsel had told him that he could not obtain a Canadian travel document in order to do so.

[5] Mr. Nilam travelled to Sri Lanka on August 5, 2011. He says that once he got there, his parents arranged for him to marry because his mother was anxious to see her son married before she died. Mr. Nilam met his future wife on September 7, 2011, and the couple was set to marry a few weeks later. The wedding was delayed, however, because Mr. Nilam's future father-in-law was in a serious accident which left him in a coma.

[6] The wedding ceremony ultimately occurred on November 10, 2011 and was attended by some 300 people. However, the wedding reception - an essential component of a Muslim

wedding - did not happen because of his wife's family's reluctance to proceed with the reception while his wife's father was still seriously ill.

[7] During the course of his trip to Sri Lanka, Mr. Nilam travelled to India on his Sri Lankan passport to undergo a hair transplant. He also attended medical appointments in Sri Lanka to receive treatment for a pre-existing knee injury. Mr. Nilam returned to Canada on December 2, 2011.

[8] Mr. Nilam had planned to return to Sri Lanka for the wedding reception in July of 2012, but the reception was postponed because of his wife's father's death on July 15, 2012. Mr. Nilam returned to Sri Lanka on December 5, 2012, once again travelling on his Sri Lankan passport. The wedding reception was held a week later and was attended by approximately 200 people.

[9] Mr. Nilam testified that he had only intended to stay in Sri Lanka for 10 days, but that his mother-in-law asked him to stay longer because his wife was suffering from depression after the loss of her father. Mr. Nilam's return to Canada was further delayed when his wife's depression worsened as a result of a miscarriage and her subsequent surgery.

[10] During his second trip to Sri Lanka, Mr. Nilam attended at several medical clinics for treatment of his knee injury. He also applied for and received a "Schengen" visa from the Swiss Embassy in Colombo before returning to Canada on May 1, 2013.

[11] In 2014, Mr. Nilam used his Sri Lankan passport to travel to Australia and Malaysia, once again submitting himself to the diplomatic protection of Sri Lanka.

[12] By Notice dated September 25, 2013, the Minister of Public Safety advised Mr. Nilam that he had commenced cessation proceedings before the Refugee Protection Division. The grounds cited for the Minister's application were that Mr. Nilam had voluntarily re-availed himself of the protection of his country of nationality.

## **II. The Board's Decision**

[13] The Board began by noting that paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, provides that a person shall cease to be a refugee where that person has voluntarily re-availed themselves of the protection of their country of nationality. After reviewing the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/REV.1, Geneva, January 1992 (*Refugee Handbook*), the Board observed that the cessation provisions of the *Refugee Convention* established three criteria to be used in determining whether cessation had occurred.

[14] These are:

1. Voluntariness: The refugee must have acted voluntarily;
2. Intention: The refugee must have intended by his or her actions to re-avail him or herself of the protection of the country of nationality; and
3. Re-availment: The refugee must actually obtain state protection.

[15] The Board observed that applications for cessation are to be judged on their own facts. It further noted that where a refugee obtains or renews a passport from his or her country of

nationality, it will be presumed that the refugee intends to re-avail themselves of the state's protection. This presumption may, however, be rebutted by the refugee with evidence to the contrary.

[16] The Board reviewed some of the evidence that had been presented and found, on a balance of probabilities, that Mr. Nilam had rebutted the presumption of voluntary re-availment. In coming to this conclusion, the Board found Mr. Nilam to be a credible witness and accepted his testimony without reservation, noting that Mr. Nilam's testimony was supported by documentary evidence.

[17] In finding that Mr. Nilam had rebutted the presumption that he had re-availed himself of Sri Lanka's protection as a result of his renewal of his Sri Lankan passport, the Board found that Mr. Nilam's actions were not voluntary, but were constrained by circumstances outside his control. Insofar as his first trip was concerned, this was the poor health of his mother, while Mr. Nilam's second trip was necessary to fulfill the cultural and religious requirements necessary to complete the formalities associated with his marriage.

[18] The Board further found that Mr. Nilam did not intend by his actions to re-avail himself of Sri Lanka's protection, as he did not intend to seek the state's protection during his visits. In addition, the Board found that Mr. Nilam did not actually re-avail himself of Sri Lanka's protection. In coming to this conclusion, the Board rejected the Minister's argument that Mr. Nilam did not keep a low profile while he was in Sri Lanka. Rather, the Board found that Mr. Nilam had attempted to mitigate his risk of persecution during his time in Sri Lanka by confining himself mostly to his family's home, avoiding contact with neighbours and government officials, and utilizing smaller health clinics rather than hospitals.

[19] In light of these findings, the Board concluded that the Minister had failed to satisfy the requirements of paragraph 108(1)(a) of *IRPA* and dismissed the application for the cessation of Mr. Nilam's refugee status.

### **III. The Issue**

[20] The parties agree that the only issue for determination is whether the Board erred in finding on the facts of this case that Mr. Nilam did not act voluntarily or intentionally in re-availing himself of the protection of Sri Lanka and that he had not actually re-availed himself of that protection.

[21] The Minister does not take issue with the legal principles applied by the Board. What the Minister takes issue with is the Board's evaluation of the evidence and its determination that the Minister had not demonstrated that Mr. Nilam had in fact re-availed himself of the protection of Sri Lanka. The parties agree that the Board's findings on these questions are to be reviewed against the standard of reasonableness.

### **IV. Analysis**

[22] Article 1C of the *Refugee Convention* provides that an individual may lose his or her refugee protection where that individual's actions indicate that they no longer have a well-founded fear of persecution in their country of nationality, or that the surrogate protection of another country is no longer required.

[23] This principle is reflected in paragraph 108(1)(a) of *IRPA*, which provides that:

**108.** (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a

**108.** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à

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| <p>person in need of protection, in any of the following circumstances:</p> <p>(a) the person has voluntarily re-availed themselves of the protection of their country of nationality;</p> | <p>protéger dans tel des cas suivants:</p> <p>a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;</p> |
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[24] Section 108 of *IRPA* further provides that, on application brought by the Minister, the RPD may determine that refugee protection has ceased because of the individual's re-availing of the protection of their country of nationality. In such cases, the refugee claim of the person will be deemed to have been rejected.

[25] If a refugee applies for and obtains a passport from his or her country of nationality, it will be presumed that the individual intends to re-avail him- or herself of the diplomatic protection of that country: *Refugee Handbook*, at para. 121. This presumption is particularly strong where the individual actually uses the passport to travel to his or her country of nationality. Indeed, some have gone so far as to suggest that it is conclusive: Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., at p. 136.

[26] The prevailing view is, however, that the presumption of re-availing may be rebutted with evidence to the contrary: *Refugee Handbook*, at para. 122. That said, it will only be in "exceptional circumstances" that travel by a refugee to his or her country of nationality on a passport issued by that country will not constitute termination of his or her refugee status: *Refugee Handbook*, at para. 124. The onus is on the refugee to adduce sufficient evidence to rebut the presumption of re-availing: *Li v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para. 42, [2015] F.C.J. No. 448.

[27] In this case, Mr. Nilam used his Sri Lankan passport to enter and leave Sri Lanka on several occasions. I note that Mr. Nilam gave inconsistent evidence with respect to the purpose of the first trip, claiming at one point that the trip was for the purpose of getting married and visiting his mother, and later claiming that it was because of his mother's illness. In contrast, Mr. Nilam's wife referred to one of his trips as being Mr. Nilam's "vacation period". These inconsistencies were never addressed by the Board.

[28] Mr. Nilam has pointed to paragraph 125 of the *Refugee Handbook* as support for his claim that visiting a sick relative has been recognized internationally as an "exceptional circumstance" that can rebut the presumption of re-availment. It is, however, important to note that the comment made in paragraph 125 of the *Refugee Handbook* relates to an individual who travels to his or her country of nationality on a travel document issued by his or her country of refuge. That is not the case here: Mr. Nilam admittedly traveled to Sri Lanka on a Sri Lankan passport, thus submitting himself to the diplomatic protection of the Sri Lankan government.

[29] Even if Mr. Nilam subjectively felt it necessary to return to Sri Lanka on the first occasion because of his mother's illness, and on the second to complete the formalities of his marriage, the Board's finding that Mr. Nilam did not intend by his actions to re-avail himself of Sri Lanka's protection was not reasonable.

[30] A central issue in a cessation case is whether the refugee continues to have a subjective fear of persecution in his or her country of nationality, and thereby continues to require the surrogate protection refugee status provides. There was a great deal of evidence before the Board that suggested that Mr. Nilam lived openly while he was in Sri Lanka in a manner that belied any subjective fear on his part. In other words, there was evidence before the Board that Mr. Nilam's



conduct suggested that he believed that the state of Sri Lanka could protect him as he went about his day-to-day life. The Board failed to really come to grips with this evidence.

[31] In particular, the Board's finding that Mr. Nilam had attempted to mitigate his risk of persecution during his time in Sri Lanka by confining himself mostly to his family's home, avoiding contact with neighbours and government officials, and utilizing smaller health clinics rather than hospitals was made without regard to the evidence that was before the Board and was thus unreasonable.

[32] For example, the Board accepted Mr. Nilam's evidence that he mitigated his risk in Sri Lanka by avoiding government officials. Yet according to Mr. Nilam's own evidence, he used his Sri Lankan passport to enter Sri Lanka from Canada and to return to Canada on two separate occasions. This would have required him to pass through Sri Lankan airports and to submit himself to airport security and passport control.

[33] Moreover, during his first trip to Sri Lanka, Mr. Nilam also used his Sri Lankan passport to travel to India from Sri Lanka for the purposes of obtaining a hair transplant – something that could hardly have been considered to have been compelling under any definition of the term. To do this, Mr. Nilam would have once again have had to travel through a Sri Lankan airport or ferry terminal, coming into contact with both the general public and government officials.

[34] Mr. Nilam's trips to Sri Lanka were also neither brief nor clandestine. He was there for a total of nine months. Contrary to the Board's finding that Mr. Nilam had attempted to mitigate his risk during his time in Sri Lanka by confining himself mostly to his family's home, Mr. Nilam's own evidence was that he and his fiancée ate in restaurants, went to the beach and to

a movie, and went shopping together. He also traveled to Colombo so that he could apply for a “Schengen” visa at the Swiss Embassy.

[35] Mr. Nilam also testified that he attended wedding events that were attended by hundreds of individuals, raising questions about his claim to have mitigated his risk by avoiding contact with neighbours and others. Mr. Nilam also attended appointments at medical clinics to attend to a non-life threatening injury, and conducted business affairs, meeting with a notary to deal with the transfer of his business interests.

[36] All of this evidence raised concerns as to whether Mr. Nilam had an ongoing fear of persecution in Sri Lanka and all of it suggested that Mr. Nilam was entrusting the defence of his interests to the state of Sri Lanka. This evidence is thus central to the question of whether Mr. Nilam had re-availed himself of the protection of Sri Lanka, and all of it arguably undermines the Board’s finding on this point. The Board’s failure to come to grips with any of this evidence renders its decision unreasonable: *Cepeda Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35 at paras. 14-17, [1998] F.C.J. No. 1425.

## **V. Conclusion**

[37] For these reasons, the application for judicial review is granted. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination in accordance with these reasons.

"Anne L. Mactavish"  
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Judge

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

**DOCKET:** IMM-1687-15

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
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NILAM

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

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