

Federal Court



Cour fédérale

**Date: 20240904**

**Docket: IMM-1141-23**

**Citation: 2024 FC 1383**

**Ottawa, Ontario, September 4, 2024**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**ANITA SHAH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant is a citizen of Nepal who arrived in Canada in December 2015 and applied for refugee protection in July 2016. She reported she feared returning to Nepal because she was an active member of the Nepali Congress Party and was persecuted by Maoists and members of the Young Communist League [YCL]. The RPD found her to be a Convention Refugee in October 2016 and she became a permanent resident in 2018.

[2] In a decision dated January 10, 2023 the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] ordered the cessation of the Applicant's refugee status for voluntarily reavailing herself of the protection of her country of nationality, based on section 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicant applies under subsection 72(1) of the IRPA for judicial review of that decision.

[3] For the reasons that follow, the Application is dismissed.

## II. Background

[4] The Applicant is married and has children. Her husband and children remain in Nepal.

[5] On July 3, 2019, officers with the Canada Border Services Agency [CBSA] stopped the Applicant as she was entering Canada at Toronto Pearson International Airport. During the interview with CBSA officers, the Applicant admitted that she had travelled to Nepal, with a Nepalese passport obtained in July 2015, and that she had transited though India to avoid having her passport stamped. In her wallet, the CBSA officers found her Nepalese driving licence, Nepalese money and receipts for purchases in Nepal (Kathmandu). The Applicant first stated she only spent 15 to 20 days in Nepal, but finally acknowledged she had remained in Nepal for about 60 days.

[6] The Applicant explained that she had a car accident in 2018 and suffered severe injuries, forcing her to undergo surgeries and causing important stress. She said that at that time, her husband had served her with divorce papers and he and her son pressured her to go back to

Nepal. She said that while in Nepal, she was taking care of her husband, who had a “chest problem” and she attended an important coming-of-age ritual for her son. She said that while she was there, she took precautions and mostly remained in her house, hiding.

[7] On October 9, 2020, the Respondent filed an application for cessation of refugee protection.

### III. Applicable law

[8] Paragraph 108(1)(a) of the IRPA provides that a claim for refugee protection shall be rejected where a person has voluntarily reavailed themselves of the protection of their country of nationality. Subsection 108(2) further provides that the RPD may, on application by the Minister, determine that refugee protection has ceased for the reasons set out in subsection 108(1), including voluntary reavailment:

#### **Cessation of Refugee Protection**

##### **Rejection**

**108 (1)** A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

**(a)** the person has voluntarily reavailed themselves of the protection of their country of nationality;

[...]

#### **Perte de l’asile**

##### **Rejet**

**108 (1)** Est rejetée la demande d’asile et le demandeur n’a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

**a)** il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

[...]

**Cessation of refugee protection**

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

**Effect of decision**

(3) If the application is allowed, the claim of the person is deemed to be rejected.

[...]

**Perte de l'asile**

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

**Effet de la décision**

(3) Le constat est assimilé au rejet de la demande d'asile.

[...]

#### IV. Decision under review

[9] The RPD considered section 108 of the IRPA in light of the interpretative principles set out in the United Nations High Commissioner for Refugees [UNHCR] *Handbook 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. 4 (reissued February 2019), online: <<https://www.unhcr.org/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>> [UNHCR Handbook] at paragraphs 118-125. The RPD noted that paragraph 108(1)(a) of the IRPA reproduces Article 1C(1) of the 1951 *Convention Relating to the Status of Refugees* and its *1967 Protocol* and that in *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 [*Nsende*] at paragraphs 12-15, this Court recognized and endorsed the three part test for reavilment set out at paragraph 119 of the UNHCR Handbook:

- (a) **voluntariness**: the refugee must act voluntarily;
- (b) **intention**: the refugee must intend by his [their] action to reavail himself [themselves] of the protection of the country of his [their] nationality; and
- (c) **reavailment**: the refugee must actually obtain such protection.

[10] Voluntariness: the RPD considered paragraph 120 of the UNHCR Handbook, noting that a refugee who does not act voluntarily does not cease to be a refugee. Here, it found that the fact the Applicant used her Nepalese passport to travel showed voluntariness. Citing *Li v Canada (Citizenship and Immigration)*, 2015 FC 459 [Li] the RPD stated that an individual with protected status returning to their country of origin using that country's passport faces a presumption of voluntary reavailment. The RPD rejected the Applicant's position that she was required to travel to save her marriage, finding instead that the Applicant had not been forced or pressured to use her Nepalese passport to return to Nepal.

[11] Intention: the RPD relied on paragraph 121 of the UNHCR Handbook, and cited the Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 63 [*Galindo Camayo (FCA)*] in noting that refugees who acquire and travel on a passport issued by their country of nationality are presumed to have intended to reavail. The RPD noted the presumption is stronger where the refugee travels to their country of nationality.

[12] The RPD concluded the Applicant failed to rebut the presumption of intent to reavail. First, the RPD found that the Applicant had travelled to Nepal using her Nepalese passport and that her reasons for doing so did not amount to exceptional circumstances. The RPD considered the Applicant's arguments regarding the pressure her husband and son were putting on her, her

husband's health and need for her help, and her need to attend her son's coming of age ceremony. It found these circumstances were not exceptional, noting the Applicant had already applied for permanent residence for her husband and her son at the time of travel, that they had talked about the divorce and were reconciling, and that her husband's sisters were taking care of him. The Applicant testified she only learned about the coming of age ceremony involving her son after arriving in Nepal.

[13] The RPD also noted that the Applicant had stayed 64 days in Nepal, used public transportation, ran errands, and went to her son's public ceremony in a temple. It considered the Applicant's declaration that she mostly stayed home, but found that she had not shown that she hid or took particular precautions to protect herself from her identified agents of harm.

[14] The RPD also considered the Applicant's reported lack of subjective knowledge of the risks to her refugee status in travelling to Nepal. It noted that the Applicant had previously stated that she could not return to Nepal because of the danger. It also noted that the Applicant had planned a detour through India to avoid getting her passport stamped in Nepal. The RPD also noted that the Applicant was educated and had access to legal advice. It concluded that all of this showed that she was aware of the risks to her status if she travelled to Nepal. The RPD therefore found that the Applicant had not rebutted the presumption.

[15] Actual reavailment: the RPD cited paragraph 122 of the UNHCR Handbook, together with the UNHCR's "The Cessation Clauses: Guidelines on their Application" [UNHCR Guidelines]. Citing *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060 at para 60, the

RPD noted that the relevant protection in issue was diplomatic protection and not state protection. Looking at the Applicant's passport, the RPD found that by using it to travel, the Applicant had placed herself under Nepal's diplomatic protection and was presumed to have actually reavailed. The RPD also relied on its prior finding that the Applicant was not in hiding while in Nepal to finally conclude that the Applicant had consciously and intentionally subjected herself to the protection of Nepal, had actually obtained the protection of that state, and had not rebutted the presumption of reavailment.

[16] The RPD allowed the Respondent's application.

V. Issues and standard of review

[17] The parties submit, and I agree, the Application raises a single issue – is the RPD's decision reasonable.

[18] The Officer's cessation decision is reviewable on the standard of reasonableness (*Galindo Camayo (FCA)*, at para 39). In conducting a reasonableness review, the reviewing court may not set aside the decision of a tribunal unless the court is "satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 75, 83, 99 and 100).

## VI. Analysis

[19] The Applicant argues that the RPD's decision is unreasonable because: (1) the RPD erred in its determination of voluntariness, and (2) failed to consider several important factors in assessing the Applicant's intention to reavail herself of the protection of Nepal.

[20] On the issue of voluntariness the Applicant relies on *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 [*El Kaissi*] to argue that reavilment requires an intention to reside permanently in the country of nationality, which was not her case. She further argues that the RPD failed to recognize that she faced estrangement from her family if she did not return and that the RPD unreasonably considered her circumstances in this regard.

[21] The Applicant's reliance on *El Kaissi* is misplaced. As was explained by Justice Ann Marie McDonald in *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224, *El Kaissi* addressed the issue of reavilment in the context of the conferral of refugee status in the first instance, engaging different circumstances than those that arise in the context of cessation:

[36] The Applicant relies on the case of *El Kaissi* to assert that there needs to be an intention to permanently reside in the country of nationality before re-availment is established. The Applicant argues that the RPD breached natural justice and the doctrine of *stare decisis* by not following *El Kaissi's* interpretation of re-availment. The Applicant maintains that she does not have a permanent intention to reside in China.

[37] However, the Applicant's reliance upon *El Kaissi* and *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434, and the RPD's comment about those cases are misplaced. Both of these cases were concerned with re-availment in the context of the conferral of refugee status in the first instance. Such assessments involve the consideration of different



circumstances and the application of different provisions of the IRPA as compared to a cessation application.

[38] Here, the issue before the RPD was re-availment in the context of the cessation of refugee status pursuant to section 180(1). Because of this distinction, I disagree with the RPD's statement that the Federal Court case law on this issue is "confused". The RPD failed to note the factual differences in the *El Kaissi* and *Camargo* cases as compared to cases where the issue is cessation of refugee status. [...] [Emphasis in original]

[22] Contrary to the Applicant's argument, the RPD did not fail to recognize the Applicant's reported reasons for travel. The RPD acknowledged that the Applicant had testified to the effect that she was compelled to return to Nepal but concluded the justification provided in support of this assertion did not show that the Applicant was forced or pressured to return to Nepal. The RPD found the Applicant acted freely and voluntarily, a finding that was reasonably available to the RPD.

[23] On the issue of intention, the RPD relied on paragraph 121 of the UNHCR Handbook and cited *Galindo Camayo (FCA)* at paragraph 63 in noting that a presumption of intent to reavail arises when a protected person acquires, renews, or uses a passport issued by their country of origin; a presumption which is even stronger when the protected person travels to their country of nationality. The presumption is rebuttable as was also noted by the RPD.

[24] The Applicant argues the RPD erred by not concluding the presumption had been rebutted in her case because she had compelling reasons to travel to Nepal – to reconcile with her family and care for her husband. She further submits that she took precautionary measures, as she "attempted to mainly stay at home." Although she attended her son's coming of age

ceremony, she submits this was because of its great cultural significance and was also important in seeking to mend the relationship with her family. Finally, she submits she lacked subjective knowledge of the consequences of her return to Nepal. She also argues the RPD conflated the questions of voluntariness and intention.

[25] The Applicant's arguments are not persuasive. In considering whether the Applicant had rebutted the strong presumption of intent to reavail, the RPD considered the evidence in light of the factors identified in *Galindo Camayo (FCA)* at paragraph 84. The RPD addressed the circumstances that the Applicant argued compelled her travel, but reasonably concluded the circumstances were neither exceptional nor did they make travel necessary. The RPD also considered the length of her visit, her activities while in Nepal, and the evidence relating to precautions the Applicant took to avoid the agents of harm but found that, collectively, this evidence demonstrated a lack of subjective fear.

[26] On the issue of subjective knowledge, the RPD noted in particular that the Applicant had organized her travel plans to avoid getting her passport stamped in Nepal. It was not unreasonable for the RAD to conclude that this evidence demonstrated that there was an awareness of the consequences of travel to Nepal. In addressing the issues of subjective fear, and the evidence related to the Applicant's routing, I am also satisfied that the RPD undertook "an individualized assessment of all the evidence before it, including the evidence adduced by the refugee as to her subjective intent" (*Galindo Camayo (FCA)*, at para 66).

[27] In regard to the argument that the RPD conflated the issues of voluntariness and intention, the RPD does refer to a presumption of voluntary reavilment in considering the issue of voluntariness. This suggests some conflation between the issue of voluntariness and the issue of intent to reavail. However, minor errors do not automatically result in a finding of unreasonableness, indeed “written reasons given by an administrative body must not be assessed against a standard of perfection” (*Vavilov* at para 91). The RPD clearly engaged in factors beyond those relevant to the question of voluntariness in conducting the intent stage of the analysis. To be sure, in considering the Applicant’s intention to reavail, the RPD conducted an individualized analysis of all the circumstances in accordance with the teachings of *Galindo Camayo (FCA)*.

## VII. Conclusion

[28] This application for judicial review is dismissed. The parties have not identified a question of general importance and none arises.

**JUDGMENT IN IMM-1141-23**

**THIS COURT'S JUDGMENT is that:**

1. The Application is dismissed.
2. No question is certified.

**"Patrick Gleeson"**

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**Judge**

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

**DOCKET:** IMM-1141-23

**STYLE OF CAUSE:** ANITA SHAH v THE MINISTER OF CITIZENSHIP  
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