Federal Court  Cour fédérale

Date: 20120119

Docket: IMM-3456-11

Citation: 2012 FC 67

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 19, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SANDRA LUZ CABRERA CADENA
and
MIGUEL ANGEL CAMACHO CABRERA

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Refugee Protection Division (RPD) placed weight on the fact that the principal applicant and her son (applicants) deliberately chose to return to Mexico for a four-year period a few weeks after obtaining refugee status. The reason provided to justify this action does not alter the voluntariness of the act. Regarding “intention”, the second condition, the Court cannot accept the female applicant’s claim. Furthermore, it is not the intention to re-establish themselves in Mexico

that is described in paragraph 108(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), contrary to what the applicants claim, but rather the intention to reavail themselves of the protection of the authorities that issued the passport that was the subject of an analysis by the RPD. The RPD therefore did not commit an error by rejecting the applicant's justification that she had returned to Mexico only in the hopes of bringing her husband to Canada (UNHCR Handbook, paragraph 119(*b*) of the IRPA).

II. Judicial procedure

[2] This is an application for judicial review of a decision by the RPD dated May 10, 2011, that the refugee protection granted to the applicants has ceased pursuant to section 108 of the IRPA.

III. Facts

[3] Sandra Luz Cabrera Cadena and her minor son, Miguel Angel Camacho Cabrera, are citizens of Mexico and obtained refugee status on September 6, 2002.

[4] On October 24, 2002, Ms. Cabrera Cadena and her son Miguel Angel returned to Mexico with their Mexican passports, which were obtained subsequent to a request to the Canadian authorities.

[5] Four years later, on October 26, 2006, Ms. Cabrera Cadena and her son Miguel Angel returned to Canada with new passports obtained from the Mexican authorities.

[6] On January 3, 2008, Ms. Cabrera Cadena and her son Miguel Angel travelled to Canada again. At the point of entry, Ms. Cabrera Cadena allegedly acknowledged having obtained refugee status and stated that she no longer needed protection in Canada.

[7] In accordance with paragraphs 108(1)(*a*) and (*d*) of the IRPA, the Minister of Public Safety and Emergency Preparedness filed an application with the RPD to cease refugee protection because the applicants had voluntarily reavailed themselves of the protection of Mexico, the country in respect of which they had sought protection in Canada.

IV. Decision under review

[8] The RPD found that the applicants had voluntarily reavailed themselves of the protection of Mexico, their country of nationality, and that they had voluntarily returned to live in Mexico, the country in respect of which they had sought protection in Canada. The RPD conducted an analysis of paragraph 108(1)(*a*) of the IRPA only.

[9] The RPD used 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*, HCR/1P/4/Eng/REV.1, Geneva, January 1992 (UNHCR Handbook), to interpret section 108 of the IRPA. The RPD relied on the fact that the applicants had used their Mexican passports to travel. It strongly emphasized, by this very fact, that, in 2006, the applicant had obtained new passports for herself and for her minor son at the time of their first return trip to Canada. In paragraph 14 of its decision, the RPD was of the opinion that these " . . . actions have created a presumption that they intended to reavail themselves of the protection of Mexico".

[10] The RPD found that the principal applicant had not rebutted the presumption with explanations that she had returned to Mexico to bring her husband to Canada and, subsequently, had had a difficult relationship with her husband, who had prevented her from returning to Canada.

[11] Regarding the minor child, the RPD stated the following at paragraph 15 of its decision: “In my opinion, an 11-year-old boy does not have the capacity to form an intent that is different from that of his mother or father with regard to the decision to reavail himself of the protection of the country of his nationality”. To arrive at this finding, the RPD relied on the fact that the applicant had made the decision on behalf of her minor child to return to Mexico and to use Mexican passports, elements that had emerged from her testimony.

V. Issue

[12] Is the RPD’s decision reasonable?

VI. Relevant statutory provisions

[13] The following provisions are relevant:

Cessation of Refugee Protection	*Perte de l’asile*
Rejection	**Rejet**
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:	**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*) the person has voluntarily reavailed themself of the protection of their country of nationality;

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

(*b*) the person has voluntarily reacquired their nationality;

b) il recouvre volontairement sa nationalité;

(*c*) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

(*d*) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

(*e*) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

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).

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).

Effect of decision

Effet de la décision

(3) If the application is allowed, the claim of the person is deemed to be rejected.	(3) Le constat est assimilé au rejet de la demande d'asile.
Exception	**Exception**
(4) Paragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)*e*) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

VII. Position of the parties

[14] The applicants, relying on paragraphs 133 and 134 of the UNHCR Handbook, allege that the RPD erred by failing to place sufficient weight on the fact that the female applicant had had no intention of re-establishing herself in Mexico and that she had stayed in Mexico under her husband's duress. Her husband had threatened the female applicant's family and had threatened to keep the minor child if the female applicant were to return to Canada. Concerning the fact that they obtained Mexican passports in 2006, the applicants argue that this was with the intention of returning to Canada and demonstrates that the female applicant had never intended to re-establish herself in Mexico, a fact the RPD failed to consider.

[15] Regarding the minor child, the applicants maintain that the RPD erred by refusing to exclude him from the decision.

[16] The respondent contends that the RPD properly interpreted the principles in the UNHCR Handbook to find that the applicants had voluntarily reavailed themselves of the protection of their country of origin. He claims that it was open to the RPD to not accept the female applicant's explanations regarding her return to Mexico. Furthermore, this finding is supported by the respondent's statement at the point of entry admitting that he no longer required the protection of Canada.

[17] The applicants also submit that the facts support the RPD's finding with respect to the minor child in that the female applicant made decisions on behalf of her son and has sole custody of him.

VIII. Analysis

[18] The Court must show great deference when interpreting inferences of fact drawn by a decision-maker at first instance (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[19] Concerning the interpretation to be given to paragraph 108(1)(*a*), the reasoning of the Court in *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531, [2009] 1 FCR 49, applies:

> [12] In order to determine what is meant by "reavailment" 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 reavailment.

> [13] As a starting point, paragraph 119 indicates that there are three requirements for reavailment under the Convention: (a) voluntariness: the refugee must act voluntarily; (b) intention: the refugee must intend by his action to reavail himself of the protection of the country of his nationality; and (c) reavailment: the refugee must actually obtain such protection.
>
> [14] Further, the UNHRC Handbook highlights the distinction between "actual reavailment of protection and occasional and incidental contacts with the national authorities" (paragraph 21). Instructively, it states that "[i]f 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."
>
> [15] Accordingly, the UNHCR Handbook suggests that while a passport application creates a presumption of intention to reavail, proof to the contrary may refute that presumption.

[20] Upon reading the RPD's decision, it is clear that it gave the female applicant the opportunity to rebut the presumption that they had reavailed themselves of the protection of Mexico by returning with their Mexican passports obtained from the Canadian authorities, which had been in possession of them further to the refugee claim in 2002.

[21] The RPD considered the female applicant's explanations, contrary to her claim. However, it found, as it was entitled to do, that her testimony did not rebut the presumption. At paragraph 14 of the decision, it specified the following:

> . . . having heard and considered all of the principal respondent's testimony, I must say that I do not see anything in that testimony that would allow me to conclude that the principal respondent has refuted the presumption that she intended to reavail herself of the protection of Mexico. Her testimony dealt mainly with her living conditions in Mexico and the fact that she had a difficult relationship with her husband. Even when she told us that she had returned to Mexico because she intended to bring her husband back to Canada with her, nothing was presented to me that could have led me to conclude that she had not, at that time, reavailed herself of the protection of Mexico by using a valid passport. . . .

[22] The RPD placed weight on the fact that the female applicant deliberately chose to return to Mexico a few weeks after obtaining refugee status. The reason provided to justify this action does not alter the voluntariness of the act. Regarding intention, the second condition, the Court cannot accept the female applicant's claim. Furthermore, it is not the intention to re-establish themselves in Mexico that is described in paragraph 108(1)(*a*) of the IRPA, contrary to what the applicants claim, but rather the intention to reavail themselves of the protection of the authorities that issued the passport that was the subject of an analysis by the RPD. The RPD therefore did not commit an error by rejecting the female applicant's justification that she had returned to Mexico only in the hopes of bringing her husband to Canada (UNHCR Handbook, paragraph 119(*b*) of the IRPA).

[23] Furthermore, the act of requesting protection was granted, according to the UNHCR Handbook:

> 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. . . .

[24] However, it must be noted that the new passport application to which the RPD referred and which was filed while the female applicant was in Mexico does not support the RPD's finding under paragraph 108(1)(*a*) of the IRPA because the presumption:

> . . . applies to a refugee who is still <u>outside his country</u>. It will be noted that the fourth cessation clause provides that any refugee will cease to be a refugee when he has voluntarily "re-established" himself in his country of nationality or former habitual residence. [Emphasis added.]

(UNHCR Handbook, footnote at page 16).

[25] Given the weight the RPD put on the female applicant's Mexican passport application filed in Mexico in 2006, it should have further elaborated its reasoning and analyzed the potential re-establishment of the female applicant under paragraph 108(1)(*d*) of the IRPA. However, the fact remains that it was not obliged to analyze all of the paragraphs in subsection 108(1) of the IRPA to establish the cessation of the protection. Having chosen to not do so, the RPD was not required to examine the intention to return to Canada, as the applicants would have liked.

[26] Under the circumstances, the RPD's findings regarding the fact that the female applicant had reavailed herself of the protection of the country were reasonable and there is no basis to intervene.

[27] The issue of the minor child, who was 11 years old at the time of the hearing, is a more delicate matter. The RPD supported its finding by merely making a distinction between its reasoning and that advanced in *Neves v Canada (Minister of Employment and Immigration)*, [1987] IADD No 75 (QL/Lexis).

[28] The RPD's finding on this point, at paragraph 15, was as follows:

> . . . So, I make a distinction between the decision that I am rendering today and the decision that was rendered by the Immigration Appeal Division (IAD). In any case, I am not bound by the IAD's decisions . . . . In my opinion, an 11-year-old boy does not have the capacity to form an intent that is different from that of his mother or father with regard to the decision to reavail himself of the protection of the country of his nationality.

[29] The RPD did not further justify its decision regarding what differentiates an 11-year-old child from a 14-year-old child when analyzing a child's intent. Furthermore, upon reading the

hearing transcript, there was no mention of the intent of the child, who was not present in the hearing room. Rather, there was mention of the steps taken by the female applicant, who is the designated representative of her minor son:

> BY THE PANEL MEMBER (to the person in question)
>
> [TRANSLATION]
>
> . . .
>
> - Ms. Cabrera Cadena, you are the mother of Miguel Angel and you are designated to act as his representative. Are you willing and able to act in the interest of your minor child?
>
> A: Yes.
>
> Q: OK. So I designate you the representative of your minor child Miguel Angel in the context of this application to cease refugee protection. Miguel Angel does not need to stay in the room but he can stay if he wishes.
>
> . . .
>
> Q: How old is your son Miguel Angel on this day?
>
> A: Eleven years old.
>
> Q: And it is you who has custody? Do you have legal custody of your son?
>
> A: Yes.
>
> . . .
>
> Q: And decisions concerning your son, who makes them?
>
> A: Me.
>
> Q: So in October 2002, it was you who made the decision on behalf of your son that he would return to Mexico with you? Is that right?
>
> A: Yes.
>
> Q: And in . . . In August 2006, it was you who made the decision on behalf of your son to obtain, to apply for and obtain a second Mexican passport?

A: Yes.

Q: OK. I have no more questions.

(Tribunal Record (TR) at pages 165, 195 and 196).

[30] Ample case law from the Immigration Appeal Division in the 1980s was directly concerned with a child's intent in a context where a child's parents had abandoned permanent residence. Although these decisions are not binding on the Court (*Bath v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1207 (QL/Lexis) at paragraph 14), they emphasize the importance of considering the intention of minors when they reach the age to form it, on the basis that they could not form it upon the departure of their parents because of their young age.

[31] The male applicant was three years old at the time of the initial departure to Mexico and was therefore not able not form an intention to reavail himself of the protection of Mexico. This could have been different at eleven years of age, his age at the time of the hearing. At that point, there should have been further analysis in order to find that an 11-year-old child cannot form an intention that differs from that of his parents.

[32] However, nothing in the evidence or in the submissions made by the parties makes it possible to determine whether the intention of the child could have been different from that of his mother.

IX. Conclusion

[33] In the circumstances of this case and in light of the foregoing, the Court cannot intervene because the decision does not go beyond the range of reasonableness.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. No question of general importance arises for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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