

FEDERAL COURT OF APPEAL

B E T W E E N:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

-and-

Maria Camila GALINDO CAMAYO

Respondent

-and-

**UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES,
CANADIAN ASSOCIATION OF REFUGEE LAWYERS**

Interveners

**MEMORANDUM OF THE INTERVENER -
U.N. HIGH COMMISSIONER FOR REFUGEES**

(Pursuant to the Order of the Honourable Mr. Justice Laskin, issued February 2, 2021)

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TABLE OF CONTENTS

	Page No.
PART I OVERVIEW	1
PART II THE FACTS AND ISSUES	2
PART III THE LAW AND ARGUMENT	2
A. The views of UNHCR are persuasive	2
B. Article 1C cessation clauses must be interpreted purposively and restrictively	3
C. Article 1C(1) is concerned exclusively with the actions of a refugee outside their country of origin	5
i. Voluntariness	6
ii. Intention to re-avail oneself of the protection of the country of nationality	7
iii. Actual re-availment	13
D. Whether the conduct of a refugee by returning to their country of origin evidences cessation should be assessed under Article 1C(4) - 'voluntary re-establishment'	14
PART IV STATEMENT ON COSTS AND ORDER SOUGHT	15
PART V LIST OF AUTHORITIES	18

1. The United Nations High Commissioner for Refugees (“UNHCR”) submits that the cessation clauses under Article 1C must be interpreted in light of the purpose of the 1951 *Convention relating to the Status of Refugees* (“1951 Convention”) as a whole: to ensure that those in need of and deserving of protection benefit from asylum and to guard against *refoulement*. A reviewing Court should favour interpretations that produce outcomes consistent with this purpose and disfavour those that do not.
2. Article 1C(1) of the 1951 *Convention* permits cessation of a refugee’s status for having “voluntarily re-availed [themselves] of the protection of their country of nationality”.¹ Article 1C(1) is concerned exclusively with a refugee’s conduct while outside their country of origin. It should be applied only in circumstances where a refugee acts voluntarily, with an intention to re-avail themselves of the protection of their country of nationality, and actually obtains such protection. The voluntary act of obtaining or renewing a national passport creates a rebuttable presumption of intention, premised on an inference that meaningful interaction with the diplomatic mission of one’s country of origin denotes an absence of subjective fear and so requires an explanation. This inference is most persuasive where the state is the agent of persecution. By contrast, where refugee protection has been granted based on a non-state agent of persecution, the inference is far less persuasive and the presumption may be more easily rebutted. The overall question for the decision-maker is whether the refugee’s actions and explanation are consistent with their claim of an ongoing fear.
3. Consideration of whether a refugee’s return to their country constitutes cessation is to be assessed not under Article 1C(1) but rather Article 1C(4) (incorporated as [s.108\(1\)\(d\)](#) of the IRPA). Under that provision, the inquiry is not whether the refugee has re-availed themselves of the protection of their country of nationality. Instead, it is whether they have become “voluntarily re-established” in that country. UNHCR is concerned that decision-makers have misapplied Article 1C(1) in this context and invites appellate guidance on this point.

¹ [Convention relating to the Status of Refugees](#), 189 U.N.T.S. 150, Can. T.S. 1969/6 (“1951 Convention”). This clause is directly incorporated into Canadian law under [s.108\(1\)\(a\)](#) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). While the 1951 *Convention* uses masculine pronouns (“himself”) in this memorandum UNHCR uses gender neutral pronouns.

PART I and II - THE FACTS AND THE ISSUES

4. UNHCR relies on the facts as set out in the Appeal Record. In the submissions below, UNHCR will address the following issues:
- a. The views of UNHCR are persuasive;
 - b. Reading Article 1C in light of the 1951 *Convention's* purpose, the cessation clauses are exhaustive and must be interpreted restrictively;
 - c. Article 1C(1) is concerned exclusively with the actions taken by a refugee while outside their country of nationality, and only applies where a refugee: acts voluntarily, with an intention to re-avail themselves of the protection of their country of nationality, and actually obtains such protection;
 - d. Consideration of whether a refugee's actions upon returning to their country constitute cessation falls under Article 1C(4) – whether they have become “voluntarily re-established” in that country.

PART III - THE LAW AND ARGUMENT

A. THE VIEWS OF UNHCR ARE PERSUASIVE:

5. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for them. UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.² This supervisory responsibility is further reflected in Article 35(1) of the 1951 *Convention* and Article II of the 1967 *Protocol* obliging State Parties to cooperate with UNHCR in the exercise of these functions.³ Canada is a State Party to both instruments.⁴ The Supreme Court of Canada⁵ and high courts internationally⁶ have endorsed the views of UNHCR as highly persuasive in this area of law.

² *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, 1950, paras 1 and 8(a).

³ *Protocol Relating to the status of Refugees*, 606 U.N.T.S. 267, Can. T.S. 1969/29 (“1967 Protocol”).

⁴ UNCHR also notes that [s.3\(3\)\(f\)](#) of the IRPA requires that the Act be construed and applied in a manner that “complies with international human rights instruments to which Canada is signatory”: *de Guzman v. Canada (MCI)*, [2005 FCA 436](#) at para 87, per Evans J.A. (for the Court) cited with approval in *B010 v. Canada (MCI)*, [2015 SCC 58](#) at para. 49, per McLachlin C.J. (for the Court).

⁵ *Chan v. Canada (Minister of Employment and Immigration)*, [\[1995\] 3 S.C.R. 593](#) at paras. 46 and 119; *Canada (Attorney General) v. Ward*, [\[1993\] 2 S.C.R. 689](#), pp. 713-714.

⁶ **UK:** *Al-Sirri (FC) (Appellant) v. Sec. of State for the Home Dep't (Respondent) and DD (Afghanistan) (FC) (Appellant) v. Sec. of State for the Home Dep't (Respondent)*, [\[2012\] UKSC 54](#), para. 36; *R (on the application*

B. ARTICLE 1C CESSATION CLAUSES MUST BE INTERPRETED PURPOSIVELY AND RESTRICTIVELY:

6. The 1951 *Convention* has as its object and purpose ensuring that those in need of and deserving of protection benefit from the right to asylum and guarding against *refoulement*.⁷ When interpreting the 1951 *Convention*'s cessation clauses, international and Canadian law requires this be done "in the light of [this] object and purpose".⁸ Given this, the UNHCR Handbook stresses that the Article 1C "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."⁹
7. Of equal importance is that the cessation clauses – and the guidance on interpreting them – not be applied in a mechanistic, punitive or rote manner.¹⁰ Consistent with the object and purpose of the 1951 *Convention*, UNHCR's *Note on Cessation Clauses* states that Article 1C only "applies when the refugee, having secured or being able to secure national protection, either of the country of origin or of another country, **no longer needs international protection** [...and] the approach to such cases should be to

of *EM (Eritrea) v. Sec. of State for the Home Dep't*, [2014] UKSC 12, paras. 71-72; USA: *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987); 107 S. Ct. 1207.

⁷ The Supreme Court of Canada has also repeatedly noted that "[t]he preamble to the *Refugee Convention* highlights the international community's 'profound concern for refugees' and its commitment 'to assure refugees the widest possible exercise of . . . fundamental rights and freedoms' and has stressed its "overarching and clear human rights object and purpose": *Febles v. Canada (MCI)*, 2014 SCC 68 at para. 27, per McLachlin C.J. (majority opinion); *Ezokola v. Canada (MCI)*, 2013 SCC 40 at para. 31, per LeBel and Fish JJ. (for the Court).

⁸ Article 31 of the *Vienna Convention on the Law of Treaties* states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". See: *Febles v. Canada (MCI)*, 2014 SCC 68 at para. 11, per McLachlin C.J. ["the meaning of the incorporated Articles of the *Refugee Convention* must be determined in accordance with the *Vienna Convention*."]

⁹ UNHCR, *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. 4, reissued February 2019 ['UNHCR Handbook'] at para. 116.

¹⁰ For instance, expert commentary emerging from UNHCR's Global Consultations on International Protection (2000-2002) cautions that "[t]he cessation clauses should not be transformed into a trap for the unwary or a penalty for risky or naive conduct": *Cessation of refugee protection*, Chapter 8.1 in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (eds. Erika Feller, Volker Türk and Frances Nicholson) Cambridge University Press, June 2003), ['Cessation: UNHCR's Global Consultations'] at 525.

ensure that no refugee is unjustly deprived of the right to international protection.”¹¹ Put another way, the analysis requires an “objective inquiry into the prospect that the State of persecution will now provide effective protection.”¹²

8. As with all provisions which take away rights or status, the cessation clauses must be carefully applied and only after a thorough assessment. At every step the burden of proof rests with the asylum State authorities, and the benefit of doubt should favour the refugee as this is consistent with the restrictive interpretation appropriate to the cessation clauses in light of the 1951 *Convention’s* overall protective goals.¹³

C. ARTICLE 1C(1) IS FOCUSED EXCLUSIVELY ON THE ACTIONS OF THE REFUGEE OUTSIDE THEIR COUNTRY OF ORIGIN:

9. Article 1C(1) permits the cessation of a refugee’s status where they have ‘voluntarily re-availed [themselves] of the protection of the country of [their] nationality.’¹⁴ This cessation clause is concerned exclusively with the actions of a refugee while *outside* their country of nationality – usually involving some form of contact with the diplomatic mission of their country of origin including through a national passport application or renewal.¹⁵
10. UNHCR’s Handbook states that for refugee status to cease under Article 1C(1), the country of asylum must demonstrate three elements:
 - (i) **voluntariness:** the refugee must act voluntarily;

¹¹ [UNHCR, Note on Cessation Clauses](#), 30 May 1997, EC/47/SC/CRP.30 [‘UNHCR Note on Cessation Clauses’] at paras. 4, 14 [emphasis added]. Similarly, this Honourable Court in *Bermudez* (2016) stated it was clear from s.108 of the IRPA that “Parliament specifically intended that the right to remain in Canada not be available to refugees **who are no longer in need of state protection**”: *Canada (MCI) v. Bermudez*, [2016 FCA 131](#) at para. 40 [emphasis added].

¹² Cessation: UNHCR’s Global Consultations, *supra* note 10, at 540

¹³ UNHCR, ‘The International Protection of Refugees: Interpreting Art. 1 of the 1951 Convention’, RSQ 20 (2001–3), pp. 77–104 [‘UNHCR, Interpreting Art. 1’], at para 10. It is a general legal principle that the burden of proof lies on the person who makes the assertion, see: [UNHCR Handbook](#), *supra* note 9, at para. 196; Cessation: UNHCR’s Global Consultations, *supra* note 10, at 515, 523, 540

¹⁴ Paragraph [108\(1\)\(a\)](#) of the IRPA essentially reproduces Article 1C(1) of the 1951 *Convention*: see *Din v. Canada (MCI)*, [2019 FC 425](#) at para. 31, *per* Russell J.; *Seid v. Canada (MCI)*, [2018 FC 1167](#) at para. 13, *per* LeBlanc J. [“section 108 incorporates by reference Article 1C of the Convention”].

¹⁵ [UNHCR Handbook](#), *supra* note 9, at para. 118; [UNHCR Note on Cessation Clauses](#), *supra* note 11, at para. 12.

- (ii) **intention:** the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;
- (iii) **re-availment:** the refugee must actually obtain such protection.¹⁶

11. While these factors are conjunctive, they are not meant to be applied as a checklist.¹⁷ The focus throughout the analysis is whether the refugee's conduct – and any inferences to be drawn from it – can *reliably* indicate that the refugee intended to waive the protection of the country of asylum and, as a result, it would *actually* be safe for them to return to their country of origin.¹⁸ In keeping with the purpose and objectives of the 1951 *Convention*, the refugee's actions “must result in him or her in fact being able to benefit from effective and durable national protection.”¹⁹

C.1: *Voluntariness*

12. To meet the voluntariness standard a refugee must “truly act out of his/her own free will in approaching the authorities of his/her country of origin.”²⁰ If the refugee does not act voluntarily, they will not cease to be a refugee. For example, if the refugee is instructed or required by an authority in their country of asylum to apply for a national passport from their diplomatic mission, they will not cease to be a refugee merely because they obey such an instruction. A refugee may also be constrained, by circumstances beyond their control, to have recourse to a measure of protection from

¹⁶ [UNHCR Handbook](#), *supra* note 9, at para. 119; UNHCR, [The Cessation Clauses: Guidelines on Their Application](#), 26 April 1999 [‘UNHCR Cessation Guidelines’] at para. 8.

¹⁷ See for example, a case where the Article 1C(1) criteria were applied as a checklist with little regard to whether obtaining national passport actually rendered the refugee safe to return to his country of origin: *X (Re)*, [2007 CanLII 80719](#) (CA IRB)

¹⁸ Commentary on UNHCR's Global Consultations explains that while a refugee's “voluntary acts, intent, and attitudes may be considered, [...] they cannot predominate over political reality”: Cessation: UNHCR's Global Consultations, *supra* note 10, at 540

¹⁹ UNHCR, Interpreting Art. 1, *supra* note 13, pp. 77–104, at para 53. See also: Kneebone S. and O'Sullivan M., ‘Part Two General Provisions, Article 1C’ in Zimmerman A. (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press: Oxford 2011, at 497: “the paramount issue is whether ‘effective protection’ is in fact available.” UNHCR concurs with the recent statement by Gagné A.C.J. in *Wesh v. Canada (MCI)*, [2020 FC 304](#) insofar as it acknowledges that the cessation analysis inherently accounts for the actual availability of protection: “I believe there is a reason why the Refugee Handbook does not mention any risk or country of origin protection analysis at the stage of the loss of status. These questions are intertwined in the analysis of the criteria to be met to conclude that there is loss of status, namely, voluntariness, intention and re-availment” (at para 24).

²⁰ [UNHCR Cessation Guidelines](#), *supra* note 16, at para. 9

their country of nationality.²¹ There will also be circumstances where an application for a national passport is made on a refugee's behalf by a third party (such as a parent or guardian applying for a child's passport) without the refugee's knowledge or consent. Such acts cannot be considered a "voluntary re-availment of protection" and will not deprive a person of refugee status.

C.2: Intention to re-avail oneself of the protection of the country of nationality:

13. The most important inquiry under Article 1C(1) is whether the refugee's interaction with their diplomatic mission was motivated by an intention to re-avail themselves of the protection of their country of nationality such that it can safely be assumed that they no longer need international protection.²² UNHCR's Handbook states: "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."²³
14. As noted in the expert report produced following UNHCR's Global Consultations, "while the refugee may reasonably be expected to explain his conduct," it is always the State initiating cessation procedures that will "bear the burden of proving re-availment."²⁴ The presumption, therefore, is best understood as imposing an obligation on the refugee to explain his or her conduct, "because voluntariness and intent are largely unknowable without the testimony of the individual concerned."²⁵
15. In order to determine the strength of the presumption in a given case and whether an explanation offered by a refugee can rebut it, it is critical to understand the inferences

²¹ [UNHCR Handbook](#), *supra* note 9, at para. 120: the refugee "may, for instance, need to apply for a divorce in [their] home country because no other divorce may have the necessary international recognition."

²² [UNHCR Cessation Guidelines](#), *supra* note 16, at para. 10. As Profs. Hathaway and Foster recount in reviewing the *travaux préparatoires* of the *Convention*, the French delegate who introduced the Article 1C(1) clause noted that "a person lost his status of refugee **only if he expressly wished to do so** and, for that purpose, performed a number of voluntary acts": Statement of Mr. Rochefort of France, UN Doc. E/AC.7/SR.160 (Aug. 18, 1950), at 9, cited in Hathaway J. and Foster M., *The Law of Refugee Status*, 2d ed (Cambridge: Cambridge University Press, 2014, at 465 [emphasis added]

²³ [UNHCR Handbook](#), *supra* note 9, at para. 121 [emphasis added].

²⁴ Cessation: UNHCR's Global Consultations, *supra* note 10, at 525

²⁵ Cessation: UNHCR's Global Consultations, *supra* note 10, at 524

that underlie the presumption. To recall, the cessation clauses should only apply where the circumstances indicate that the refugee no longer needs international protection and can safely return to their country of origin.²⁶ So what is it about the act of voluntarily applying for a national passport that permits a decision-maker to reliably infer from those facts that this would be the case?

16. Canadian jurisprudence has largely identified those inferences as being that, by voluntarily applying for or renewing a national passport, the refugee is accepting and expressing confidence in the diplomatic/consular protection of their country of origin. In the judgment below the Application Judge held that: “a refugee’s application for, or renewal and use of, a passport from their country of origin creates a presumption, in the absence of proof to the contrary, that the refugee intended to reavail and actually reavailed themselves of the protection of their country of origin. **This occurs because a passport entitles its holder to travel under the protection of the issuing government to and from foreign countries**”.²⁷
17. This understanding of the Handbook’s presumption of intention is reflected in the second certified question along with other decisions from the Federal Court.²⁸ And, based on this understanding, the presumption is strengthened when the refugee actually travels on the passport to a third-country.²⁹
18. This line of jurisprudence then relies on a more tenuous inference that, by accepting and expressing confidence in the diplomatic protection of their country of origin, the refugee also accepts and expresses confidence in the protection of their country of origin in general. Thus, it is presumed, it is safe to infer from a refugee’s voluntary act of obtaining a national passport that they are no longer in need of protection.³⁰

²⁶ [UNHCR Note on Cessation Clauses](#), *supra* note 11, at paras. 4, 14; *Canada (MCI) v. Bermudez*, 2016 FCA 131 at para. 40.

²⁷ *Camayo v. Canada (MCI)*, [2020 FC 213](#) at para. 38, *per* Fuhrer J. [emphasis added]

²⁸ See, for example: *Abadi v. Canada (MCI)*, [2016 FC 29](#) at para. 16, *per* Fothergill J; *Lu v Canada (MCI)*, [2019 FC 1060](#) at para 60, *per* Walker J.

²⁹ See, for example: *X (Re)*, [2014 CanLII 90099](#) (CA IRB) at para. 39; *X (Re)*, [2016 CanLII 105329](#) (CA IRB) at para. 42. Cf: *X (Re)*, [2014 CanLII 100854](#) (CA IRB) at paras. 28-29.

³⁰ For example, in *X (Re)*, [2018 CanLII 149583](#) (CA IRB), the IRB reasoned that: “The respondent through her re-availment was acknowledging her confidence in the Nigeria government to protect

19. UNHCR submits that a different reading of the inferences informing the presumption is correct, for three reasons.³¹
20. First, the presumption arises upon the refugee's voluntary application for a passport independently of any intention by the refugee to travel with the passport under the protection of their country of origin, let alone proof of actual travel. Thus, an application in and of itself, cannot support an inference that a passport application denotes the refugee's acceptance of diplomatic protection while outside the country of asylum.
21. Second, the very notion that one is acceding to a state's diplomatic protection when obtaining or travelling on a passport is outdated and does not reflect practical realities. As the Handbook's presumption infers intent from a refugee's action, such inferences must be premised on the common-sense understanding of the consequences of those actions – not an arcane or legalistic understanding of them. Most refugees, like anyone else, will understand passports as mere travel documents that permit them to cross borders, and not as documents signifying the diplomatic protection of their home country.³² Even if passports were commonly understood as markers of such protection while travelling abroad, few if any refugees would understand an acceptance of such

her although she was granted refugee protection on the basis of her fear of remaining in Nigeria" (at para. 28). Similarly, in *X (Re)*, [2018 CanLII 147454](#) (CA IRB), the IRB reasoned: "The Respondent's actions demonstrate that she was implicitly expressing confidence in the PRC authorities to protect her although she had been granted refugee status on the basis of her fear of the Chinese authorities" (at para. 18).

³¹ UNHCR believes that this misconception accounts for academic criticism which has labelled the presumption as "problematic" [see Hathaway J. and Foster M., *supra* note 22, at 468, or "somewhat overstated" [see Kneebone S. and O'Sullivan M., *supra* note 19, at 497]. See also: *Yuan v. Canada (MCI)*, [2015 FC 923](#), at para 30, *per* Boswell J. As detailed in these submissions, UNHCR maintains that where the presumption is properly understood as grounded on an inference that meaningful interaction with the diplomatic mission of one's country of origin denotes an absence of subjective fear, thus inviting a refugee to explain her motivation, the resulting analysis remains appropriately focussed on the actual availability of protection in the country of origin.

³² See Cessation: UNHCR's Global Consultations, *supra* note 10, at 524: "Especially in light of the extensive use of carrier sanctions, possession of a passport may be a modern necessity that does not signal a desired link to the state of origin. This may be true whether the passport is obtained to facilitate flight from the State of origin or after obtaining refuge, especially where alternative travel documents are not available or the refugee is unaware of how to procure them."

diplomatic protection as a general indicator of their belief in the availability of state protection of their country of origin in all circumstances.³³

22. Third, the issuance of a national passport does little if anything in many cases to indicate that it is now safe for the refugee to return to their home country – especially in cases involving non-state agents of persecution. Women refugees fleeing domestic violence or persons fleeing forced recruitment by militant groups where the state is unable to offer protection do not become any safer in their country of origin by having a passport issued in the country of asylum. UNHCR supports the comments of Bédard J. in *Bashir* (2015):

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...³⁴

23. In sum, a presumption grounded in the inference that obtaining, or travelling on, a national passport denotes a refugee's acceptance of the diplomatic and, by extension, generalized protection of their country of origin runs contrary to a purposive and restrictive approach to the cessation clauses. Such a mechanistic application may readily lead to the *refoulement* of refugees in circumstances where they never intended to waive protection and where they would be at continued risk. An approach

³³ As Profs. Hathaway and Foster write: “when most persons approach consular or diplomatic authorities to secure the documentation needed for such purposes as travel, enrollment in school, or professional accreditation, they do so simply as a matter of routine, with no thought to the legal ramifications of their act.”: Hathaway J. and Foster M., *supra* note 22, at 465.

³⁴ *Canada (MPSEP) v. Bashir*, [2015 FC 51](#) at para 70, *per* Bédard J, citing James C. Hathaway's *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 193-195.

respectful to the Convention must favour analytical frameworks that lead to cessation only in cases where the refugee is genuinely no longer at risk.

24. In light of these conceptual frailties, UNHCR highlights a different inference underlying the presumption of intention under Article 1C(1): that applying for and receiving a national passport indicates a refugee's lack of subjective fear of the state. Subjective fear has already been identified in a number of Federal Court judgments as being a "central issue" in a cessation analysis. As stated by Mactavish J. (as she then was) in *Nilam* (2015): "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."³⁵ Likewise, as stated by Boswell J. in *Yuan* (2015): "Each of the conditions in articles 1C (1), (2) and (4) contemplate situations where the element of subjective fear no longer exists, and it is appropriate that refugee protection should then expire."³⁶ **As detailed below**, UNHCR submits that **understanding the application of the presumption as being premised on a lack of ongoing subjective fear** better explains the **presumption's** operation in law. This interpretation provides the basis for outcomes in cessation cases that will be more consistent with the object and purpose of the 1951 *Convention*.
25. As noted in the UNHCR Handbook, "[p]ersecution is normally related to action by the authorities of a country."³⁷ In such cases, approaching one's diplomatic mission is to approach the agent of persecution itself. Applying for a national passport is to disclose to the agent of persecution one's precise whereabouts. Such actions are normally inconsistent with a person who fears persecution from that same state agent. Where the refugee nonetheless voluntarily does so, this conduct may support a

³⁵ *Canada (MCI) v. Nilam*, [2015 FC 1154](#) at para. 30, per Mactavish J. (as she then was) quoted with approval in *Abadi v. Canada (MCI)*, [2016 FC 29](#), per Fothergill J. See also: *Canada (MCI) v. Antoine*, [2020 FC 370](#), at para. 40, per Pentney J.

³⁶ *Yuan v. Canada (MCI)*, [2015 FC 923](#) at para. 21, per Boswell J. See also: *Ortiz Garcia v. Canada (MCI)*, [2011 FC 1346](#) at para. 8, per Barnes J. quoted with approval in *Abechkhrishvili v. Canada (MCI)*, [2019 FC 313](#) at para. 20, per McDonald J. ["Reavailment typically suggests an absence of risk or a lack of subjective fear of persecution."].

³⁷ [UNHCR Handbook](#), *supra* note 9, at para. 65.

reasonable (albeit rebuttable) inference that the refugee no longer fears the state. An ongoing subjective fear is generally a necessary element of the international refugee definition.³⁸ The absence of subjective fear informs why a refugee who voluntarily obtains or renews a passport in such circumstances can be presumed – absent evidence to the contrary – to no longer need international protection and to have re-availed themselves of the protection of their country of nationality, even when they have not travelled on the document.

26. While the presumption arises in all cases where a refugee voluntarily obtains a national passport, the underlying inference is most persuasive where a refugee has fled a state agent of persecution – in particular where the state agent has an active interest in the refugee (such as through the issuance of an outstanding warrant) or where the refugee is actively hiding from the state. It follows that the inference grows less persuasive the further the facts of the case depart from that scenario. It is least persuasive where the refugee has fled a non-state agent of persecution. In those circumstances, approaching one’s diplomatic mission is *not* to approach the agent of persecution itself: applying for a national passport will *not* mean disclosing to the agent of persecution the refugee’s precise whereabouts. As such – absent evidence of meaningful collaboration between the state and the non-state actor – undertaking these actions will usually not be inconsistent with a person who continues to fear persecution from the non-state agent.

27. As an analytical construct designed to guide consistent international application of the 1951 *Convention*, the presumption of an intent to re-avail still arises when a refugee fearing a non-state agent applies for a national passport. The refugee’s action invites the asylum State’s inquiry and requires some explanation. But absent any inferences that suggest the refugee’s subjective fear or the overall basis for surrogate protection have fundamentally changed, the presumption for refugees fearing a non-state actor will be easily rebutted. For example, a refugee who applies for a national passport may rebut the presumption by simple explanation that she continues to fear the non-

³⁸ UNHCR notes that subjective fear is not an element of the test under s. 97(1) of the *IRPA*.

state agent of persecution. As the refugee's subjective fear remains unchanged, so too does the basis for surrogate protection.³⁹

28. UNHCR recognizes that the lack of subjective fear is not always a reliable indicator of the lack of the need for protection in all cases.⁴⁰ As such, the strength of the presumption of an intention to re-avail arising from a refugee's action may also vary based on their age, abilities and the overall "personality of the applicant."⁴¹
29. In response to the second certified question in this appeal, UNHCR submits that the inquiry must be focused on whether the obtaining or use of a national passport to travel to a third country reliably evidences a lack of ongoing subjective fear of the agent of persecution. In most cases, the overall question for the decision-maker will be, taking into account that "[t]he definition of a refugee is certainly not designed to exclude brave or simply stupid persons,"⁴² do the refugee's actions and explanation indicate that they no longer fear the state?
30. Where the refugee fears a state agent, the decision to voluntarily approach the state to obtain or renew a passport (despite not knowing the precise legal consequences of doing so) will create a stronger presumption of an ongoing lack of subjective fear of the state and, thus, an intent to re-avail. However, as in all cases, this presumption can

³⁹ This is analogous to the presumption of state protection in a refugee claim. The presumption still arises in situations where the state is the agent of persecution, but it is easily rebutted: see *Chaves v. Canada (MCI)*, [2005 FC 193](#), at para. 15, *per* Tremblay-Lamer J.

⁴⁰ As this Court held in *Yusuf v. Canada (MEI)*, [1991] F.C.J. 1049 (CA): "The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent. Moreover, I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms." See also *Canada (MCI) v. Patel*, [2008 FC 747](#), at para. 33.

⁴¹ [UNHCR Handbook](#), *supra* note 9, at para. 40: "An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure."

⁴² *Yusuf v. Canada (MEI)*, [1991] F.C.J. 1049 (CA).

be rebutted by evidence or an explanation advanced by the refugee.⁴³ The key issue is the purpose or reason for which the passport was obtained or renewed.⁴⁴ A presumption of intent to re-avail properly grounded in inferences related to subjective fear is not rebutted by a lack of awareness of the diplomatic meaning of a passport since applying for a national passport is generally inconsistent with a subjective fear of the state as it involves approaching the state and disclosing one's whereabouts to it – facts of which almost all refugees are well aware.

31. Conversely, where the refugee fears a non-state actor, the decision to voluntarily approach the state to obtain a passport will create a weak presumption of an ongoing lack of subjective fear of the agent of persecution. In certain cases, such a presumption may be overcome by an explanation by the refugee that they needed the document for more routine travel to a third country and were unaware of the availability of alternative travel documents.

C3: Actual re-availment

The last element in the Article 1C(1) inquiry is actual re-availment. This requires that, having intended to avail themselves of the protection of their country of origin, “the refugee must actually obtain such protection.”⁴⁵ Mere attempts or unsuccessful requests for protection will not suffice. “Cessation will come about only where such requests are granted and protection is *de facto* extended to the person.”⁴⁶

⁴³ Even where a refugee has fled a state agent of persecution, there are many examples of situations in which they can give a subjective explanation or legitimate reason for their actions which rebuts the presumption of intent to re-avail. UNHCR has noted that “[t]here may be cases where obtaining or renewing a national passport should not be considered as indicative of an intention to re-avail of the protection of the country of nationality” and cautions that “every case has to be assessed on its own merits and on the basis of the particular act of the refugee”: [UNHCR Cessation Guidelines](#), *supra* note 16, at para. 10). For example, an exigent and compelling need to obtain a passport – such as to visit a very ill relative – “may predominate over a subjective intent to re-avail oneself of national protection”: Cessation, UNHCR's Global Consultations, *supra* note 10, at 524. See, similarly: *El Kaissi v Canada (MCI)*, [2011 FC 1234](#) at para. 29, *per* Near J. (as he then was) and cited with approval in *Jing v. Canada (MCI)*, [2019 FC 104](#) at paras. 20, 24, *per* Manson J.

⁴⁴ [UNHCR Cessation Guidelines](#), *supra* note 16, at para. 10.

⁴⁵ [UNHCR Handbook](#), *supra* note 9, at para. 119.

⁴⁶ [UNHCR Cessation Guidelines](#), *supra* note 16, at para. 11. In any scenario, throughout the entire analysis the state seeking to cease refugee status must prove that effective protection is in fact available from the state of origin: see Kneebone S. and O'Sullivan M., *supra* note 19, at 497: “whilst

D. WHETHER THE CONDUCT OF A REFUGEE BY RETURNING TO THEIR COUNTRY OF ORIGIN EVIDENCES CESSATION SHOULD BE ASSESSED UNDER ARTICLE 1C(4) - 'VOLUNTARY RE-ESTABLISHMENT'

32. As mentioned above, Article 1C(1) is concerned exclusively with the actions of a refugee while outside of their country of origin. By contrast, the Handbook explains that "[t]he situation of a refugee who has actually returned to the country of [their] nationality is governed by the fourth cessation clause": Article 1C(4). UNHCR recalls that the actions of a refugee by returning to their country of origin – and whether doing so evidences cessation – should be assessed exclusively under this article. The relevant inquiry is not whether the refugee has re-availed himself but rather whether he "has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution."⁴⁷
33. In UNHCR's view, the phrase 'voluntarily re-established' is to be understood as return to the country of nationality "with a view to permanently residing there. Consistent with the intention of the 1951 *Convention's* drafters, a temporary visit by a refugee to their former home country does not constitute 're-establishment' and will not involve loss of refugee status under the present clause."⁴⁸
34. Hence, return alone, or physical presence in the country of origin, is insufficient to invoke the cessation clause, as the second requirement of voluntary re-establishment must also be fulfilled. Conversely, if a refugee visits the country of origin frequently and avails themselves of the benefits and facilities in the country normally enjoyed by

voluntariness depends on subjective intention, the paramount issue is whether 'effective protection' is in fact available".

⁴⁷ [UNHCR Handbook](#), *supra* at note 9, at paras. 118, 133; [UNHCR Note on Cessation Clauses](#), *supra* note 11, at para. 12. See: Hathaway J. and Foster M., *supra* note 22, at 469: "[A] problematic aspect of contemporary practice is the conflation of voluntary re-availment of the home country's protection with physical return to its territory."

⁴⁸ [UNHCR Handbook](#), *supra* note 9, at para. 134. As described by Hathaway J. and Foster M., at *supra* note 22, at 469 "... the drafters of the Convention considered, but rejected, a proposal that refugee status would cease upon return by a refugee to her country of origin. Because **the mere fact of return was understood to be an insufficient indicator of intention to claim the protection of the state**, the decision was taken to condition cessation under Art. 1(C)(4) on evidence not simply of return, but rather *voluntary re-establishment* in the country of origin." [bold emphasis added].

citizens of the country, the cessation clause may be invoked.⁴⁹ UNHCR's Guidelines on the Cessation Clauses further explain: "There are no definite criteria as to when a person could be considered as being 're-established'. Prolonged stay is an indication of re-establishment. The length of stay, however, is only one factor for determining 're-establishment'. Another indicator is the sense of 'commitment' which the refugee has in regard to the stay in the country of origin."⁵⁰

35. In response to the third certified question in this appeal, UNHCR's position is that, to the extent that the refugee arranged for protection measures while outside of their country of origin, those arrangements are relevant to the question of whether their acquisition or use of a national passport evidences an intent to re-avail under Article 1C(1). But once the refugee arrives in their country of origin, the actual use of private security or other protection measures⁵¹ should be assessed under Article 1C(4) in asking whether they have become voluntarily re-established. In this regard, the use of private security during short trips to the country of origin will generally be inconsistent with the requirement that a re-established refugee have "avail[ed] themselves of the benefits and facilities in the country normally enjoyed by citizens of the country".⁵²

PART IV - STATEMENT ON COSTS AND ORDER SOUGHT

36. UNHCR does not seek costs against any other party and does not waive its privileges and immunities under applicable international legal instruments. UNHCR seeks leave to present oral argument before the Court based on these submissions.

⁴⁹ [UNHCR Note on Cessation Clauses](#), *supra* note 11, at para. 12. The Appellant cites this specific paragraph with reference to the re-availment assessment at paragraph 43 of their memorandum. However, the UNHCR Note clearly distinguishes between a refugee's actions outside of the country of origin and upon return: "A refugee can also reacquire the protection of the country of origin by returning there. For the cessation clause to be applicable, the return must, under the terms of the Convention, have been undertaken voluntarily and the refugee must also have "re-established" himself or herself in the country of origin."

⁵⁰ [UNHCR Cessation Guidelines](#), *supra* note 16, at para. 21: "A short stay may warrant cessation of refugee status if the refugee had carried on a normal livelihood without problems and performed obligations which a normal citizen would, such as paying taxes. Such behaviour would be indicative of a normalization of relations with the country. On the other hand, short visits to the country of origin for compelling reasons would not normally suffice for application of this clause. For instance, the return of a refugee to his or her country of origin to assess the situation should not be considered as "re-establishment" within the meaning of this provision."

⁵¹ E.g. remaining in hiding or using false identity documents when travelling within the country.

⁵² [UNHCR Note on Cessation Clauses](#), *supra* note 11, at para. 12.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY of FEBRUARY, 2021

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PART V: LIST OF AUTHORITIES

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Court File No. A-79-20

FEDERAL COURT OF APPEAL

B E T W E E N:

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Appellant

-and-

Maria Camila GALINDO CAMAYO

Respondent

-and-

**UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES,
CANADIAN ASSOCIATION OF REFUGEE
LAWYERS**

Interveners

**MEMORANDUM OF THE INTERVENER -
UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES**

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