Federal Court  Cour fédérale

Date: 20150728

Docket: IMM-5365-14

Citation: 2015 FC 923

Ottawa, Ontario, July 28, 2015

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

BETWEEN:

XIN LI YUAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is a citizen of China who came to Canada on January 9, 2009. Claiming to be a Christian whose underground house church had been raided by the Public Security Bureau, he was

granted refugee protection on May 4, 2011, by the Refugee Protection Division of the Immigration and Refugee Board. He became a permanent resident of Canada on August 21, 2012.

[2] In November, 2012, the Applicant applied for a Chinese passport, allegedly because he wanted something to prove his identity in case his permanent resident card would not be sufficient if he ever traveled outside Canada. The passport was issued to him on January 14, 2013, and he used it to travel to China on March 23, 2013 to arrange his mother's funeral. The Applicant returned to Canada on April 23, 2013.

[3] On October 23, 2013, the Minister of Citizenship and Immigration applied to the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] to cease the Applicant's refugee protection pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. The Minister alleged that the Applicant had re-availed himself of China's protection by his actions, and that country conditions had changed enough that the Applicant was no longer afraid of returning to China. On June 13, 2014, the RPD agreed the Applicant had re-availed himself of China's protection within the meaning of paragraph 108(1)(a) of the *Act*, and therefore ceased his status as a protected person. The Applicant's loss of his status as a protected person also caused his permanent resident status to be lost because of paragraph 46(1)(c.1) of the *Act*.

[4] The Applicant now applies for judicial review of the cessation decision pursuant to subsection 72(1) of the *Act*, asking the Court to set the RPD's decision aside and return the matter to a different panel of the RPD. The Applicant further alleges that the loss of his permanent resident status under paragraph 46(1)(c.1) of the *Act* infringes both sections 7 and 12 of the *Canadian Charter of Rights and*

Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

II. Issues

[5] This application for judicial review raises the following issues:

1. What is the standard of review for the RPD's decision?
2. Should the RPD have assessed whether the Applicant would be at risk in China?
3. Did the RPD err in determining that the Applicant had re-availed himself of China's protection?
4. Should the constitutional issues be decided?
5. If so, does paragraph 46(1)(c.1) of the *Act* infringe section 7 of the *Charter* or section 12 of the *Charter*?
6. If any *Charter* rights are infringed, is paragraph 46(1)(c.1) saved by section 1 of the *Charter*?

III. Consequences of Cessation under Paragraph 108(1)(a)

[6] Before addressing the issues raised by this application, it is useful to note the consequences of cessation under paragraph 108(1)(a) of the *Act*. Once refugee protection is conferred by subsection 95(1) of the *Act*, refugees have a relatively straightforward path to permanent residency. Subject to a few conditions and exceptions, they can become permanent residents so long as "they have made their application in accordance with the regulations and … are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38" (*Act*, s 21(2)). Until recently, the Minister generally did not endeavour to cease protecting refugees who became permanent

residents, since cessation did not affect their permanent resident status (*Olvera Romero v Canada (Citizenship and Immigration)*, 2014 FC 671 at paragraphs 80-83, 26 Imm LR (4th) 123). This position changed, however, when sections 18 and 19(1) of the *Protecting Canada's Immigration System Act*, SC 2012, c 17 [*PCISA*] came into force on December 15, 2012 (*Order Fixing December 15, 2012 as the Day on which Certain Sections of the Act Come into Force*, SI/2012-95, (2012) C Gaz II, 2982).

[7] Now, for refugees whose protection is ceased under paragraphs 108(1)(a) to (d) of the *Act*, paragraph 46(1)(c.1) of the *Act* provides that:

46. (1) A person loses permanent resident status	**46.** (1) Emportent perte du statut de résident permanent les faits suivants :
…	…
(*c.1*) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(*a*) to (*d*);	*c.1*) la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)*a*) à *d*), la perte de l'asile;

[8] Former refugees whose protection is ceased lose any rights they had acquired as a permanent resident, including "the right to enter and remain in Canada" (*Act*, s 27(1)). As foreign nationals, they cannot work in Canada without a work permit (*Act*, s 30(1); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 196 [*Regulations*]). They may lose any job they have and might not even be able to apply for a work permit from within Canada (*Regulations*, s 199). They will also likely lose access to many social services, although they may still receive whatever healthcare benefits are afforded

to rejected refugee claimants (see *Order Respecting the Interim Federal Health Program, 2012*, SI/2012-26, (2012) C Gaz II, 1135, s 1, *sub verbo* "person whose refugee claim has been rejected"; *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651, 28 Imm LR (4th) 1).

[9] A further consequence of cessation under paragraph 108(1)(a) arises by virtue of subsection 40.1(2) of the *Act*. This subsection provides that:

40.1 … (2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(*a*) to (*d*).	**40.1** … (2) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)*a*) à *d*), la perte de l'asile d'un résident permanent emporte son interdiction de territoire.

[10] Persons like the Applicant thus become subject to removal proceedings under section 44 of the *Act*. If a removal order is issued and becomes enforceable, then "the order must be enforced as soon as possible" (*Act*, s 48(2)). Former refugees do not have many options to prevent their removal from happening. Cessation decisions cannot be appealed to the Refugee Appeal Division of the IRB (*Act*, s 110(2)(e)), and a judicial review application does not automatically stop removal proceedings from commencing.

[11] In addition, subsection 108(3) of the *Act* deems a successful cessation application to be a rejection of the protected person's claim. This means that former refugees suffer additional consequences provided for in the *Act*: subsection 24(4) prevents them from applying for temporary

resident permits for one year; paragraph 112(2)(b.1) prohibits them from receiving a pre-removal risk assessment [PRRA] for at least one year (or three years if they are from a designated country of origin); and paragraph 25(1.2)(c) precludes them from applying for any humanitarian and compassionate grounds exemptions for one year, unless they fall within the exceptions set out in subsection 25(1.21).

IV. The RPD's Decision

[12] In granting the Minister's cessation application on the ground that the Applicant had re-availed himself of China's protection, the RPD relied upon certain passages from 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*, (Geneva: UNHCR, 1992) [Handbook], and noted that re-availment had to be (1) voluntary, (2) intentional, and (3) actual, before it could ground a claim for cessation. The RPD found all three requirements for cessation were met with respect to the Applicant. There were no extenuating circumstances which had forced the Applicant to apply for a Chinese passport. Although he testified that he wanted the passport for identification purposes, the RPD noted that he already had a permanent resident card and he never made any effort to ask Canadian officials about alternative courses of action. Citing *Nsende v Canada (Citizenship and Immigration)*, 2008 FC 531 at paragraph 15, [2009] 1 FCR 49 [*Nsende*], the RPD determined that issuance of the passport raised a presumption that the Applicant intended to re-avail himself of China's protection. The RPD found that the Applicant did not rebut this presumption, and by using his passport to return to China he had obtained China's protection.

[13] According to the RPD, the fact the Applicant went to China to arrange his mother's funeral was irrelevant. The Applicant's counsel had compared the return to China with an example in the UNHCR

Handbook which said visiting a sick parent might not be re-availment. However, the RPD said this possibility was stated in the context of someone traveling with documentation other than a passport. By traveling on a genuine passport, the RPD found the Applicant had alerted the Chinese authorities to his presence and, moreover, the RPD did not believe the Applicant when he said he had assistance when exiting China. The Applicant testified he was in hiding during his time in China, but the RPD noted that the Applicant "did stay in the same urban area of which he was a native, he did make his presence known to various relatives, and he failed to take any steps to shorten his stay." The RPD thus decided the Applicant was "implicitly expressing confidence in the state of China to protect him," and it ceased the Applicant's protection because of paragraph 108(1)(a) of the *Act*. Since this determination was sufficient to allow the Minister's application, the RPD found it unnecessary to consider whether the reasons for which the Applicant had originally sought refugee protection had ceased to exist (citing *Cabrera Cadena v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 67 at paragraph 25, 408 FTR 1 [*Cadena*]).

V. Analysis

A. *What is the standard of review?*

[14] A full analysis of the applicable standard of review with respect to the RPD's interpretation of paragraph 108(1)(a) and its application to the facts is not necessary since the jurisprudence has already satisfactorily determined the standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 57, 62, [2008] 1 SCR 190 [*Dunsmuir*]).

[15] This Court has reviewed cessation decisions on the reasonableness standard, not only with respect to the RPD's interpretation of paragraph 108(1)(a), but also its application of such paragraph to the facts (*Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 at paragraphs 24-25 [*Bashir*]; *Nsende* at paragraph 9; *Cadena* at paragraph 12). Accordingly, the RPD's decision should not be set aside so long as "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). The Court can neither reweigh the evidence nor substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339).

[16] As for the constitutional challenges to a statutory provision such as paragraph 46(1)(c.1) of the *Act*, the standard of review is typically correctness (*Dunsmuir* at paragraph 58; *Doré v Barreau du Québec*, 2012 SCC 12 at paragraph 43, [2012] 1 SCR 395). In this case though, the RPD never made any decision about the constitutionality of paragraph 46(1)(c.1) because that provision was never challenged in the RPD proceedings. Whether the constitutional issue now raised by the Applicant on this judicial review application is properly before the Court will be discussed below.

B. *Should the RPD have assessed whether the Applicant would be at risk in China?*

[17] The RPD did not consider whether the Applicant faced any ongoing risk in China. The Applicant submits that the RPD had a responsibility to reassess the risk in China before it could cease protecting him. Citing *Yusuf v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 35 (QL) at

paragraph 2, 179 NR 11 (CA) [*Yusuf*], the Applicant states that the only question, and therefore the only test, is that derived from the definition of Convention Refugee: does the Applicant now have a well-founded fear of persecution? In the Applicant's view, the RPD's failure to answer this question violates the principle of non-*refoulement* articulated in article 33 of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6 [*Refugee Convention*], and in article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 [*Convention against Torture*]. The Applicant emphasizes that he has no access to a PRRA, and the lack of a risk assessment at the cessation stage thus exposes him to *refoulement*. The Applicant also criticizes the Canada Border Services Agency for establishing a quota whereby 875 cessation and vacation cases are referred to the RPD per year, a policy which he says is contrary to Canada's international obligations.

[18] However, article 33 only protects refugees, and the *Refugee Convention* "conceives of refugee status as a transitory phenomenon that comes to an end if and when a refugee can reclaim the protection of her own state or has secured an alternative form of enduring national protection" (James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2d ed (Cambridge: Cambridge University Press, 2014) at 462). This objective is enshrined in article 1C of the *Refugee Convention*, which provides several situations where refugee protection will cease:

> **C.** This Convention shall cease to apply to any person falling under the terms of section A if
>
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
>
> (2) Having lost his nationality, he has voluntarily re-acquired it; or

> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

So long as a claimant falls within any of these provisions, he or she is no longer a refugee and no longer enjoys the protection of article 33 of the *Refugee Convention*. Subsection 108(1) of the *Act* largely mirrors the criteria in article 1C, so the question is whether article 1C and its domestic counterpart can apply only to refugees who face no risk in their countries of origin.

[19] With respect to this question, it is helpful to turn to the UNHCR Handbook which, generally, "must be treated as a highly relevant authority in considering refugee admission practices" (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paragraph 46, 128 DLR (4th) 213, La Forest J, dissenting but not on this point (see paragraph 119)). The UNHCR Handbook

advises (at paragraphs 112 and 116) that the cessation clauses should be interpreted and applied strictly because refugees need to be assured "that their status will not be subject to constant review in the light of temporary changes - not of a fundamental character - in the situation prevailing in their country of origin" (see *Bashir* at paragraph 44).

[20] Even with a strict interpretation though, I disagree with the Applicant's argument that risk needs to be determined for every ground of cessation. Nothing in the Handbook supports any such interpretation. Furthermore, the last two grounds explicitly deal with changed country conditions or risk, which implies that a change in such conditions is not necessary for cessation to apply under the other four grounds. Each of those other grounds involves situations where a refugee voluntarily submits to another form of protection, either that of his former country of origin or that of another country. As stated by the authors of *The Law of Refugee Status* (at 464):

> The refugee may elect to entrust her safety to the state of origin by way of re-availment of its former protection, by re-acquisition of its nationality, or by re-establishment in its territory. Behaviour of any of these three sorts is understood to reflect a determination by the refugee to entrust her well-being to her country of origin, an exercise of individuated self-determination in which international law can but acquiesce.
>
> [Emphasis added; footnotes omitted]

[21] This is entirely consistent with the concept of refugee protection. Objective risk is not the only criterion for refugee protection; a claimant must also "subjectively fear persecution" (*Canada (AG) v Ward*, [1993] 2 SCR 689 at 723, 103 DLR (4th) 1). 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. As stated in the UNHCR Handbook (at paragraph 116): "if a refugee, for whatever reasons, no longer wishes to be considered a refugee, there will be no call for continuing to grant him refugee status and international protection."

[22] The only case upon which the Applicant relies to support his interpretation of section 108 is *Yusuf*, where the Federal Court of Appeal stated that "the only question, and therefore the only test, is that derived from the definition of Convention Refugee…: does the claimant now have a well-founded fear of persecution?" The Applicant's reliance upon *Yusuf*, however, is misguided. *Yusuf* was not a cessation case at all; it was about whether refugee protection should be granted in the first place. The principle governing that case was simply that a grant of refugee protection must be forward-looking. *Yusuf* stands for nothing more. To the extent that *Yusuf* refers to "changed circumstances," that comment could only apply to articles 1C (5) and (6), and it does not affect the other grounds of cessation.

[23] The Applicant further submits that the cessation hearing before the RPD is his last chance for any kind of risk consideration. He says there was already a conditional removal order issued against him when he first came to Canada, that it has now been triggered by the RPD's cessation decision, and that there are no further safeguards against his removal. Ostensibly, this could raise concerns under article 3 of the *Convention against Torture*, which prohibits *refoulement* "where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[24] However, the Applicant's concerns in this regard are unfounded. There likely was a conditional removal order issued against him when he first came to Canada, but "[a] removal order that has not been enforced becomes void if the foreign national becomes a permanent resident" (*Act*, s 51). Thus, despite the fact that section 40.1 of the *Act* makes the Applicant inadmissible, he could not be deported until the removal process in section 44 is engaged. He would be entitled to whatever safeguards that process might entail (see e.g. *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at paragraphs 26-42, [2006] 1 FCR 3; but see *Nagalingam v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1411 at paragraphs 29-34, [2013] 4 FCR 455). If a removal order is issued, the Applicant will still have the opportunity to ask for removal to be deferred and some section 97 risks can be considered then (see e.g. *Peter v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1073 at paragraphs 149-175, 31 Imm LR (4th) 169).

[25] In conclusion with respect to this issue, therefore, any concerns about non-*refoulement* do not affect the criteria for ceasing refugee protection. Prospective risk does not prevent refugee protection from ceasing under paragraph 108(1)(a) of the *Act* (*Balouch v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 765 at paragraphs 19-20).

C. *Did the RPD err in determining that the Applicant had re-availed himself of China's protection?*

[26] The cessation criteria in the *Refugee Convention* are incorporated into the *Act* through section 108. Subsection 108(2) permits the Minister to apply to cease someone's protection on any of the grounds set out in subsection 108(1), and paragraph 108(1)(a) stipulates that:

108. (1) A claim for refugee	**108.** (1) Est rejetée la

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:	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;

[27] The UNHCR Handbook (at paragraph 119) sets out three criteria for re-availment. These criteria have been adopted by this Court, so "the refugee must: (1) act voluntarily; (2) intend by his action to reavail himself of the protection of the country of nationality; and (3) actually obtain such protection" (*Bashir* at paragraph 46). The RPD correctly identified these criteria in this case.

[28] After identifying the three criteria, the RPD reasonably found that the Applicant had voluntarily applied for a passport. While the Applicant contends that his return to China was not voluntary because he was responding to his mother's death, that contention does not affect his reasons for applying for a passport some five months prior to her death.

[29] The RPD next applied the presumption that someone who voluntarily applies for a passport from their country of origin intends to re-avail himself of that country's protection. The Applicant attempted to rebut this presumption by saying he just wanted identification and a way to travel to the United States. However, the RPD noted that he already had a permanent resident card and that he did

not require the passport for anything. Hence, the RPD determined that the Applicant "made the [passport] application solely for reasons of convenience."

[30] The presumption attached to acquiring a passport has been criticized in *The Law of Refugee Status* for shifting the burden on a refugee to "disprove a presumed - but factually highly unlikely - premise that securing or renewing a passport evinced the refugee's intention to renounce refugee status in favour of the country of origin's protection" (*The Law of Refugee Status* at 468). The authors opine that "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" (*The Law of Refugee Status* at 465).

[31] Regardless of the merits of that argument against this presumption, the presumption is supported in the UNHCR Handbook (at paragraph 121), and it also has received judicial approval (*Nsende* at paragraph 14; *Bashir* at paragraph 59; *Li v Canada (Citizenship and Immigration)*, 2015 FC 459 at paragraph 42). It was reasonable for the RPD to rely on this presumption, and it is understandable why the Applicant's explanations for his actions did not convince the RPD that re-availment was not intended.

[32] As to the final criterion of actual re-availment, it is instructive to look to the UNHCR Handbook, which states the following (at paragraph 122):

> 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.
>
> [Emphasis added]

[33] In this case, the RPD did not find that the Applicant had obtained his passport "for the purposes of returning" to China. However, once the Applicant's mother died and he used his passport to return to China, the RPD determined that he "did actually obtain the protection of Chinese authorities, thereby fulfilling the third requirement." The RPD reasoned as follows:

> [23] …the respondent not only obtained the services and assistance of Chinese officials in obtaining a new passport, as he was entitled to do as a citizen of China, but … his visit there with a valid passport in his own identity meant that he was alerting officials to his presence in the country. As set out above, the panel found that the respondent did not provide credible evidence of any efforts he made to avoid coming to their attention, either in entering or departing China. While he testified that he did not stay in his own home or venture out in public much, the respondent did stay in the same urban area of which he was a native, he did make his presence known to various relatives, and he failed to take any steps to shorten his stay. The respondent thereby was implicitly expressing confidence in the state of China to protect him, although he was granted refugee protection on the basis of his fear of agents of the state…

[34] The Applicant complains that the RPD's credibility finding that he had not taken any measures to avoid exit controls was unreasonable inasmuch as it was based on a plausibility finding. However, the RPD's assessment of how the Applicant exited China did not rely on a plausibility finding at all; the RPD simply found the Applicant's testimony was inconsistent. The Applicant said at first that he was helped

by his friend who assisted him in exiting China, but he later said it was actually his uncle's friend or relative. He also stated that he was not clear about the details on how he bypassed the exit controls, but then said he thought the person assisting him was an airport official. It was reasonable for the RPD to not believe the Applicant in light of these inconsistencies and elaborations. As the Court stated in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paragraph 43: "contradictions in the evidence, particularly in a refugee claimant's own testimony, will usually afford the RPD a reasonable basis for finding the claimant to lack credibility." The credibility finding by the RPD that the Applicant had not taken any measures to avoid exit controls was reasonable.

[35] However, the RPD's conclusion that the Applicant had actually re-availed himself of China's protection contradicted its other factual findings and, therefore, was not reasonable. On the one hand, the RPD accepted that the Applicant was hiding from the Public Security Bureau [PSB] by living at his cousin's house and seeing only relatives, that the PSB had been looking for him on the day of his mother's funeral, and that he had avoided attending his mother's funeral out of fear that the PSB would find him there; but, on the other, it found that he had re-availed himself of China's protection because he remained in the same general area and received visitors. Whether he was hiding perfectly, however, the fact of the matter is that he was still hiding.

[36] In these circumstances, a finding of actual re-availment cannot be justified and is unreasonable. How could the Applicant intentionally and actually re-avail himself of China's protection while actively avoiding -- and fearing -- the entities charged with that responsibility? How could someone who fears that the state of China will persecute him be "implicitly expressing confidence in the state of China to protect him" from its own officials and laws? The RPD's findings on these points were contradictory

and, hence, unreasonable. The RPD's decision should therefore be set aside on this basis and the matter returned to the RPD for redetermination.

D. *Should the constitutional issues be decided?*

[37] The RPD's cessation decision having been set aside, paragraph 46(1)(c.1) of the *Act* no longer applies to the Applicant unless the RPD, upon redetermination of this matter, again decides to cease his protection. In the interests of judicial restraint, constitutional pronouncements should not be made in circumstances where they are unnecessary (*Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156 at paragraphs 66-67, 381 DLR (4th) 541). Any such pronouncements about paragraph 46(1)(c.1) of the *Act* in this case are unnecessary given the finding above that the RPD's decision should be set aside.

[38] Moreover, there are several reasons aside from judicial restraint as to why the constitutional issues raised by the Applicant should not be considered in this case.

[39] First, the evidentiary record is weak, so this is not a suitable case to decide the constitutional issues in any event. All of the evidence is derived from the record before the RPD, and the Applicant's affidavit focuses only on the events leading to the cessation application. There is almost no evidence of the personal effect that losing permanent residence has had on the Applicant. He testified during the hearing before the RPD that his wife and children are presently in Canada, so that might support an inference that forcing him to leave Canada would separate him from his family. However, there is no evidence as to what status his family has in Canada, whether they are established here, or what else has happened to the Applicant. Has he lost his job? Has he been able to secure a work permit? Has the loss

of permanent resident status affected the quality or frequency of any medical attention he or his family have sought? Have removal proceedings been initiated against him? There are no answers to these sorts of questions to be found in the record, which means that most of the constitutional analysis in this case would need to be decided on the basis of abstract predictions about the likely effect of the loss of permanent residence. As the Supreme Court stated in *Mackay v Manitoba*, [1989] 2 SCR 357 at 361-362, 61 DLR (4th) 385:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[40] Second, the Applicant never raised any constitutional issues with respect to paragraph 46(1)(c.1) before the RPD. Reviewing courts generally will not decide an issue "where the issue could have been but was not raised before the tribunal" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 23, [2011] 3 SCR 654 [*Alberta Teachers*]). Just because the constitutional issues would likely be reviewed on a correctness standard does not change this principle from *Alberta Teachers* (*Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paragraphs 37-58 [*Forest Ethics*]). If anything, the Federal Court of Appeal has asserted that it is all the more important that constitutional issues be raised at first instance, so as to gain the insights of the tribunal and establish the very factual foundation which is absent from the present case (*Forest Ethics* at paragraphs 42-45).

[41] This, however, presumes that the RPD would have had jurisdiction to consider the constitutional questions now raised by the Applicant (*Forest Ethics* at paragraph 40). The Respondent argues that the RPD only has jurisdiction to apply section 108. Any collateral consequences arising from that determination are not the RPD's concern, and it therefore does not have the authority to interpret paragraph 46(1)(c.1) or determine its constitutionality.

[42] In ordinary circumstances though, an argument that the RPD lacks jurisdiction should not relieve parties of the obligation to raise a constitutional issue with the RPD first. As with all divisions of the IRB, the RPD has "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction" (*Act*, s 162(1) (emphasis added)). Furthermore, "an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision" (*Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at paragraph 36, [2003] 2 SCR 504). Whether the RPD has jurisdiction to consider the constitutionality of paragraph 46(1)(c.1), therefore, is essentially a question of statutory interpretation, something which typically attracts deference from the Court (*Alberta Teachers* at paragraphs 30, 34). By inviting the Court to make this determination now, the parties are at least sidestepping the RPD on the jurisdictional question, and the RPD deserves the first chance to answer that question just as much as it does the constitutional one (*Forest Ethics* at paragraphs 42-45).

[43] Admittedly, the RPD has previously considered the same issues and declined jurisdiction, essentially accepting the arguments made by the Respondent in this case (see: *Re X*, 2014 CanLII 66637

at paragraphs 19-25). It may seem excessively formalistic to insist that a litigant must first raise a constitutional issue at the RPD even when there is prior authority to suggest that jurisdiction may be declined. However, in the absence of any decision by the RPD in this case as to such issues, they form no part of the decision under review.

VI. Certified Questions

[44] The Applicant proposed the following certified questions at the conclusion of the hearing of this matter:

> 1. When deciding whether to allow an application by the Minister for cessation of refugee status pursuant to s. 108(1)(a) of the Immigration and Refugee Protection Act based on past actions, can the Board allow the Minister's application without addressing whether the person is at risk of persecution upon return to their country of nationality at the time of the cessation hearing?
>
> 2. Is it unconstitutional under s. 7 of the Charter to revoke permanent residency automatically, without a process and without a risk assessment for persons previously found to be refugees?

[45] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 FCR 290, the Federal Court of Appeal stated as follows:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons…

[46] Since no constitutional issues were considered in the foregoing reasons for judgment, the second question proposed by the Applicant clearly is not appropriate for certification.

[47] As for the first question, although it does arise from the case because the RPD did not address whether the Applicant would be at risk of persecution upon return to China at the time of the cessation hearing, that was not dispositive of this matter: as noted above, the RPD's decision is unreasonable because of its contradictory findings.

VII. Conclusion

[48] The RPD's decision was unreasonable since its findings of fact were inconsistent with its conclusion that the Applicant intentionally and actually re-availed himself of China's protection. Therefore, the decision will be set aside and the matter returned to the RPD for redetermination. There is no reason to consider whether paragraph 46(1)(c.1) of the *Act* is constitutional.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Refugee Protection Division for redetermination by a different panel member; and there is no question of general importance for certification.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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