Federal Court  Cour fédérale

Date: 20181206

Docket: IMM-1186-18

Citation: 2018 FC 1224

Ottawa, Ontario, December 6, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

DO MEE TUNG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this judicial review, the Applicant challenges the finding of the Refugee Protection Division (RPD) that she re-availed herself of the protection of China within the meaning of paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] In 2002, the Applicant was granted refugee status in Canada because of her fear of persecution in China as a Falun Gong practitioner. In 2004, she became a permanent resident (PR). She then obtained two Chinese passports (in 2004 and 2009) and travelled to China

extensively. On April 24, 2014, the Minister applied for cessation of her refugee status. For the purpose of the cessation application, the Applicant advised the RPD that the circumstances upon which refugee status had been granted had ceased to exist pursuant to paragraph 108 (1)(e) of the *IRPA*.

[3] However, the RPD also found that the Applicant had voluntarily re-availed herself to China pursuant to paragraph 108(1)(a) of the *IRPA*. It is the re-availment finding that the Applicant now challenges.

[4] For the reasons that follow, this judicial review is dismissed as the test of re-availment applied by the RPD is the correct test and the findings of the RPD are reasonable. I decline to certify a question.

Background

[5] The Applicant became a PR of Canada in May 2004. One month later, in June 2004, she applied for and obtained her Chinese passport. She renewed her Chinese passport in 2009. Between 2004 and 2014, she travelled to China as indicated in her passport, on numerous occasions. She explained to the RPD that the purpose of her return to China was to care for her ailing mother and to support her incarcerated husband. During that period, she travelled to China on 12 occasions and stayed there for at least one month on each visit.

[6] Although the Applicant was granted refugee status in 2002 on the basis of her practice of Falun Gong, she claims to have stopped the practice of Falun Gong.

[7] In 2014, the Minister applied for cessation of the Applicant's refugee status. The cessation application was granted but subsequently set aside by a decision of the Federal Court on November 20, 2015 and sent back for redetermination (Court file IMM-6683-14).

[8] The RPD redetermination was heard on February 9, 2018 and it is this decision that is now under review.

RPD Decision

[9] In advance of the RPD's redetermination of the cessation application, legal counsel for both the Minister and the Applicant made joint submissions that the Applicant's refugee status should only cease because of changed circumstances under paragraph 108(1)(e) of the *IRPA.*

[10] In the RPD's decision dated February 27, 2018, it found that the Applicant showed a voluntary intent to re-avail herself of the protection of China, her country of nationality, and that the reasons for which she sought refuge in Canada ceased to exist.

[11] The RPD referenced the United Nations High Commissioner for Refugees *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (UNHCR Handbook) and case law on the requirements to establish re-availment. In considering the evidence, the

RPD determined that Ms. Tung obtained her Chinese passports voluntarily and travelled to China voluntarily on 12 occasions. The RPD acknowledged that, while she may have had personal reasons for returning to China, her actions were still voluntary.

[12] The RPD noted that the Minister has the burden of proving re-availment on a balance of probabilities. However, the RPD found that by applying for and obtaining a passport from China, a presumption of re-availment was raised, thereby putting the onus on the Applicant to rebut the presumption. The RPD concluded that she did not rebut the presumption of re-availment.

[13] The Applicant testified that she traveled to China to take care of her mother, but the RPD noted that there was evidence that other family members took care of her mother when she was not there. Further, the RPD noted a lack of evidence about her mother's medical condition. The Applicant also claimed that her presence in China was necessary to support her incarcerated husband and to deal with legal paperwork on his behalf. However, the RPD noted that when she was not in China, her husband's nephew provided this assistance. The RPD determined that assisting her husband did not establish that her presence in China was necessary.

[14] The RPD noted that on her numerous trips to China, the Applicant interacted with Chinese authorities by using her Chinese passport at border security, both when entering and exiting the country. She also interacted with authorities at her husband's detention center. Despite this, the Applicant claims that the authorities never questioned her about her Falun Gong

involvement. With respect to her practice of Falun Gong, she testified that she stopped practicing Falun Gong in Canada because she was required to pay a $50 group membership fee.

[15] Before the RPD, the Applicant relied upon *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 [*El Kaissi*] at paragraph 28 where the court stated that re-availment is not "a temporary visit but requires an intention to permanently reside in that country before physical presence will negate refugee status". In response, the RPD stated that the Federal Court had confused the concepts of re-availment and re-establishment as outlined in the UNHCR Handbook. The RPD determined that there is no actual requirement for the Applicant to have the mental intention to permanently reside in China to find that she falls within paragraph 108(1)(a) of the *IRPA*.

[16] The RPD concluded that the Applicant's actions in applying for a Chinese passport, renewing the passport, voluntarily travelling to China on 12 occasions, staying in China for extended periods of time, and her continued interactions with Chinese authorities without issue, did not rebut the presumption that she intended to re-avail herself of Chinese protection.

[17] With regard to changed circumstances as set out in paragraph 108(1)(e), the RPD determined that the reasons for which refugee protection was originally sought had ceased to exist as the Applicant stopped practicing Falun Gong after arriving to Canada and did not practice Falun Gong during any of her visits to China. Although she alleged a continued fear of returning to China because of her previous affiliation to Falun Gong, the RPD found no serious

possibility of persecution considering her extensive travel to China and her interactions with Chinese authorities without incident.

[18] The RPD noted that when two or more cessation clauses of section 108(1) might apply, it should apply the clauses temporally depending upon the timing of the underlying events of cessation. However, the RPD found that the evidence was unclear as to when the Applicant stopped practicing Falun Gong. Therefore, the RPD found that changed circumstances under paragraph 108(1)(e) could have occurred either before or after she re-availed herself of China's protection under paragraph 108(1)(a). The RPD concluded that it could consider any of the cessation grounds in section 108(1) of the *IRPA* and found that the Applicant's refugee status ceased under both paragraphs 108(1)(a) and 108(1)(e).

Statutory Provisions

[19] The relevant provisions of section 108(1) of the *IRPA* are as follows:

> (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:
>
> (a) the person has voluntarily reavailed themself of the protection of their country of nationality;
>
> …
>
> (e) the reasons for which the person sought refugee protection have ceased to exist.

Issues

[20] The Applicant raises various issues with the RPD decision which can be addressed as follows:

A. Did the RPD err in its approach to cessation?

B. Did the RPD err in finding re-availment?

C. Do certified questions arise?

Analysis

Standard of review

[21] Reasonableness is the applicable standard of review for the RPD's interpretation of the relevant provisions of the *IRPA* and its assessment of whether grounds for cessation have been established (*Siddiqui v Canada (Citizenship and Immigration*), 2016 FCA 134 at para 11).

[22] Additionally, the RPD's interpretation of its home statute, the *IRPA*, is owed significant deference (*Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at paragraphs 29 and 74).

[23] The standard of correctness applies to questions of law or of natural justice (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 55).

A. Did the RPD err in its approach to cessation?

[24] The Applicant argues that the RPD was required to make a definitive finding on when cessation occurred because, she contends, cessation can only occur once. However, this argument is not supported by the wording of section 108(1), which contemplates various circumstances that can give rise to cessation. In essence, what the Applicant is arguing is that the RPD cannot find more than one ground of cessation. For the reasons outlined below, this argument is without merit.

[25] A finding of cessation under paragraph 108(1)(e) would result in the Applicant losing refugee status only. However, a finding of cessation on the other grounds of paragraphs 108(1)(a) to (d) would result in the Applicant also losing her PR status by operation of paragraph 46(1)(c.1) of the *IRPA*, which states:

> 46(1) A person loses permanent resident status
>
> …
>
> (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)

[26] Legal counsel for the Applicant and the Minister submitted joint submissions to the RPD that the Applicant's refugee status should only be assessed pursuant to paragraph 108(1)(e) of the *IRPA*, since the Applicant concedes that she stopped the practice of Falun Gong and cessation under changed circumstances has occurred.

[27] It is the Applicant's position that the RPD was required to follow the joint submission or, alternatively, provide reasons for not doing so.

[28] Prior to the hearing, the RPD advised the parties that despite the conceded cessation ground, it would consider any other applicable cessation grounds. This approach is in keeping with the broad discretion the RPD has under the *IRPA* as noted by Justice O'Reilly in *Canada (Citizenship and Immigration) v Al-Obeidi*, 2015 FC 1041 at paragraphs 21 and 22 as follows:

> …As mentioned, IPRA permits the Board to consider any grounds of cessation set out in s 108(1). A respondent's concession that one ground has been satisfied would not prevent the Board from considering another. In the circumstances of that case, the Board felt obliged to consider other grounds of cessation that had been put forward by the Minister. The fact that the Board considered those other grounds does not suggest that the Board erred in not doing so in this case.
>
> In sum, on a cessation application by the Minister, the Board can consider any ground set out in s 108(1) of IRPA. If the respondent refugee persuades the Board, or concedes, that his or her status has ceased by virtue of a change of country conditions (s 108(1)(*e*)), the Board has discretion to consider other grounds. It is neither compelled to do so, nor prevented from doing so. However, where there is uncontradicted and undisputed evidence that the refugee's status has ceased under another ground (e.g., acquisition of citizenship in a country capable of protection), the Board should consider it.

[29] Similarly, although the Applicant conceded cessation of refugee status under the singular ground of changed circumstances, the RPD was within its discretion to consider other applicable grounds of cessation. The fact that the RPD also considered the ground of re-availment does not suggest that the RPD failed to consider the change of circumstances.

[30] As noted, the Applicant does not take issue with the RPD finding of cessation on the basis of changed circumstances. Presumably, the Applicant assumed that by conceding this ground and having the agreement of the Minister, the RPD would restrict its consideration to the conceded ground. However, that is not how the RPD approached its assessment, nor was it compelled to do so. The Applicant further argues that the RPD erred by not providing its reasons for not following the joint submission of counsel.

[31] In my view, the argument that the RPD did not follow counsels joint submission is without merit and fails to acknowledge the discretion afforded to the RPD under the *IRPA*. It cannot be presumed that the drafters of the *IRPA* intended to allow the delegated discretion to be fettered or controlled by the submissions of parties or their legal counsel. I agree with the comment of Justice Zinn in *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1134 [*Fong*] where he states at paragraph 31, "… the IAD is entitled to reject a joint submission so long as it provides reasons for so doing [citations omitted]." While the facts in *Fong* are different the principle applies.

[32] However here the RPD did not reject the joint submissions, but instead exercised its prerogative to consider other grounds of cessation under section 108(1) of the *IRPA*. Further, the RPD advised the parties in advance of the hearing that it would consider additional grounds of cessation and by doing so the RPD provided the necessary reasons for going beyond recommendations of legal counsel.

[33] Overall, the RPD's assessment of cessation was reasonable and the RPD did not err in its approach to considering cessation under section 108(1).

B. **Did the RPD err in finding re-availment?**

[34] The Applicant further argues that the RPD erred in its finding of re-availment.

[35] With respect to the test for re-availment, the RPD states as follows in paragraphs 21 and 22:

> [21] The respondent's counsel cited *Kaissi v. Canada (MCI)*, 2011 FC 1234 as authority that re-availment requires an intention to permanently reside in the country of nationality. Citing *Camargo v. Canada (MCI)*, 2003 FC 1434, [2003] FCJ No. 1830, the Federal Court in *Kaissi* stated "re-availment is not a temporary visit but requires an intention to permanently reside in that country before physical presence will negate refugee status." With respect, the Federal Court confused the concepts of re-availment and re-establishment in these decisions. At paragraph 35 of *Camargo*, the Federal Court stated as follows:
>
> > According to the Office of the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1988), "re-establishment" and "re-availment" both require an element of intent on the part of a claimant before physical presence in a country will negate refugee status. Paragraph 134 of the UNHCR Handbook states that a temporary visit by a refugee to the country where persecution was feared without an intention to permanently reside there should not result in the loss of refugee status.
>
> [22] It is clear that paragraph 134 of the UNHCR Handbook is discussing the meaning of re-establishment. The quote cited in both *Camargo* and *Kaissi* about the requirement of intention to permanently reside in the country of nationality appears under the heading in the *UNHCR Handbook* "(4) voluntary re-establishment in the country where persecution was feared." Paragraph 134 in its totality reads as follows:

> 134. The clause refers to "voluntary re-establishment". This is to be understood as return to the country of nationality or former habitual residence with a view to permanently residing there. A temporary visit by a refugee to his former home country, not with a national passport but, for example, with a travel document issued by his country of residence, does not constitute "re-establishment" and will not involve loss of refugee status under the present clause.

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

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

[38] Here, the issue before the RPD was re-availment in the context of the cessation of refugee status pursuant to section 180(1). Because of this distinction, I disagree with the RPD's statement that the Federal Court case law on this issue is "confused". The RPD failed to note the factual differences in the *El Kaissi* and *Camargo* cases as compared to cases where the issue is cessation of refugee status. Nevertheless, nothing turns on this statement by the RPD since the

RPD ultimately applied the correct assessment of re-availment as referenced in paragraph 23 of its decision as follows:

> [23] There is no requirement for the respondent to have the intention to permanently reside in China to establish that she falls within subsection 108(1)(a) of the Act. The Minister is required to establish, on a balance of probabilities, that she had the intention to re-avail herself of the protection of China. When I consider the respondent's actions of applying for and obtaining two Chinese passports, her use of these passports for travelling to China, the number and the length of her trips to China, her whereabouts and activities in China, including regular interaction with Chinese authorities at her husband's detention facility, and her abandonment of Falun Gong practice, I find that she has not rebutted the presumption that she has re-availed herself of the protection of China.

[39] The test for re-availment in the context of the cessation of refugee status is noted by Justice O'Reilly in *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 [*Cerna*] at paragraph 12 as follows:

> Reavailment comprises three elements: (1) the refugee must have acted voluntarily; (2) the refugee mush have intended to reavail himself or herself of the protection of the country of nationality; and (3) the refugee must actually have obtained protection (*Nsende v. Canada (Minister of Citizenship and Immigration*), 2008 FC 531 at paras 12-15; *Cabrera Cadena v. Canada (Minister of Public Safety and Emergency Preparedness*), 2012 FC 67 at para 22).

[40] This test has been followed in *Kuoch v Canada (Citizenship and Immigration)*, 2015 FC 979 [*Kuoch*] and *Mayell v Canada (Minister of Citizenship and Immigration)*, 2018 FC 139.

[41] The RPD applied this test when it considered the Applicant's claim that her return to China was necessary to care for her sick mother and support her incarcerated husband. However, the RPD found there was no evidence that her presence in China was necessary as

there were other family members in China who could and did carry out these functions in her absence. The RPD concluded that her travel to China was not necessary but was voluntary. Having found her visits to China voluntary, the RPD concluded that this called into question her alleged subjective fear.

[42] In *Li v Canada (Citizenship and Immigration)*, 2015 FC 459, Justice O'Reilly outlines the applicable burden of proof as follows at paragraph 42:

> The Minister has the burden of proving re-availment on the balance of probabilities. In doing so, the Minister is entitled to rely on the presumption of re-availment by proving that the refugee obtained or renewed a passport from his or her country of origin. Once that has been proved, the refugee has the burden of showing that he or she did not actually seek re-availment. As stated in the UNHCR Handbook, where there is proof that a refugee has obtained or renewed a passport "[i]t 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" (para 121).

[43] Here, the Applicant applied for and obtained two Chinese passports after being declared a refugee in Canada. She travelled back and forth to China extensively using her Chinese passports. The presumption of re-availment is particularly strong in circumstances where a refugee uses his or her national passport to return to the country of nationality (*Kuoch* at paras 28-29).

[44] The Applicant had the burden to rebut the presumption of re-availment and she simply could not do so. With respect to when the Applicant stopped practicing Falun Gong, the RPD acknowledged that the Applicant's Falun Gong practice had "stopped at some point". Considering the Applicant conceded that she had ceased the practice of Falun Gong, the burden

of proof was on her to provide the necessary evidence in support. Although the Applicant attempted to draw a temporal distinction between when she stopped practicing Falun Gong and her acts of re-availment, the RPD found that it was impossible to determine the timing of these events.

[45] The finding of the RPD that the Applicant, by her own actions, displayed the voluntary intention to actually re-avail herself of China is reasonable.

[46] The RPD applied the correct analysis for re-availment in the context of cessation, and the RPD did not err in finding re-availment.

Conclusion of Issues A and B

[47] The Applicant's argument that her changed circumstances pursuant to paragraph 108(1)(e) occurred before re-availment under paragraph 108(1)(a) could occur, is tied to her position that she gave up Falun Gong before she returned to China. However, given the RPD's finding that it was unclear when she gave up Falun Gong in relation to her re-availment actions, it was not unreasonable for the RPD to find that both cessation clauses should apply.

[48] The RPD acted reasonably in deciding the ultimate issue of cessation on a ground not raised by the parties. This is in keeping with the discretion afforded to the RPD.

C. Do Certified Questions Arise?

[49] The Applicant poses three questions for certification as follows:

> 1. Can a person cease to be a Convention Refugee on more than one occasion. If the answer is in the negative, is the tribunal required to make clear findings of fact as to why and when the Applicant ceased to be a Convention Refugee?
>
> 2. Can a person reavail him/herself of the protection of his/her country of nationality if the person does not have the intention to reside their [*sic*] permanently?
>
> 3. In considering an application for cessation under section 108 (l) of lRPA when the tribunal exercises its discretion as to which provision to apply, is the tribunal required to provide a cogent explanation for its exercise of discretion?

[50] The Respondent disagrees that the Applicant's questions meet the test for certification, and proposes the following question for certification:

> (a) What is the legal test in finding that a refugee claimant has reavailed his/herself within the meaning of paragraph 108(1)(a) of the *IRPA*?
>
> (i) In particular, does the legal test for reavailment, within the meaning of paragraph 108(1)(a) of the *lRPA*, require an intention on behalf of the individual to permanently reside in the country from which they sought protection?

[51] The test for certification was recently confirmed by the Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 where at paragraph 46 the court states:

> This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 (CanLII) at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of

> the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness*), 2015 FCA 21 (CanLII), 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 (CanLII), 485 N.R. 186 at paras. 15, 35).

[52] Based upon this test, I am unable to conclude that any of the proposed questions meet the criteria for certification, or that the questions can be reformulated so as to address any deficiencies. The fundamental problem is that none of these questions would be dispositive of an appeal.

[53] The first question as posed by the Applicant does not arise on the facts of this case. Based upon the evidence, the RPD found that it could not determine the precise timing of the cessation events. Accordingly, the question posed is hypothetical.

[54] The second question as posed by the Applicant, has already been addressed in my reasons above. Despite the commentary of the RPD, there is in fact no confusion in the Federal Court case law regarding the test to be applied in the context of re-availment in cessation cases. Accordingly, I decline to certify this question or the similar question posed by the Respondent.

[55] Finally, with respect to the third question proposed by the Applicant, the discretion of the RPD is fully addressed in the case of *Al-Obeidi*. I therefore decline to certify the question as nothing turns on it.

[56] In my view, none of the proposed questions would be dispositive of an appeal, they do not transcend the interests of the parties, and they do not raise any issues of broad significance or of general importance. As such, no certified questions arise.

JUDGMENT in IMM-1186-18

THIS COURT'S JUDGMENT is that

1. This judicial review is dismissed; and

2. I decline to certify the questions posed by the parties.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
Suzanne Bruce	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman PC Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT