Federal Court  Cour fédérale

Date: 20190808

Docket: IMM-4552-18

Citation: 2019 FC 1060

Ottawa, Ontario, August 8, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

JING YING LU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Jing Ying Lu, seeks judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board granting the Minister's application to cease her Convention refugee status pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The RPD determined that the Applicant had voluntarily reavailed herself of the protection of her country of origin (China)

within the meaning of paragraph 108(1)(a) of the IRPA. Consequently, her refugee claim was deemed to be rejected (subsection 108(3) of the IRPA).

[2] The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

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

I. Background

[4] The Applicant is a citizen of the People's Republic of China. She arrived in Canada from China in 2001 and was found to be a refugee by the RPD on July 22, 2002. The basis for her refugee claim was her practice of Falun Gong and a sexual assault by a police officer. The Applicant became a permanent resident of Canada on September 23, 2004.

[5] The Applicant applied for and obtained a Chinese passport in June 2004 and renewed the passport on June 18, 2009. Between 2005 and 2013, she travelled to China on seven occasions for personal reasons, each trip lasting approximately one month.

[6] At the RPD hearing, the Applicant testified that she informed officials at the Chinese consulate in Vancouver (BC) when she first applied for a passport in 2004 that she was a Falun Gong practitioner and that she had made a refugee claim in Canada that had been accepted. The officials required her to sign a document promising to no longer practice Falun Gong before they would issue a passport. The Applicant signed the document and received her passport.

[7] On April 9, 2014, the Minister brought an application pursuant to subsection 108(2) of the IRPA for a determination by the RPD that the Applicant's refugee protection had ceased.

II. Decision under review

[8] The Decision is dated August 28, 2018.

[9] The RPD first considered the application of paragraph 108(1)(a) of the IRPA. The panel stated that the Minister bore the burden of proving that the Applicant had voluntarily reavailed herself of the protection of China on a balance of probabilities.

[10] Citing the United Nations High Commissioner for Refugees *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (UNHCR Handbook) and jurisprudence of this Court (*Nsende v Canada (Citizenship and Immigration*), 2008 FC 531 at para 13 (*Nsende*); *Canada (Public Safety and Emergency Preparedness*) *v Bashir*, 2015 FC 51 at para 46 (*Bashir*)), the RPD set out the three-part test for reavailment:

1. Voluntariness: The claimant must act voluntarily;
2. Intention: The claimant must intend by their actions to reavail themself of the protection of the country of their nationality;
3. Reavailment: The claimant must actually obtain such protection.

[11] Voluntariness: The Applicant had been issued two passports by Chinese authorities in Vancouver and had returned to China on seven occasions. The RPD found that the Applicant

voluntarily obtained the passports and travelled to China. The RPD acknowledged the Applicant's personal reasons for returning to China but stated that there was no evidence she was forced or pressured to apply for the passports or to return to China. She acted of her own free will.

[12] Intention: The RPD noted that, if a refugee claimant applies for and obtains a passport, in the absence of proof to the contrary, it is presumed that the claimant intends to avail themself of the protection of their country of nationality (UNHCR Handbook at para 121; *Nsende* at para 14; *Bashir* at para 59). The presumption is particularly strong where the claimant uses the national passport to return to that country (*Abadi v Canada (Citizenship and Immigration*), 2016 FC 29 (*Abadi*). The RPD also noted that the claimant bears the burden of rebutting the presumption.

[13] The RPD canvassed the personal reasons for which the Applicant returned to China (visiting her relatives, seeing her father when he was hospitalized, obtaining assistance with fertility problems, assisting her parents with a Canadian visa application). The panel found that the Applicant travelled openly to China using her own identity and took no steps to mask her presence in the country from the authorities. The RPD summarized its findings as follows:

> [18] The [Applicant] obtained the assistance of Chinese officials in obtaining PRC passports on two occasions. She advised Chinese officials in Vancouver that she was a practitioner of Falun Gong and obtained the first PRC passport in exchange for a promise to stop her practice. She travelled to the PRC repeatedly using the PRC passports that she was issued. Chinese officials were aware not only of the [Applicant]'s travels, but also of her former practice of Falun Gong. The [Applicant]'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. I find that the [Applicant] has

> failed to rebut the presumption that she intended to re-avail herself of the protection of the PRC.

[14] Reavailment: As the Applicant obtained and used her passports to repeatedly travel to China and to the United States, the RPD found that she had in fact reavailed herself of the protection of China.

[15] The RPD then addressed the Applicant's argument that the panel should have restricted itself to a determination under paragraph 108(1)(e) of the IRPA as, temporally, the reasons for which she sought protection ceased to exist before any reavailment. The Applicant argued that a change of circumstances occurred when she agreed to no longer practice Falun Gong as a precondition for obtaining the first passport. The RPD did not agree, stating:

> I do not concur. Before agreeing to no longer practice the [Applicant] had already chosen to approach the Chinese authorities to obtain the passport and, accordingly, to re-avail herself of their protection. Further, she then chose to give up her religious practice in exchange for the passport and the Chinese authorities' protection.

[16] The RPD relied on the decision in *Canada (Citizenship and Immigration) v Al-Obeidi*, 2015 FC 1041 (*Al-Obeidi*) to state that it had discretion to consider any ground set out in subsection 108(1) when determining a cessation application. As the presumption of reavailment arose when the Applicant applied for the first passport and the strong presumption applied when she actually travelled to China using the passport, the RPD found that the application was more appropriately decided pursuant to paragraph 108(1)(a) of the IRPA.

[17] The RPD concluded that paragraph 108(1)(a) applied to the Applicant and that she had voluntarily reavailed herself of the protection of China. The Minister's application for cessation of her status as a Convention refugee was allowed and her claim deemed rejected (subsections 108(2) and (3) of the IRPA).

III. Issues

[18] The Applicant raised two issues in her submissions in this application:

1. Did the RPD unreasonably conclude that cessation occurred under paragraph 108(1)(a) prior to and to the exclusion of paragraph 108(1)(e) of the IRPA?
2. Did the RPD unreasonably conclude that the Applicant reavailed herself of the protection of China under paragraph 108(1)(a) of the IRPA?

IV. Standard of review

[19] The two issues before me are reviewable against the standard of reasonableness (*Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 at para 11*(Siddiqui)*; *Bashir* at paras 22-25); *Maqbool v Canada (Citizenship and Immigration)*, 2016 FC 1146 at paras 22-23; *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 at paras 21-22 (*Tung*)). In determining the Minister's application, the RPD addressed questions of mixed fact and law concerning the interpretation and application of subsection 108(1) generally and, specifically, the interplay of paragraphs 108(1)(a) and 108(1)(e) of the IRPA.

V. Legislative Background

[20] The relevant provisions of subsections 108(1) and (2) of the IRPA are as follows:

Cessation of Refugee Protection

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

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

…

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

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

[21] Where the RPD finds that refugee protection has ceased pursuant to paragraph 108(1)(e) of the IRPA, the claimant loses refugee status only and does not lose permanent resident status and become inadmissible to Canada. In contrast, a finding of cessation by the RPD pursuant to paragraphs 108(1)(a) to (d) does result in the loss of permanent resident status by operation of paragraph 46(1)(c.1) of the IRPA:

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).

VI. Analysis

1. Did the RPD unreasonably conclude that cessation occurred under paragraph 108(1)(a) prior to and to the exclusion of paragraph 108(1)(e) of the IRPA?

Applicant's submissions

[22] The Applicant's first and foundational argument is that a person ceases to be a refugee at a specific point in time. In her view, once a person loses refugee status for one reason (e.g. changed circumstances in the country of origin), they cannot subsequently lose it again for another reason. Therefore, the RPD must determine both the reason for the loss and the moment in time when refugee status ceased (citing Justice Marceau's reasoning in *Mileva v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 398, 1991 CanLII 8182 (FCA) and excerpts from the *UNHCR Guidelines on International Protection (Cessation of Refugee Status)*). The Applicant states that the recognition of refugee status by the RPD is the *de jure* recognition of a status that already exists and that the inverse is equally true. A refugee loses refugee status at a particular point in time when all of the elements of one of the grounds of cessation have been satisfied and the RPD formally recognizes the loss when it issues a cessation determination. In other words, an RPD decision regarding cessation of refugee status is a finding after the fact. The Applicant states:

> 42. When the RPD considers an application for cessation, the RPD must make findings of fact and then apply those facts and determine when and why cessation occurred. If cessation occurred at a specific time for one of the reasons set out in s. 108(1), it cannot then occur again for a different reason at a later date. As such there can only be one point at which cessation occurred and the RPD's cessation decision is *de jure* recognition of the pre-existing facts. In exercising its discretion to determine the appropriate ground of cessation, it is the role of the RPD to review

> the facts and make a determination as to when and why cessation occurred.

[23] The Applicant acknowledges that the RPD may determine that refugee protection has ceased on any of the grounds set forth in subsection 108(1) of the IRPA (*Al-Obeidi*, *Tung*). She submits that, in light of the serious consequences resulting from a determination of cessation pursuant to paragraph 108(1)(e), the RPD must carefully consider how its discretion will be exercised in any case in which both paragraph 108(1)(e) and any one of paragraphs 108(1)(a) to (d) may apply, and must provide cogent reasons for the exercise of its discretion. The Applicant also argues that, as paragraph 108(1)(e) does not result in the loss of permanent resident status, if the evidence in a case discloses that cessation of refugee status occurred due to a change in country conditions or circumstances, the RPD should only render a cessation finding on that basis. Otherwise, the exclusion of paragraph 108(1)(e) from the purview of paragraph 46(1)(c.1) is rendered nugatory.

[24] The second element of the Applicant's submissions is that the RPD unreasonably found that she had reavailed herself of the protection of China prior to renouncing her practice of Falun Gong. She submits that the panel's finding was made without regard to the evidence as she swore off Falun Gong prior to receipt of the first passport and her initial return to China. The Applicant argues that a decision to apply for a passport is distinct from applying for the passport and receiving it, and that the test for reavailment requires actual receipt of protection from the country of nationality. If her renunciation of Falun Gong occurred before she received her passport, the change in circumstance preceded any reavailment.

[25] In addition, the Applicant submits that she testified she decided "in her heart" to no longer practice Falun Gong before approaching Chinese officials to renew her passport. Therefore, she in fact renounced the practice prior to her first application for a Chinese passport.

Respondent's submissions

[26] The Respondent submits that the RPD has discretion to determine under which ground(s) cessation of protection has occurred and is not obliged to explain why it exercised its discretion pursuant to subsection 108(2) of the IRPA (*Al-Obeidi*; *Olvera Romero v. Canada (Citizenship and Immigration)*, 2014 FC 671). The Respondent states that the Applicant rests her entire argument on the principle of *de jure* recognition of status but that the authorities she relies on do not stand for the principle cited. The Respondent's position is that the RPD makes a cessation determination based on all of the facts in question, which may include multiple reavailments, and that there is no authority to support the assertion that cessation is tied to a temporal timeframe (*Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 329 at para 31 (*Siddiqui FC*); *Tung* at para 24). The Respondent states:

> [33] It is clear from *Tung*, that the Court confirmed that it would be open to the panel to consider more than one ground of cessation. It is entirely reasonable then that there could be various reasons cessation applies; and that these reasons could relate to events that are temporally diverse. Simply put, the mere fact that cessation is a recognition of a change of status does not mean that the change of status must[] be based on a single point in time.

[27] The Respondent states that cessation happens once but that it is the RPD that makes this determination. The Respondent argues that the Applicant is taking the concept of reavailment

and equating it to the RPD's determination of cessation, ignoring the fact that the two are distinct.

[28] The Respondent also submits that the RPD made no error in concluding that the Applicant had first decided to approach the Chinese authorities in Canada to obtain a passport to return to China. Her agreement to no longer practice Falun Gong came about only in response to a demand from the authorities. The Respondent states that the RPD considered the Applicant's testimony that she had already decided to stop practising Falun Gong prior to approaching the Chinese consulate, contrary to her submission that the panel ignored this evidence. Finally, the Respondent argues that the fact the Applicant had not yet received a Chinese passport and returned to China when she signed her renunciation is not determinative as the RPD considers the full sequence of events to determine whether cessation has occurred.

Analysis

[29] For the reasons that follow, I find that the RPD's conclusion that the Applicant's refugee status ceased under paragraph 108(1)(a) of the IRPA and not paragraph 108(1)(e) was reasonable.

[30] The Applicant first submits that:

> The Federal Court has determined that recognition of refugee status by the RPD is in fact *de jure* recognition of a status that already existed. If recognition of the conferring of refugee status is a *de jure* recognition of a pre-existing fact, so too must be a determination of cessation.

[31] The RPD's decision that an individual is a Convention refugee and/or a person in need of protection, or that the individual's refugee status has ceased, can properly be described as *de jure* recognition of a pre-existing set of facts. However, in neither case is the RPD required either by the provisions of the IRPA or by the jurisprudence to make a finding that the individual has been a Convention refugee as of a specific date or that the individual's refugee status has ceased as of specific date. The Applicant's submissions surrounding the *de jure* nature of the RPD's role do not establish her temporal argument.

[32] The Applicant's primary submission is that the RPD's determination of a cessation application is constrained by a temporal analysis of the evidence before it. She submits that the RPD must analyse the evidence against the relevant paragraphs of subsection 108(1) to determine the first date on which cessation under any one of the paragraphs occurred.

[33] The starting point for my analysis of this submission is the IRPA itself. Subsection 108(1) begins with the statement that a refugee protection claim shall be rejected and the claimant is not a Convention refugee or person in need of protection, "in any of the following circumstances", and then lists the circumstances in which refugee protection will be lost in paragraphs (a) to (e). Further, subsection 108(2) provides that, on application by the Minister, the RPD may determine that refugee protection referred to in subsection 95(1) of the IRPA has ceased "for any of the reasons described in subsection (1)".

[34] On its face, the IRPA places no limitation on the RPD as to the manner, whether temporal or otherwise, in which it must assess a cessation application. Inherent in the circumstances

described in each of paragraphs 108(1)(a) to (e) is the likelihood that any number of facts, actions and events, occurring over a period of time, will factor in to the RPD's assessment (see, for example, *Siddiqui FC* at para 31; Justice Shore's factual finding of reavailment was undisturbed by the Federal Court of Appeal in *Siddiqui, supra*, at para 4). If Parliament had intended to limit the RPD's discretion pursuant to subsections 108(1) and (2), it clearly could have done so. For example, when implementing paragraph 46(1)(c.1) of the IRPA in 2012, Parliament could have insisted that the RPD first consider any cessation of refugee status under paragraph 108(1)(e) before any consideration of the remaining paragraphs of the subsection, but chose not to do so.

[35] The jurisprudence of this Court is consistent, establishing that the RPD may proceed on any of the grounds set out in subsection 108(1) of the IRPA in considering cessation. In *Al-Obeidi*, Justice O'Reilly stated (at paras 21-22):

> [21] ... As mentioned, IRPA 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.
>
> [22] 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.

[36] Justice O'Reilly's emphasis on the discretion of the RPD to consider any of the grounds set out in subsection 108(1) was confirmed in *Tung* (at para 28), a case with strong factual parallels to that of the Applicant. In addition, Justice Macdonald specifically addressed the argument advanced in this case, as follows (*Tung* at para 24):

> [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.

[37] The Applicant acknowledges that the RPD has discretion to consider an application for cessation of refugee status on any of the grounds set forth in subsection 108(1) of the IRPA but, in fact, her point in time argument would effectively negate that discretion. The premise that the RPD's discretion is limited to a temporal determination of when refugee status was first lost and then an automatic application of one of the paragraphs in subsection 108(1) is not reflected in the statute or the jurisprudence of this Court. The argument unduly restricts the RPD's discretion in a manner that was not contemplated by Parliament. The determination of loss of refugee status is made by the RPD on all of the facts and evidence in a particular case, and the timing of the events in question is only one aspect of the determination.

[38] In exercising its discretion and considering the grounds for cessation set out in subsection 108(1), the Applicant argues, and I agree, that the RPD must act reasonably and must support the exercise of its discretion with adequate reasons. Where more than one of the paragraphs of the subsection may apply, the RPD should assess the evidence and submissions of the parties in

respect of each of the paragraphs in question. In *Al-Obeidi*, Justice O'Reilly stated that the RPD should consider the various grounds of cessation if, in the particular case, "there is uncontradicted and undisputed evidence that the refugee's status has ceased under another ground" (*Al-Obeidi* at para 22).

[39] In the present case, the RPD addressed the interplay between paragraphs 108(1)(a) and 108(1)(e) as follows:

> [22] Pursuant to *Canada (Minister of Citizenship and Immigration) v. Al-Obeidi*, on a cessation application by the Minister the RPD can consider any ground set out in subsection 108(1). Given the presumption of re-availment that arises when a refugee applies for a passport from their country of nationality, and the strong presumption that arises when they do so in order to actually travel to their country of nationality, I find that the present matter is more appropriately decided under paragraph 108(1)(a) than 108(1)(e).

[40] The question then becomes whether the RPD's factual findings regarding the Applicant's reavailment and her renunciation of Falun Gong, and its conclusion that the Minister's application was more appropriately decided under paragraph 108(1)(a), were reasonable.

[41] The RPD's factual findings took into account the Applicant's submission regarding the timing of her renunciation of Falun Gong and her reavailment:

> [20] … Specifically, he [counsel to the Applicant] argues that a change of circumstances occurred when the [Applicant], as a precondition for obtaining the first PRC passport, agreed to no longer practice Falun Gong. I do not concur. Before agreeing to no longer practice the [Applicant] had already chosen to approach the Chinese authorities to obtain the passport and, accordingly, to re-avail herself of their protection. Further, she then chose to give up her religious practice in exchange for the passport and the Chinese authorities' protection.

[42] The Applicant makes two arguments contesting the RPD's finding. First, she argues that reavailment occurs when a refugee actually receives a passport and not at the time of making the application because it is only on receipt of the passport that protection of the country of origin is obtained. I do not agree. The argument attempts to limit the RPD's reavailment analysis to a single event and, as stated above, this argument is unduly restrictive. The RPD's analysis must take into account all of the facts and evidence before it, including the timeline of the events which, taken together, result in a finding of reavailment.

[43] The Applicant's submission that all of the elements of reavailment must be met in order for the RPD to ultimately determine that cessation of refugee status has occurred on the basis of paragraph 108(1)(a) of the IRPA is correct. The RPD's analysis cannot end with a finding that an applicant has applied for a passport. However, the Applicant's approach to the Chinese authorities and her application for a Chinese passport are reasonable starting points for the RPD's analysis of her intention to reavail. The RPD committed no error in identifying this starting point and proceeding to assess the Applicant's subsequent receipt of the passport and trips to China, notwithstanding her intervening promise to refrain from practising Falun Gong.

[44] The Applicant's second argument is that the RPD erred by failing to address her evidence that "in her heart" she had given up Falun Gong prior to approaching the Chinese consulate. This evidence was elicited by her counsel as follows:

> CLAIMANT: So the last time I decided not to practice Falun Gong. I must see my parents. My parent I must. I have to see my parents
>
> CLAIMANT'S COUNSEL: This is before the consulate official required you to sign a promise

> CLAIMANT: It was my decision in my heart.
>
> CLAIMANT'S COUNSEL: Before you requested to sign this promise or after you requested to sign this promise
>
> CLAIMANT: Before

[45] The RPD found that the Applicant decided to stop practicing Falun Gong after approaching the Chinese authorities to obtain a passport. The question posed to the Applicant was whether or not, before signing the promise at the Chinese consulate, she decided to stop practicing Falun Gong. In response to her counsel's question, she testified that she decided to stop practicing prior to signing the promise. She did not testify that she decided to stop practicing prior to going to the consulate. Her evidence does not contradict the RPD's finding and there was no need for the panel to address the exchange in the Decision.

[46] The evidence before the RPD was that the Applicant's renunciation of her practice of Falun Gong followed the request of an official when she attended at the Chinese consulate to renew her passport:

> MEMBER: Are you um – still practising um – Falun Gong
>
> CLAIMANT: No
>
> MEMBER: When did you stop
>
> CLAIMANT: When I applied for my first passport I stopped
>
> MEMBER: Um – why
>
> CLAIMANT: Because I signed a promise letter at the NPRC (ph) consulate
>
> […]
>
> MEMBER: But if um – how would the Chinese authorities even know that you were practising openly or in private in Canada. I can

> see them getting you to promise not to practise if you go back to China, but how would they even know that you were practising in Canada
>
> CLAIMANT: But I promised at the consulate that I would not practise Falun Gong anymore
>
> MEMBER: Is there any other reasons why you stopped your practise?
>
> CLAIMANT: No, that's the only reason
>
> […]

[47] The RPD's factual finding that the Applicant sought a Chinese passport prior to abandoning her practice of Falun Gong was reasonable, as was its consideration of the presumption of reavailment and its application to the Applicant's circumstances. I find that the RPD's exercise of its discretion to determine the Minister's application pursuant to paragraph 108(1)(a) was reasonable and intelligibly explained.

[48] Finally, the Applicant argues that, where an application for cessation is made and the evidence discloses that cessation occurred due to a change in country conditions, the RPD should only render a finding based on paragraph 108(1)(e) of the IRPA as, otherwise, Parliament's removal of the paragraph from the application of paragraph 46(1)(c.1) is rendered nugatory. I do not agree as, in the exercise of its discretion pursuant to subsections 108(1) and 108(2), the RPD is required to act reasonably. There will inevitably be cases before the tribunal in which the sequence of events and evidence demonstrate that the most reasonable application of paragraphs 108(1)(a) to (e) results in a finding of cessation due to a change in circumstances (paragraph 108(1)(e)).

2. Did the RPD unreasonably conclude that the Applicant reavailed herself of the protection of China under paragraph 108(1)(a) of the IRPA?

Parties' submissions

[49] The Applicant submits, in the alternative, that the RPD erred in its analysis of reavailment. She raises three arguments in this regard: (1) that the RPD gave no consideration to her subjective understanding of the effect that her return trips to China would have on her permanent resident status in light of the 2012 amendments to the IRPA (*Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 at paras 18-20 (*Cerna*)); (2) that the RPD erred in finding that her explanation for her applications for a Chinese passport and trips to China were not relevant to voluntariness; and (3) that the RPD erred in finding that she had reavailed herself of the protection of China when she was compelled by the Chinese state to abandon her religious practice in order to return, thereby succumbing to continued persecution.

[50] The Respondent relies on the presumption that a refugee has reavailed themself of the protection of their country of origin when the refugee visits that country using a passport issued by the country's government. The Respondent points out that this "protection" is specific and relates to the diplomatic and consular protection offered by the government issuing the passport.

[51] The Respondent argues that the Applicant's reliance on the decision in *Cerna* is misplaced as the applicant in that case testified as to his understanding that his permanent resident status was secure. In the present case, there was no evidence before the RPD to this effect. With respect to voluntariness, the Respondent states that the Applicant returned several

times to China for various personal reasons and that it was reasonable for the RPD to conclude that her actions were voluntary. Finally, the Respondent strongly contests the Applicant's submission that she was subject to continued persecution by virtue of the demand of the Chinese authorities that she promise to refrain from practising Falun Gong, stating that the argument is disingenuous.

Analysis

[52] The RPD relied on this Court's decision in *Abadi* in support of its statement that a refugee who applies for and obtains a passport will be presumed to intend to avail themself of the protection of their country of nationality absent evidence to the contrary (see also *Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 at para 17). Justice Fothergill's summary of this presumption in *Abadi* (at paras 16-17) provides context for the RPD's analysis of reavailment:

> [16] In my view, the RPD properly applied the test for re-availment and reasonably found that Mr. Shamsi had failed to rebut the presumption that he intended to re-avail himself of Iran's protection by acquiring an Iranian passport and travelling to that country. When a refugee applies for and obtains a passport from his country of nationality, it is presumed that he intended to re-avail himself of the diplomatic protection of that country (*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at para 121 [Refugee Handbook]; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 14). The presumption of re-availment is particularly strong where a refugee uses his national passport to travel to his country of nationality. It has even been suggested that this is conclusive (Guy Goodwinn-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., at page 136).
>
> [17] However, the prevailing view is that the presumption of re-availment may be rebutted with evidence to the contrary (Refugee Handbook at para 122). The onus is on the refugee to adduce sufficient evidence to rebut the presumption (*Canada (Minister of*

> *Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26 [*Nilam*], citing *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42).

[53] I find that the RPD reasonably concluded that the Applicant failed to rebut the presumption that she intended to reavail herself of the protection of China. The panel properly considered each of the three elements of the established test for reavailment and drew reasonable conclusions from the Applicant's actions in applying for two Chinese passports and repeatedly returning to China between 2005 and 2013 to visit her parents and other relatives, on two occasions because her father was ill and on one occasion because her grandmother was ill; to obtain assistance with fertility problems; and to assist her parents with a Canadian visitor visa application. The Applicant entered China openly, using her Chinese passport, and made no attempt to evade officials or to disguise her presence in the country.

Effect on permanent resident status

[54] The Applicant relies on the following reasoning in *Cerna* (at paras 18-20):

> [18] The Board failed to take account of Mr Cerna's testimony that he travelled to Peru only on the strength of his belief that he enjoyed the security of having permanent residence in Canada, and the corresponding protection that his status carried with it. Further, he had no idea that he put his status at risk by travelling back to Peru. As the law stood at the time of his travels, cessation of refugee status did not affect permanent residence (for a discussion of the current consequences of cessation of refugee status, see *Yuan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 923, at paras 6-11).
>
> [19] Many Canadian permanent residents will assume that their status would allow them to turn to Canada for protection even when travelling to their countries of origin. Permanent resident status "attracts much greater stability, longevity and associated rights' than that of a foreign national" (*Bermudez v Canada*

> *(Minister of Citizenship and Immigration)*, 2015 FC 639 at para 30 citing *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429). In these circumstances, the Board must take account of the refugees' subjective intentions before concluding that they have availed themselves of the protection of their countries of origin.
>
> [20] In my view, the Board should have considered whether the evidence relating to Mr Cerna's subjective understanding of the benefits of his permanent resident status rebutted the presumption that he had intended to obtain Peru's protection by acquiring a Peruvian passport. Without that analysis, the Board's conclusion on reavailment does not represent a defensible outcome based on the facts and the law.

[55] The Applicant's argument on this issue is not persuasive. The Federal Court of Appeal has recognized that the loss of permanent resident status is an intended consequence of a favourable cessation application (*Canada (Citizenship and Immigration) v Bermudez*, 2016 FCA 131 at para 42). The issue in *Cerna* was that the RPD failed to consider Mr. Cerna's evidence of his belief that his permanent residence remained secure. In the present case, there is no evidence in the record regarding the Applicant's subjective understanding of the benefits of her permanent resident status (see *Abechkhrishvili v Canada (Citizenship and Immigration)*, 2019 FC 313 at para 25).

Applicant's explanations for her trips to China

[56] The Applicant submits that the RPD erred in finding that her explanations for her return trips to China were not relevant to voluntariness and, further, that the panel applied an unduly narrow test in considering only whether she had been forced or pressured by a person or the Chinese government to return to China. She states that the RPD erred in ignoring the evidence that the reason for her first return to China was her father's ill health, arguing that being forced to

return to care for a family member impacted the voluntary nature of her return. This argument is a reflection of her position that reavailment occurs at a specific point in time and that the RPD cannot consider a series of events in assessing reavailment.

[57] The RPD did not ignore the evidence of the personal circumstances prompting the Applicant's trips to China. The panel stated that, while she had her own reasons for obtaining the passports and returning to China, the Applicant was not forced or pressured to do so by any person or by the Chinese government. The panel was aware of her reasons for returning. Its conclusion regarding the voluntary nature of her decisions must be understood in the context of its review of all of the evidence. The RPD's conclusion that she acted voluntarily and without duress was not unreasonable solely because the RPD detailed the Applicant's reasons more fully in the following section of the Decision. It is clear from the RPD's assessment of the evidence that the Applicant simply did not overcome the presumption of reavailment based on exceptional circumstances for her return trips to China.

Continued persecution

[58] The Applicant's third alternative argument is as follows:

> 75. If the Tribunal did not accept that the Applicant's circumstances changed prior to reavailment, it must have found that she received protection as a Falun Gong practitioner in China. However such a conclusion is not supported by the tribunal's findings of fact. The Tribunal found that there was no evidence that the persecution of Falun Gong practitioners in China had ceased, and that the Applicant had, as a condition of her return to China, been required to renounce her religious practice. The tribunal found that Ms. Lu was compelled by the Chinese state to abandon her religious practice in order to return. This is not the act of someone who is *seeking protection* from religious persecution.

> This is the act of someone *succumbing* to persecution to visit her sick family members and pursue her hopes of raising a family. It is submitted that being required to abandon one's religious practice as a condition to return to the country of one's nationality is an act of persecution, <u>whereas reavailment requires actual receipt of protection.</u>
>
> (Italics in original, underlining added)

[59] I find that the Applicant's argument that she was forced to succumb to persecution in order to visit her family in China and to seek fertility treatments does not reflect either the evidence in this case or the RPD's analysis in the Decision. Her first statement that the RPD "must have found that she received protection as a Falun Gong practitioner in China" mischaracterizes the RPD's reavailment finding, attempting again to limit the finding to the point in time when she applied for the first passport. The RPD's finding was based on the full sequence of events which included the Applicant's receipt of two passports and seven trips to China over a number of years. The RPD made no finding that she received protection as a Falun Gong practitioner in China.

[60] The Applicant's equation of persecution with being required to forego the practice of Falun Gong in order to receive a Chinese passport is not persuasive. She appears to conflate state protection related to the ground on which she made her refugee claim with diplomatic protection, which is the relevant protection for the purposes of reavailment. The Applicant actually received protection when she decided to travel to China and the United States while relying on the international diplomatic protection of her country of origin.

[61] The Applicant states that returning to China but swearing to renounce religious practices in order to do so is analogous to returning to China but going into hiding and continuing to fear persecution (citing *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 (*Yuan*)). The difficulty with the Applicant's reliance on the decision in *Yuan* is that the applicant in that case actively avoided detection when returning to China (*Yuan* at paras 35-36). In contrast, the Applicant testified that she took no precautions while travelling to China. Each time, she entered openly through Shanghai Airport using her Chinese passport. She gave no evidence that she was in hiding during her trips to China. As the RPD found, she "took no steps to mask her presence in the country from the Chinese authorities".

VII. Certified Questions

[62] The Applicant proposes the following certified questions:

1. Is the RPD required to make determinations in relation to cessation temporally? If the answer is positive, is the tribunal required to make clear findings of fact as to why and when the Applicant ceased to be a Convention Refugee?

2. In considering an application for cessation under section 108(1) of IRPA 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?

[63] In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 46 (*Lunyamila*), the Federal Court of Appeal summarized the criteria for certification of a question pursuant to subsection 74(d) of the IRPA:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 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, 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, 485 N.R. 186 at paras. 15, 35).

[64] I conclude that the questions posed for certification do not meet the criteria set out in *Lunyamila*.

[65] The first question does not raise an issue of broad significance or general importance and would not be dispositive of an appeal. Neither subsection 108(1) nor subsection 108(2) of the IRPA requires that the RPD determine a cessation application temporally and the jurisprudence of this Court establishes that the RPD may consider any of the paragraphs of subsection 108(1) upon receipt of a cessation application from the Minister. In addition, the RPD in the present case reasonably addressed the Applicant's temporal argument within the exercise of its subsection 108(1) discretion and provided reasons for its conclusion.

[66] The second question posed by the Applicant was also proposed for certification in *Tung*. I agree with Justice MacDonald's statement that the discretion of the RPD in determining a cessation application pursuant to subsections 108(1) and (2) of the IRPA is fully addressed in *Al-Obeidi*. Further, the RPD explained its exercise of discretion in the Decision.

VIII. Conclusion

[67] The application will be dismissed. The RPD considered the evidence before it and reasonably concluded that it was more appropriate to determine the Minister's cessation application on the basis of paragraph 108(1)(a), and not 108(1)(e), of the IRPA. The panel conducted a global assessment of the facts, including the temporal nature of the Applicant's actions in applying for her Chinese passports, promising to cease her practice of Falun Gong, receiving two Chinese passports and openly travelling to China for personal reasons using those passports. The RPD assessed the three elements of the test for reavailment against the Applicant's actions and provided reasons for its conclusions. As a result, the panel's conclusion that the Applicant voluntarily reavailed herself of the protection of her country of nationality was reasonable.

JUDGMENT in IMM-4552-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

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

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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