

Federal Court



Cour fédérale

**Date: 20220204**

**Docket: IMM-1047-20**

**Citation: 2022 FC 141**

**Ottawa, Ontario, February 4, 2022**

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

**BETWEEN:**

**DO MEE TUNG**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Do Mee Tung, seeks judicial review of a departure order issued by a delegate of the Minister of Public Safety and Emergency Preparedness [Minister] against her on February 6, 2020, pursuant to subsection 40.1(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. I have attached the relevant provisions of the Act and the Regulations in the Annex to this decision.

[2] Ms. Tung is a 66-year-old woman who came to Canada from China in 2001 and was granted refugee status in October 2002 based on her claim of persecution as a Falun Gong follower. She obtained permanent resident status in May 2004, yet her application for Canadian citizenship in March 2010 was never perfected.

[3] Since arriving in Canada, Ms. Tung obtained two Chinese passports (in June 2004 and May 2009) and travelled to China on 12 occasions up until 2014. Consequently, in April 2014, the Minister of Citizenship and Immigration applied to the Immigration and Refugee Board for cessation of her refugee status pursuant to subsection 108(2) of the Act on the grounds that Ms. Tung's refugee status had ceased because she had reavailed herself of the protection of her native China (paragraph 108(1)(a) of the Act). At the time, Ms. Tung was out of the country. She learned about the application in early June 2014. By then, the hearing had been set down for July 18, 2014. In August 2014, the Refugee Protection Division [RPD] agreed with the Minister of Citizenship and Immigration and nullified the 2002 grant of refugee status, however, the RPD decision was set aside on judicial review on procedural fairness grounds: the RPD unreasonably denied Ms. Tung an adjournment so as to allow her immigration consultant to properly prepare for the hearing (*Tung v Canada (Citizenship and Immigration)*, 2015 FC 1296).

[4] On redetermination, the RPD found that Ms. Tung's refugee status had ceased not only on account of her having voluntarily reavailed herself of the protection of China (paragraph 108(1)(a) of the Act), but also on account of her having given up the practice of Falun Gong (under paragraph 108(1)(e) of the Act), which meant that the reason for which Ms. Tung

sought refugee protection had ceased to exist [February 27, 2018 decision]; judicial review was dismissed (*Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 [*Tung 2018*]).

[5] On March 22, 2018, a section 44 report was prepared against Ms. Tung in which the officer determined Ms. Tung to be a foreign national who, in the opinion of the officer, was inadmissible pursuant to subsection 40.1(1) of the Act on final determination under subsection 108(2) of the Act – in this case the February 27, 2018 decision – that her refugee status has ceased. The determination that Ms. Tung was no longer a permanent resident – and was now a foreign national – was in accordance with paragraph 46(1)(c.1) of the Act, which provides that a person loses permanent resident status on final determination under subsection 108(2) of the Act that their refugee protection has ceased on account of, amongst other reasons, the person having reavailed themselves of the protection of their country of nationality (paragraph 108(1)(a) of the Act). Ms. Tung does not dispute that a section 44 report could have been issued, but argues that it should have been issued under subsection 40.1(2) of the Act, from which, unlike subsection 40.1(1), she would have had a right of appeal.

[6] Following the hearing that took place on December 11, 2018, the Minister's delegate [first delegate] confirmed that Ms. Tung had lost her permanent resident status and issued a deportation order against her; the removal order was set aside on judicial review on the grounds that the decision did not meet the hallmarks of justification, transparency and intelligibility in that the first delegate failed to address Ms. Tung's argument that it would not be lawful for the Minister to issue removal because she was at that time and continues to be a permanent resident of Canada and not a foreign national (*Tung v Canada (Public Safety and Emergency*

*Preparedness*), 2019 FC 917 [*Tung 2019*]). In short, Ms. Tung argued that paragraph 46(1)(c.1) of the Act, by which she was found to have lost her permanent resident status, did not apply to her because the conduct that led to the cessation of her refugee status under subsection 108(2) – reavilment pursuant to paragraph 108(1)(a) of the Act – took place in 2004, thus prior to the enactment of paragraph 46(1)(c.1) of the Act, which came into force on December 15, 2012. Consequently, the application of paragraph 46(1)(c.1) to her situation would, she argued, constitute a retrospective application of the provision and a new consequence to her act of reavilment and be contrary to the Supreme Court decision in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50; [2017] 2 SCR 289.

[7] On January 31, 2020, a second Minister’s delegate [Minister’s delegate] conducted a further interview with Ms. Tung, at which time Ms. Tung raised the same argument that she had made before the first delegate in respect of the prohibition against the retrospective application of paragraph 46(1)(c.1) of the Act and argued that although her refugee status had ceased upon the February 27, 2018 decision of the RPD, her permanent resident status had not. On February 6, 2020, the Minister’s delegate found, on a balance of probabilities, that Ms. Tung was a foreign national who was inadmissible on a final determination under subsection 108(2) of the Act that her refugee protection had ceased [decision of the Minister’s delegate]. It is this decision which is the subject matter of the present application for judicial review.

[8] The Minister’s delegate addresses Ms. Tung’s written submissions as follows:

In the written submission you stated that you were aware that a determination was made to cease Ms. Tung’s refugee status by the Refugee Protection Division (RPD) but that the decision does not affect Ms. Tung losing her permanent resident status as she lost her

refugee status through cessation prior to the coming into force of paragraph 46(1)(c.1) of the Immigration and Refugee Protection Act (IRPA) on December 15, 2012. You further stated that because Ms. Tung did not lose her permanent resident status, I did not have jurisdiction to hold the Minister's Delegate proceeding.

Ms. Tung's refugee status was ceased under both paragraphs 108(1)(a) and 108(1)(e) of the IRPA on February 27, 2018 by the RPD. Therefore, by operation of law, as per paragraph 46(1)(c.1) of the IRPA, Ms. Tung has lost her permanent resident status and is now a foreign national.

...

I note in your submissions that you reference the retrospective application of the statute under paragraph 46(1)(c.1) of the IRPA coming into force on December 15, 2012. However, in my view this is not a relevant consideration to the decision before me at this time. I will also note that this argument was made and addressed at the time of the cessation decision challenge in the Federal Court [a reference to *Tung 2018*]. Rather, at this time my decision is to determine whether or not the 44(1) report written by Officer S. MacDonald is well founded.

Upon reviewing the relevant sections of the IRPA, the law definitively states that under paragraph 46(1)(c.1), a person loses permanent resident status on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraph 108(1)(a) to (d). The final determination was rendered on February 27, 2018 by the RPD to cease Ms. Tung's refugee status through cessation under both paragraphs 108(1)(a) and 108(1)(e). As a result, I conclude that you are no longer a permanent resident as defined by the IRPA, and instead you are a foreign national.

Therefore, the 44(1) report stating that Ms. Tung is inadmissible under subsection 40.1(1) of the IRPA on a balance of probabilities is well founded and, in accordance to paragraph 228(1)(b.1) of the IRPR, I am issuing you a Departure Order.

[Emphasis added.]

[9] Ms. Tung raises two issues on judicial review:

- i. Are the reasons of the Minister's delegate deficient because they fail to address the issues raised by Ms. Tung in relation to the retrospective application of paragraph 46(1)(c.1) of the Act?
- ii. Did Ms. Tung lose her permanent resident status by the automatic operation of paragraph 46(1)(c.1) at the same time that the RPD determined pursuant to subsection 108(2) that her refugee status had ceased with the issuance of the February 27, 2018 decision?

[10] Ms. Tung argues that she did not lose her permanent resident status because paragraph 46(1)(c.1) should not be applied retrospectively to conduct that led to cessation that occurred before that provision came into force. She argues that in her case, the triggering event – the event of her reavilment that led to the cessation of her refugee status – took place with the application for her Chinese passport and trip to China in 2004, thus prior to the coming into force of paragraph 46(1)(c.1) of the Act. The words “has ceased” in paragraph 46(1)(c.1) and subsection 108(2) of the Act, she argues, make it clear that the RPD is simply *de jure* confirming that an event – in this case reavilment – has already taken place in the past. Consequently, as she did not lose her status as a permanent resident, Ms. Tung argues, the Minister's delegate did not have jurisdiction to issue a deportation order against her pursuant to subsection 40.1(1) of the Act as that provision of the Act addresses foreign nationals and not permanent residents. To hold differently, argues Ms. Tung, would be to render subsection 40.1(2) meaningless.

[11] The Minister does not agree that reavilment necessarily took place in 2004 but argues that the Minister's delegate reasonably found that Ms. Tung was a foreign national inadmissible under subsection 40.1(1) of the Act. The relevant triggering event in this case, argues the Minister, is not the event that led to the cessation of Ms. Tung's refugee protection under subsection 108(1), but rather the "final determination" itself that such refugee protection had ceased – being the February 27, 2018 decision – which thus was made after the coming into force of paragraph 46(1)(c.1) of the Act; the reasons which led to the "final determination", in this case the events of reavilment, are immaterial for the application of paragraph 46(1)(c.1) of the Act. According to the Minister, the wording of paragraph 46(1)(c.1) is clear and unambiguous and therefore no statutory interpretation of the provision is called for, thus Ms. Tung ceased to be a permanent resident when the RPD made a final determination on February 27, 2018, that her refugee protection ceased.

[12] The parties agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). This Court should intervene only if the decision under review does not bear "the hallmarks of reasonableness – justification, transparency and intelligibility" and if the decision is not justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The principles of statutory interpretation are among the legal considerations that could constrain the second delegate in her decision (*Vavilov* at para 106), and a decision that does not properly apply the principles of statutory interpretation could not be considered a reasonable decision.

[13] On the issue of the sufficiency of the decision of the Minister's delegate, I must admit that the reasons are not the apogee of clarity, however, read as a whole, I am satisfied that the Minister's delegate did address the issue raised by Ms. Tung in relation to the retrospective application of paragraph 46(1)(c.1) of the Act; the Minister's delegate is clearly alive to the arguments put forward by Ms. Tung but finds her submissions not to be relevant to the case at hand given the definitive wording of paragraph 46(1)(c.1), leading to the determination that Ms. Tung's status was nonetheless lost by operation of law. The Minister's delegate did not feel the need to go down the road of statutory interpretation, but brevity of the reasons does not render the decision unreasonable. As stated by Mr. Justice Brown in *Tung 2019*, "the assessment need not be excessive in length nor detail", however, in this case, I am satisfied that it was sufficient.

[14] I accept that the reference by the Minister's delegate to this Court's decision in *Tung 2018* is somewhat confusing as Madam Justice MacDonald did not definitively deal with the issue of the retrospective application of paragraph 46(1)(c.1) of the Act, however the Minister's delegate did not say that she did. The Minister's delegate simply commented that the issue of the retrospective application of paragraph 46(1)(c.1) was addressed by Madam Justice McDonald; in fact, it was addressed when Madam Justice McDonald stated: "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*". However, Madam Justice McDonald did not determine the issue as it was not relevant to her finding that the February 27, 2018 decision was reasonable. In any event, this is not a situation similar to that



before Mr. Justice Little in *Okojie v Canada (Citizenship and Immigration)*, 2020 FC 948, where the removal decision made no reference to the applicant's argument regarding the rule against the retrospective effect of paragraph 46(1)(c.1) of the Act. As was the case with Mr. Justice Brown in *Tung 2019*, Mr. Justice Little granted the application for judicial review of the removal decision because of the deficiency of the reasons, but declined to take up the applicant's request to provide an interpretation of the relevant provisions of the Act. In this case, I find that the reasons of the Minister's delegate bear, albeit just barely, the hallmarks of reasonableness – justification, transparency and intelligibility – and are justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 86).

[15] In any event, the issues as to when Ms. Tung lost here permanent resident status and the purpose of subsection 40.1(2) were recently addressed by this Court in *Cano Granda v Canada (Citizenship and Immigration)*, 2021 FC 1471 [*Cano Granda*], where Madam Justice McVeigh held that “an individual loses their permanent resident status when their refugee protection ceases” (*Cano Granda* at para 29), which in this case was the February 27, 2018 decision.

[16] With respect to the second issue, and although Ms. Tung agrees that the effect of paragraph 46(1)(c.1) is automatic, she argues that it is not automatic where the acts that led to the cessation of refugee status occurred prior to the coming into force of that paragraph. Ms. Tung says that three things happened in 2004: she gave up Falun Gong, she obtained her first Chinese passport and she undertook her first trip to China. Her argument before me is predicated on a determination that the event or events of her reavilment which led to the cessation of her

refugee status occurred prior to the coming into force of paragraph 46(1)(c.1) of the Act; this is where Ms. Tung's argument fails.

[17] I do not agree with Ms. Tung's reading of the February 27, 2018 decision that the RPD determined that the events leading to reavilment took place in 2004. In its February 27, 2018 decision, the RPD found the following:

- i. Ms. Tung applied for and obtained two Chinese passports, the first in June 2004 and the second in May 2009;
- ii. Between 2004 and 2010, Ms. Tung travelled to China six times;
- iii. In the years 2012, 2013 and 2014, Ms. Tung travelled to China twice each year for several months at a time;
- iv. It is unclear when Ms. Tung gave up Falun Gong, and thus it is not possible to know whether the change in circumstances preceded reavilment.

[18] Paragraph 46(1)(c.1) of the Act came into force on December 15, 2012. Putting aside the issue of a possible change in circumstances under paragraph 108(1)(e), which would not attract the application of paragraph 46(1)(c.1) in any event, what is clear is that Ms. Tung travelled to and remained in China for a significant period of time at least four times after the coming into force of that provision of the Act. The RPD did not say when reavilment took place or whether there had been a change of circumstances causing cessation of refugee protection under paragraph 108(1)(e) prior to reavilment. Rather, the RPD member determined simply that “[w]hen I consider [Ms. Tung's] actions of applying for and obtaining two Chinese passports, her use of these passports for travelling to China, the number and 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." As mentioned, judicial review of the RPD decision was dismissed.

[19] It may well be that the issuance of the passports alone may not have led to a finding of reavailment, nor any particular trip back to China, however, considering the number of trips to China taken by Ms. Tung in 2013 and 2014, their length, and the activities undertaken during those trips, I cannot say that the determination of the Minister's delegate that paragraph 46(1)(c.1) of the Act applied to her situation was unreasonable. Even if I were to accept Ms. Tung's argument and interpretation of the Act, this is not a case such as the one in *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 1287, where the "triggering event" leading to the cessation of her refugee protection under section 108 of the Act clearly took place prior to the coming into force of paragraph 46(1)(c.1) of the Act. Even if there existed, as suggested by Ms. Tung, an obligation upon the Minister's delegate to conduct a temporal assessment of the triggering events leading to the cessation of refugee status, here, there was sufficient evidence of such events having occurred after the coming into force of paragraph 46(1)(c.1) to justify the Minister's delegate finding that Ms. Tung's status was nonetheless lost by operation of law and determining that the subsection 44(1) report written by Officer S. MacDonald is well-founded.

[20] Under the circumstances, I find nothing unreasonable with the decision of the Minister's delegate and would dismiss the present application for judicial review.

[21] On a final note, Ms. Tung submitted the following question for certification:

Does section 46(1)(c.1) result in the loss of permanent residence status for refugees who have been determined by the RPD to have ceased to be Convention Refugees under sections 108(1)(a) to (d) if the conduct that led to the determination occurred before December 15, 2012, the date of the coming into force of section 46(1)(c.1)?

[22] Because the events which led to the cessation of Ms. Tung's refugee status did not all occur prior to the coming into force of paragraph 46(1)(c.1), I do not agree that the question would be dispositive of the issues of this case (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22). I therefore see no need to certify the question.

**JUDGMENT in IMM-1047-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. There are no questions for certification.

“Peter G. Pamel”

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Judge

**ANNEX**

*Immigration and Refugee Protection Act, SC 2001, c 27:*

**Cessation of refugee protection — foreign national**

40.1(1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.

**Cessation of refugee protection — permanent resident**

(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).

...

**Preparation of report**

44(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

**Referral or removal order**

(2) If the Minister is of the opinion that the report is

**Perte de l'asile — étranger**

40.1(1) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire.

**Perte de l'asile — résident permanent**

(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.

[...]

**Rapport d'interdiction de territoire**

44(1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

**Suivi**

(2) S'il estime le rapport bien fondé, le ministre peut déférer

well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

...

[...]

#### **Permanent resident**

#### **Résident permanent**

46(1) A person loses permanent resident status

46(1) Emportent perte du statut de résident permanent les faits suivants :

(a) when they become a Canadian citizen;

a) l'obtention de la citoyenneté canadienne;

(b) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;

b) la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence;

(c) when a removal order made against them comes into force;

c) la prise d'effet de la mesure de renvoi;

(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;

(d) on a final determination under section 109 to vacate a

d) l'annulation en dernier ressort de la décision ayant

<p>decision to allow their claim for refugee protection or a final determination to vacate a decision to allow their application for protection; or</p>	<p>accueilli la demande d'asile ou celle d'accorder la demande de protection;</p>
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<p>(e) on approval by an officer of their application to renounce their permanent resident status.</p>	<p>e) l'acceptation par un agent de la demande de renonciation au statut de résident permanent.</p>
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...

[...]

### **Rejection**

### **Rejet**

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

108(1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

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

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

(b) the person has voluntarily reacquired their nationality;

b) il recouvre volontairement sa nationalité;

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

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

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

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

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

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



**Cessation of refugee protection**

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

**Effect of decision**

(3) If the application is allowed, the claim of the person is deemed to be rejected.

**Perte de l'asile**

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

**Effet de la décision**

(3) Le constat est assimilé au rejet de la demande d'asile.

*Immigration and Refugee Protection Regulations, SOR/2002-227:***Subsection 44(2) of the Act — foreign nationals**

228(1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

...

(b.1) if the foreign national is inadmissible under subsection 40.1(1) of the Act

**Application du paragraphe 44(2) de la Loi : étrangers**

228(1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

[...]

b.1) en cas d'interdiction de territoire de l'étranger au titre du paragraphe 40.1(1) de la

on grounds of the cessation of  
refugee protection, a departure  
order;      Loi pour perte de l'asile,  
l'interdiction de séjour;

...

[...]

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1047-20

**STYLE OF CAUSE:** DO MEE TUNG v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** DECEMBER 15, 2021

**JUDGMENT AND REASONS:** PAMEL J.

**DATED:** FEBRUARY 4, 2022

**APPEARANCES:**

Lorne Waldman, C.M. FOR THE APPLICANT

Mahan Keramati FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lorne Waldman PC FOR THE APPLICANT  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario