



RPD File No. / N° de dossier de SPR : VB4-01144

Private Proceeding / Huis clos

**Reasons and Decision – Motifs et décision**  
**Application to Cease Refugee Protection – Demande de constat de perte d'asile**

<b>Applicant</b>	The Minister of Citizenship and Immigration Canada	<b>Demandeur(e)</b>
<b>Respondent(s)</b>	XXXX XXXX XXXX	<b>Personne(s) protégée(s)</b>
<b>Date(s) of Hearing</b>	June 13, 2018	<b>Date(s) de l'audience</b>
<b>Place of Hearing</b>	Vancouver, BC	<b>Lieu de l'audience</b>
<b>Date of Decision</b>	August 28, 2018	<b>Date de la décision</b>
<b>Panel</b>	Warren Puddicombe	<b>Tribunal</b>
<b>Counsel for the Protected Person</b>	Alexander Ning	<b>Conseil(s) de la (des) personnes protégée(s)</b>
<b>Designated Representative(s)</b>	N/A	<b>Représentant(e)(s) Désigné(e)(s)</b>
<b>Counsel for the Minister</b>	Azeem Lalji	<b>Conseil du ministre</b>

2018 CanLII 147454 (CA IRB)

## REASONS FOR DECISION

### INTRODUCTION

[1] This is the decision of the Refugee Protection Division (“the RPD”) with respect to the application of the Minister of Immigration, Refugees and Citizenship (“the Minister”) pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act* (the “Act”)<sup>1</sup> to determine that the refugee protection conferred on the Respondent, XXXX XXXX XXXX, has ceased.

### DETERMINATION

[2] The Minister’s application for cessation of the respondent’s status as a Convention refugee is allowed and her claim is deemed to be rejected in accordance with section 108(3) of the *Act*.

### ANALYSIS

#### Background

[3] The Respondent, XXXX XXXX XXXX, is a citizen of the People’s Republic of China (“PRC”). She arrived in Canada in 2001.<sup>2</sup> In his application, the Minister states that the Respondent was found to be a Convention refugee by the RPD on July 22, 2002.<sup>3</sup> While neither the RPD’s Notice of Decision nor the reasons for the RPD’s decision were in evidence, at the hearing of the Minister’s application the Respondent confirmed that she became a Convention refugee in July 2002.

[4] The Respondent also confirmed at the hearing that the basis for her refugee protection claim was her practice of Falun Gong, and a sexual assault by a XXXX XXXX. In an interview

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<sup>1</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

<sup>2</sup> Exhibit 1.

<sup>3</sup> Exhibit 1.

with Canada Border Services Agency (“CBSA”) Hearings Advisor XXXX XXXX on March 5, 2014, the Respondent explained that after she was arrested in 2000 in a park in Guangzhou along with other Falun Gong practitioners she was taken to a police station and questioned, and that she was touched in a sexual way by XXXX XXXX. After her release the same XXXX summoned her repeatedly back to the station and questioned and touched her again.<sup>4</sup>

[5] According to the Minister, the Respondent obtained permanent resident status in Canada on XXXX XXXX, 2004.<sup>5</sup> At the hearing of the Minister’s application, the Respondent confirmed that she became a permanent resident of Canada in XXXX 2004.

[6] The Respondent applied for and obtained PRC passports on XXXX XXXX, 2004 and XXXX XXXX, 2009. Between 2005 and 2013 the Respondent travelled to the PRC seven times. She remained for about a month each time she went.<sup>6</sup>

[7] On April 9, 2014 the RPD received an application from the Minister pursuant to subsection 108(2) of the *Act* for a determination that the Respondent’s refugee protection has ceased for the reasons described in subsection 108(1)(a) of the *Act*.<sup>7</sup> The hearing of the Minister’s application took place on June 13, 2018. At the conclusion of the hearing I asked both parties to provide written submissions regarding the Minister’s application. Submissions from the Minister were received June 27, 2018, those from the Respondent on July 4, 2018, and a reply from the Minister on July 18, 2018.

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<sup>4</sup> Exhibit 1.

<sup>5</sup> Exhibit 1.

<sup>6</sup> At page 157 of Exhibit 4 is a list of the Respondent’s returns to the PRC, which includes dates, places traveled to, as well as the reasons for the Respondent’s returns. At the outset of the hearing of the Minister’s application on June 13, 2018 both parties conceded to the facts as they appear on that page.

<sup>7</sup> Exhibit 1.

**Subsection 108(1)**

[8] Subsection 108(1) of the *Act* reads as follows:

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 themselves of the protection of their country of nationality;
- (b) the person has voluntarily reacquired their nationality;
- (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
- (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
- (e) the reasons for which the person sought refugee protection have ceased to exist.

**Paragraph 108(1)(a)**

[9] As noted above, paragraph 108(1)(a) of the *Act* provides that a claim for refugee protection shall be rejected and a person is not a Convention refugee or a person in need of protection when that person has voluntarily re-availed themselves of the protection of their country of nationality. The Minister has the burden of proving re-availment on a balance of probabilities.<sup>8</sup>

[10] The UNHCR Handbook and subsequent jurisprudence indicate that there are three requirements for re-availment under the Convention: voluntariness: the refugee must act voluntarily; intention: the refugee must intend by her actions to re-avail herself of the protection

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<sup>8</sup> *Li v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 459.

of the country of her nationality; and re-availment: the refugee must actually obtain such protection.<sup>9</sup>

### **Voluntariness**

[11] Since she obtained refugee protection, the Respondent has been issued two passports by the PRC authorities in Vancouver, the first on XXXX XXXX, 2004, and the second XXXX XXXX, 2009.<sup>10</sup> The Respondent has also, since obtaining refugee protection, returned to the PRC on seven different occasions, as follows: from XXXX XXXX, 2005 to XXXX XXXX, 2005; XXXX XXXX, 2006 to XXXX XXXX, 2006; XXXX XXXX, 2009 to XXXX XXXX, 2009; XXXX XXXX, 2010 to XXXX XXXX, 2010; XXXX XXXX, 2011 to XXXX XXXX, 2011; XXXX XXXX, 2012 to XXXX XXXX, 2012; and XXXX XXXX, 2013 to XXXX XXXX, 2013.<sup>11</sup>

[12] The Minister argues that the Respondent obtained her passports and returned to the PRC voluntarily. I agree. There is no evidence that she was under duress or constrained by circumstances beyond her control. The Respondent may have had her own reasons for obtaining the passports and returning to the PRC, but no person or government forced or pressured her to do so. She acted of her own free will.<sup>12</sup> I therefore find that the Respondent obtained the PRC passports and returned to the PRC voluntarily.

### **Intention**

[13] If a refugee applies for and obtains a passport or a renewal of one, it will, in absence of proof to the contrary, be presumed that the refugee intends to avail herself of the protection of

<sup>9</sup> Exhibit 1, United Nations High Commissioner for Refugees (UNHCR), *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 Reissued Geneva*, DECEMBER 2011, Chapter III, Cessation Clauses at paragraph 119; *Nsende v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 531; *Canada (Minister of Public Safety and Emergency Preparedness) v. Bashir*, 2015 FC 51.

<sup>10</sup> Exhibit 1.

<sup>11</sup> Exhibits 1 and 4.

<sup>12</sup> Exhibit 1, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES GENEVA *The Cessation Clauses: Guidelines on their Application* UNHCR, Geneva, April 1999 at paragraph 9.

the country of her nationality.<sup>13</sup> The presumption becomes particularly strong where a refugee uses her national passport to return to her country of nationality.<sup>14</sup> The burden is on the Respondent to rebut that presumption.<sup>15</sup>

[14] The reason given by the Respondent at the hearing of the Minister's application for obtaining the first PRC passport was that her father was ill and she wanted to return to see him. The reasons that she gave for obtaining the second passport was that the first passport was going to expire, and the passport was the only identity document that she had.

[15] With respect to her returns to the PRC, the Respondent states that the reasons for her various returns were to visit her parents and other relatives, on two occasions because her father was hospitalized; to visit her grandmother who was seriously ill and who passed away shortly afterwards; to obtain assistance with her fertility problems; and to assist her parents with a Canadian visitor visa application. Each of the seven returns was for about a month. When the claimant returned she went to XXXX XXXX in Zhe Jiang Province, XXXX XXXX in Si Chuan Province, and XXXX XXXX in Guang Dong Province. In her interview with the CBSA Hearings Advisor on March 5, 2014 the Respondent stated that each time she returned to the PRC she entered through the XXXX airport.<sup>16</sup>

[16] The Respondent stated in testimony at the hearing of the Minister's application that when she applied for the first PRC passport she told the officials at the Chinese Consulate in Vancouver that she was a Falun Gong practitioner and that she had made a refugee claim which had been accepted. The officials there stated that she had to sign a document promising to no

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<sup>13</sup> Exhibit 1, United Nations High Commissioner for Refugees (UNHCR), *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* Reissued Geneva, DECEMBER 2011, at paragraph 121; *Nsende v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 531; *Canada (Minister of Public Safety and Emergency Preparedness) v. Bashir*, 2015 FC 51.

<sup>14</sup> Exhibit 1, United Nations High Commissioner for Refugees (UNHCR), *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* Reissued Geneva, DECEMBER 2011, at paragraph 122; *Abadi v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 29.

<sup>15</sup> *Nsende v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 531.

<sup>16</sup> Exhibit 1.

longer practice Falun Gong before they would issue her the passport. The Respondent signed the document and was issued the passport.

[17] While she did state in testimony during the hearing that she did not return to Guangzhou, where the XXXX who had sexually assaulted her worked before she had fled the PRC to seek protection in Canada, the Respondent gave no indication that she was in hiding when she returned to the PRC. She entered and exited with valid passports issued in her own identity. There is no indication that she made any efforts to enter or exit the country surreptitiously. While in the PRC the Respondent visited her parents and other relatives, attended hospitals to assist her father and saw fertility specialists. She took no steps to mask her presence in the country from the Chinese authorities. In fact, when she went to the Chinese Consulate in Vancouver to obtain the first PRC passport she alerted them not only to the fact she intended to return but also that she was a Falun Gong practitioner, and subsequently obtained the authorities' permission to return.

[18] The Respondent 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 traveled to the PRC repeatedly using the PRC passports that she was issued. Chinese officials were aware not only of the Respondent's travels, but also of her former practice of Falun Gong. The Respondent's actions demonstrate that she was implicitly expressing confidence in the PRC authorities to protect her although she had been granted refugee status on the basis of her fear of the Chinese authorities. I find that the Respondent has failed to rebut the presumption that she intended to re-avail herself of the protection of the PRC.

### **Re-availment**

[19] As discussed above, since she was found to be a Convention refugee the Respondent acquired a PRC passport twice and made seven returns to the PRC using the two PRC passports that she had obtained. The Respondent also used one of her PRC passports to travel to the United

States a number of times as well.<sup>17</sup> I find that the Minister has established that the Respondent has re-availed herself of the protection of the PRC, her country of nationality.

### **Paragraph 108(1)(e)**

[20] Counsel for the Respondent has argued that I should restrict myself to a determination under 108(1)(e) only, given that temporally the reasons for which the Respondent sought protection ceased to exist before any possible re-availment occurred. Specifically, he argues that a change of circumstances occurred when the Respondent, 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 Respondent 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.

[21] Counsel for the Respondent also seems to be arguing that a change of circumstances has arisen because Falun Gong practitioners are no longer persecuted. This contention is, based on the country evidence, without merit.<sup>18</sup>

[22] Pursuant to *Canada (Minister of Citizenship and Immigration) v. Al-Obeidi*,<sup>19</sup> 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).

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<sup>17</sup> Exhibit 1.

<sup>18</sup> Exhibit 3, National Documentation Package, (NDP) for China, April 30, 2018, items 1.17, 2.1, 12.1 and 12.27, Response to Information Request (RIR) CHN104580.E.

<sup>19</sup> *Canada (Minister of Citizenship and Immigration) v. Al-Obeidi*, 2015 FC 1041.



## CONCLUSION

[23] I find that paragraph 108(1)(a) of the *Act* applies to the present case, and that the Respondent has voluntarily re-vailed herself of the protection of her country of nationality. Accordingly, the Minister's application for cessation of the Respondent's status as a Convention refugee, pursuant to section 108(2) of the *Act*, is allowed and her claim is deemed to be rejected

(signed) “Warren Puddicombe”

**Warren Puddicombe**

August 28, 2018

**Date**