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2023 FC 871

Mohsin Abbas (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: ABBAS V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Walker J.—Toronto, January 11; Ottawa, June 21, 2023.

Citizenship and Immigration — Status in Canada — Convention Refugees and Persons in Need of Protection — Cessation of refugee protection — Application for judicial review of Immigration and Refugee Board, Refugee Protection Division (RPD) decision granting respondent's application to cease applicant's refugee protection, deem applicant's claim rejected pursuant to Immigration and Refugee Protection Act (IRPA), ss. 108(2),(3) — Applicant, journalist, citizen of Pakistan, authored articles critical of government during regime of President Pervez Musharraf — Fled Pakistan in 2002, made refugee claim in Canada — Granted refugee status in 2008, became permanent resident in 2009 — Musharraf regime ended in August 2008 — Applicant obtained Pakistani passport in December 2008 —Travelled to Pakistan numerous times between 2009–2021 — Before RPD, respondent argued that RPD should apply only IRPA, s. 108(1)(a) in determining cessation application as applicant's repeated return trips to Pakistan established reavailment — Applicant argued that RPD should make decision solely on basis of IRPA, s. 108(1)(e) in light of adverse collateral consequences of s. 108(1)(a) finding — RPD deemed it could consider either or both ss. 108(1)(a),(e), concluded that it would assess both — Granted respondent's application, determining that (a) applicant had voluntarily reavailed himself of protection of his country of origin (s. 108(1)(a)); (b) reasons for which applicant had sought refugee protection had ceased (s. 108(1)(e)) — Applicant submitted that RPD unreasonably conflated "intention", second element of test for reavailment within meaning of s. 108(1)(a), with that of "voluntariness" in direct contradiction of Federal Court of Appeal guidance in Canada (Citizenship and Immigration) v. Galindo Camayo (Camayo) — Whether RPD's failure to explain why it exercised its discretion to consider both IRPA, ss. 108(1)(a),(e) reasonable; whether RPD's analysis of reavailment consistent with Federal Court of Appeal guidance in Camayo — RPD committed significant error by failing to justify its discretionary decision to impose collateral adverse consequences on applicant by virtue of its application of s. 108(1)(a) as additional ground of cessation — Serious shortcomings in RPD's decision "such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" — Loss of refugee protection under IRPA, s. 108(2) having serious potential consequences for person affected — Cessation decision also resulting in loss of permanent resident status, inadmissibility for permanent resident whose refugee protection has ceased under any of IRPA, s. 108(1)(a) through (d) — These collateral consequences not following for person whose refugee protection found to have ceased under s. 108(1)(e) — Premise that absence of express legislative provision requiring

reasons exonerating administrative decision maker from its obligation to explain its analysis, conclusions are without merit, not consistent with fundamental administrative law principle that decision maker must justify its decision — Clear that IRPA allowing RPD discretion to consider any one or more of grounds of cessation set out in s. 108(1) — Equally clear that Parliament has determined that loss of permanent resident status, inadmissibility to Canada following only for persons whose protection ceases by virtue of s. 108(1)(a) through (d) — Parliament has recognized through its structuring of IRPA that person who loses refugee protection under s. 108(1)(e) for reasons beyond their control, without any action on their part should not lose their permanent resident status, become inadmissible — Stakes for affected person very high in cessation applications — RPD required to demonstrate that it has factored those stakes into decision, explain why decision best reflects legislature's intention — RPD referred to collateral consequences resulting from finding of cessation pursuant to any of ss. 108(1)(a) through (d) — However, its decision did not explain why, factoring in those consequences, it exercised its discretion to assess respondent's application under s. 108(1)(a) when parties, panel accepted that refugee protection should cease under s. 108(1)(e) — RPD committed reviewable error in failing to consider sequence of events that led to applicant's return trips to Pakistan, explain basis on which it nevertheless applied s. 108(1)(a), attendant serious consequences — Conflated voluntariness, intention in its assessment of reavailment; ignored chronology of events that resulted in applicant first returning to Pakistan — Federal Court of Appeal in Camayo emphasized that question of intention to reavail "has nothing to do with whether the motive for travel was necessary or justified" — RPD could not merely extrapolate from its findings that person obtained passport of their country of nationality, returned to that country voluntarily to also conclude that person intended to reavail themselves of country's protection — Fact that applicant returned to Pakistan voluntarily not excusing RPD from considering his subjective intention when returning, his submissions in rebuttal of presumption — RPD's failure to engage with applicant's submissions reviewable error — Whether or not applicant's arguments regarding reavailment ultimately accepted, RPD required to consider applicant's insistence that he had not actually reavailed himself of protection of government of Pakistan — RPD's statement that it had considered whether applicant had taken steps to evade his agents of persecution indicating lack of critical analysis when clear that risk of persecution by Musharraf regime no longer existed — RPD's decision set aside in part, matter referred back to differently constituted panel to reconsider only part of respondent's cessation application made pursuant to IRPA, s. 108(1)(a) — Application allowed in part.

STATUTES AND REGULATIONS CITED

IMMIGRATION AND REFUGEE PROTECTION ACT, S.C. 2001, C. 27, SS. 25(1.2)(C)(I), 40.1(2), 46(1)(C.1), 48(2), 63(3), 74(D), 108, 110(2)(E), 112(2)(B.1).

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674; *Canada (Public Safety and Emergency Preparedness) v. XY*, 2022 FCA 113, 89 Imm. L.R. (4th) 173.

CONSIDERED:

Ravandi v. Canada (Citizenship and Immigration), 2020 FC 761, [2021] 3 F.C.R. 177; *Canada (Citizenship and Immigration) v. Galindo Camayo*, 2022 FCA 50, [2022] 4 F.C.R. 220; *Canada (Citizenship and Immigration) v. Al-Obeidi*, 2015 FC 1041; *Tung v. Canada (Citizenship and*

Immigration), 2018 FC 1224; *Lu v. Canada (Citizenship and Immigration)*, 2019 FC 1060; *Chokheli v. Canada (Citizenship and Immigration)*, 2020 FC 800, 76 Imm. L.R. (4th) 291.

REFERRED TO:

Camayo v. Canada (Citizenship and Immigration), 2020 FC 213, [2020] 2 F.C.R. 575, affd 2022 FCA 50, [2022] 4 F.C.R. 220; *Singh v. Canada (Citizenship and Immigration)*, 2022 FC 1481; *Thapachetri v. Canada (Citizenship and Immigration)*, 2020 FC 600; *Chowdhury v. Canada (Citizenship and Immigration)*, 2021 FC 312; *Okojie v. Canada (Citizenship and Immigration)*, 2019 FC 1287; *Dubrézil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 142.

AUTHORS CITED

United Nations. Office of the United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.4 (Geneva, reissued February 2019).

APPLICATION for judicial review of a decision by the Immigration and Refugee Board's Refugee Protection Division granting the respondent's application to cease the applicant's refugee protection and deem his claim rejected pursuant to subsections 108(2) and (3) of the *Immigration and Refugee Protection Act*. Application allowed in part.

APPEARANCES

Lorne Waldman and *Steven Blakey* for applicant.

David Cranton for respondent.

SOLICITORS OF RECORD

Waldman & Associates, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

[1] WALKER J.: The Applicant, Mr. Abbas, is a journalist and citizen of Pakistan who authored articles critical of the government during the regime of President Pervez Musharraf. In 2002, he fled Pakistan and made a refugee claim in Canada. The Applicant was granted refugee status in 2008 and, in 2009, became a permanent resident.

[2] The Musharraf military regime came to power in Pakistan in 1999 and suspended the constitution. Musharraf assumed the presidency in 2001 and reinstated an amended constitution the following year. One provision of the amended constitution extended his term as President for five (5) years.

[3] In 2007, the Musharraf regime declared a state of emergency to address growing unrest and again suspended the country's constitution. The regime also declared martial law and imposed stringent censorship restrictions on the media.

[4] President Musharraf resigned as head of the Pakistani army in November 2007 and lifted the state of emergency the following month.

[5] On August 18, 2008, Musharraf resigned the presidency and his regime ended.

[6] The Applicant obtained a Pakistani passport in December 2008 and renewed the passport on several occasions between 2009 and 2017. In addition, the Applicant travelled to Pakistan a number of times between 2009 and 2021, largely in furtherance of his work as a journalist.

[7] On May 8, 2018, the Minister applied to the RPD [Refugee Protection Division] to cease the Applicant's refugee protection and deem his claim rejected pursuant to subsections 108(2) and (3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[8] The RPD granted the Minister's application in a decision dated September 23, 2021. The RPD determined that (a) the Applicant had voluntarily reavailed himself of the protection of his country of origin (paragraph 108(1)(a), IRPA); and (b) the reasons for which the Applicant had sought refugee protection in Canada had ceased (paragraph 108(1)(e), IRPA).

[9] The Applicant now seeks the Court's review of the RPD's decision.

[10] For the reasons that follow, the application will be allowed in part. The RPD erred in refusing to explain its decision to consider paragraph 108(1)(a) of the IRPA in light of the accepted fact that the Applicant took no action to obtain a Pakistani passport or to travel to Pakistan until the Musharraf regime had fallen and the reasons for which he had received protection in Canada had ceased (paragraph 108(1)(e)). The RPD also unreasonably conflated voluntariness and intention in its analysis of the Applicant's subjective intention to reavail himself of the protection of Pakistan.

I. Decision under review

[11] The RPD first addressed what it termed the primary disagreement between the Applicant and the Minister: whether the panel should assess and apply only paragraph 108(1)(a) or paragraph 108(1)(e) of the IRPA in determining the Minister's cessation application.

> **Rejection**
>
> **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.

[12] The Minister argued that the RPD should apply only paragraph 108(1)(a) as the Applicant's repeated return trips to Pakistan established reavailment. The Applicant disagreed, stating that the panel has discretion to consider all applicable grounds of

cessation. Further, he argued that the panel may and should, on the facts of his case, make a decision solely on the basis of paragraph 108(1)(e) in light of the adverse collateral consequences to him of a paragraph 108(1)(a) finding.

[13] The RPD considered this Court's decision in *Ravandi v. Canada (Citizenship and Immigration)*, 2020 FC 761, [2021] 3 F.C.R. 177 (*Ravandi*) and its statement [at paragraph 7] that:

> … [W]here the RPD has a choice to make between different grounds on which to cease refugee protection and opts for a ground that carries deleterious collateral consequences for the individual instead of a ground that does not entail those consequences, the reasons provided for doing so must reflect what is at stake for the individual—namely, not only the loss of refugee protection but also those deleterious collateral consequences.

[14] The RPD set out certain of the additional adverse consequences of a paragraph 108(1)(a) finding (including loss of permanent resident status) but noted that the provisions of the IRPA and the relevant jurisprudence authorize the RPD to consider any of the grounds set out in subsection 108(1). In the panel's view, it could consider either or both paragraphs 108(1)(a) and/or (e) of the IRPA and concluded that it would assess both.

[15] The RPD's decision focuses on the question of whether the Applicant voluntarily reavailed himself of the protection of Pakistan within the meaning of paragraph 108(1)(a) by virtue of his application for and use of Pakistani passports to return to the country from 2009 onwards. In concluding that the Applicant had done so, the panel was guided by the UNHCR [United Nations High Commissioner for Refugees] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* and the concepts of voluntariness, intention and reavailment:

Voluntariness – obtaining the Pakistani passports: The Applicant obtained a Pakistani passport in 2008 in order to satisfy an entrance requirement for an academic fellowship program at the University of Manila in the Philippines. He renewed the passport in 2011, 2013 and 2017. The RPD found that there was no credible evidence that the Applicant was coerced into obtaining the passports and concluded that he acted voluntarily in obtaining his four Pakistani passports.

Voluntariness – return travel to Pakistan (2009–2021): The Applicant travelled to Pakistan on seven occasions between 2009 and 2021 to pursue his work as a journalist and, on one of those occasions, to attend a memorial service for his uncle. The RPD considered the number and duration of trips and the absence of any evidence that he was forced or pressured to return to Pakistan. The panel concluded that the Applicant voluntarily returned to pursue his investigative journalism.

Intention: The Minister has the burden of proving reavailment on a balance of probabilities. Where the Minister proves that a refugee claimant has obtained or renewed a passport of their country of origin, there is a presumption that the claimant intends to avail themself of the protection of that country absent proof to the contrary. The claimant then bears the burden of demonstrating they did not intend to reavail themselves of the country's protection. Here, the Applicant failed to rebut the presumption because his reasons for obtaining the Pakistani passports and using the passports to travel did not allow for a determination that he acted involuntarily. As a

result, the RPD concluded that the Minister had demonstrated the Applicant intended to reavail himself of the protection of Pakistan.

Actual reavailment: The RPD reviewed the Applicant's return visits to Pakistan, any efforts made to hide from his agents of persecution during the periods of actual reavailment, and his use of Pakistani passports to travel to countries other than Pakistan. The RPD concluded that the Applicant had failed to rebut the presumption of actual reavailment.

[16] The Applicant conceded at the outset of the RPD hearing that there had been a change in conditions in Pakistan with the fall of the Musharraf regime in 2008 and that his refugee protection should cease on the basis of paragraph 108(1)(e) of the IRPA. The RPD agreed and this aspect of the decision is not in issue.

[17] In summary, the RPD concluded that the Applicant had voluntarily and intentionally reavailed himself of the protection of Pakistan and that the reasons for which he sought protection in Canada had ceased to exist. Accordingly, the RPD allowed the Minister's application for cessation of the Applicant's status as a Convention refugee pursuant to paragraphs 108(1)(a) and (e) of the IRPA and deemed his claim for protection rejected.

II. Issues and Standard of Review

[18] There are two determinative questions in this application:

1. Was the RPD's failure to explain why it exercised its discretion to consider both paragraphs 108(1)(a) and (e) of the IRPA reasonable?

2. Was the RPD's analysis of reavailment consistent with the guidance of the Federal Court of Appeal (F.C.A.) in *Canada (Citizenship and Immigration) v. Galindo Camayo*, 2022 FCA 50, [2022] 4 F.C.R. 220 (*Camayo FCA*)?

[19] The Applicant also submits that the RPD committed a reviewable error in failing to consider the timeline of critical events in his case: the fall of the Musharraf regime in 2008 and the Applicant's subsequent decision to obtain a Pakistani passport and to repeatedly return to the country using that passport. I have addressed this submission in my analysis of the RPD's decision to consider paragraphs 108(1)(a) and 108(1)(e) and as an ancillary aspect of my analysis of the RPD's conclusions regarding reavailment and intention to reavail.

[20] The RPD's cessation decision is subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), at paragraphs 10 and 23; *Camayo v. Canada (Citizenship and Immigration)*, 2020 FC 213, [2020] 2 F.C.R. 575, at paragraphs 17–18; affd *Camayo FCA*, at paragraphs 39–43).

[21] The Supreme Court in *Vavilov* held that, to be reasonable, a decision must be based on "internally coherent reasoning" and "must be justified in relation to the constellation of law and facts that are relevant to the decision" (citations omitted) (*Vavilov*, at paragraph 105). Further, "the legal and factual contexts of a decision

operate as constraints on the decision maker in the exercise of its delegated powers" (*Vavilov*, at paragraph 105).

[22] One of the legal or factual considerations that may constrain an administrative decision maker is the impact of the decision on an individual. As the Supreme Court explained: "[t]he principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention" (*Vavilov*, at paragraph 133). The legislature's intention and the legal consequences at stake are critical considerations in cessation applications where, not only may the individual lose refugee protection, they may also lose permanent resident status and become inadmissible to Canada.

III. Analysis

1. *Was the RPD's failure to explain why it exercised its discretion to consider both paragraphs 108(1)(a) and (e) of the IRPA reasonable?*

[23] The Applicant submits that the RPD departed from this Court's jurisprudence and, more generally, the obligation of an administrative decision maker to explain its reasoning and conclusions, without justification. He emphasizes that his is a case in which it is clear, and was clear to the RPD, that reasons for his refugee protection ceased in August 2008 by virtue of the fall of the Musharraf regime. The Applicant acknowledges that the RPD has discretion to consider multiple grounds of cessation. However, he argues that the panel erred in declining to explain its decision to apply paragraph 108(1)(a) of the IRPA, despite its acknowledgment of the implications of its decision to do so.

[24] I agree with the Applicant. I find that the RPD committed a significant error by failing to justify its discretionary decision to impose a series of collateral adverse consequences on the Applicant by virtue of its application of paragraph 108(1)(a) as an additional ground of cessation. This error in itself justifies the Court's intervention.

[25] The loss of refugee protection under subsection 108(2) of the IRPA has serious potential consequences for the person affected. If that person is a permanent resident and the RPD determines that their refugee protection has ceased under any of paragraphs 108(1)(a) through (d), its cessation decision also results in the loss of permanent resident status and inadmissibility (subsection 40.1(2) and paragraph 46(1)(c.1), IRPA). The cessation decision cannot be appealed to either the Refugee Appeal Division or the Immigration Appeal Division (paragraph 110(2)(e) and subsection 63(3), IRPA). In addition, the person is subject to removal from Canada as soon as possible (subsection 48(2), IRPA) and is barred from seeking a Pre-removal Risk Assessment or making an application for permanent residence on humanitarian and compassionate grounds for at least one year (paragraph 112(2)(b.1) and subparagraph 25(1.2)(c)(i), IRPA).

[26] In contrast, the loss of permanent resident status and inadmissibility (and additional statutory consequences) do not follow for persons whose refugee protection is found to have ceased under paragraph 108(1)(e). Therefore, the RPD's decision of which or how many grounds of cessation to consider—those set out in paragraphs

108(1)(a) through (d) or, instead, the ground set out in paragraph 108(1)(e)—determines whether the person will or will not suffer collateral adverse consequences.

[27] As noted, the RPD acknowledged Justice Norris's direction that an RPD panel must "demonstrate that it has considered the consequences of [its cessation] decision and that those consequences are justified in light of the facts and law" (*Ravandi*, at paragraph 33). The RPD stated that it had closely considered the legislative regime in the IRPA concerning the concurrent loss of refugee protection and permanent resident status that may result from a cessation application. The panel also stated that it had considered the limited recourse available to a person affected by a cessation decision.

[28] Citing this Court's jurisprudence, the RPD found that it has discretion to assess and apply one or more grounds of cessation in each case, including cases in which the person affected concedes that their refugee status has ceased by virtue of a change in country conditions (*Canada (Citizenship and Immigration) v. Al-Obeidi*, 2015 FC 1041 (*Al-Obeidi*); *Tung v. Canada (Citizenship and Immigration)*, 2018 FC 1224 (*Tung*)). The RPD continued [at paragraph 24]:

> While the Federal Court jurisprudence in *Ravandi* directs the panel to explain why it has chosen one ground of cessation instead of another, the legislative regime governing cessation proceedings does not require the panel to explain its choice. If Parliament had intended for the panel to give greater weight or importance to one ground over another, it would have provided for this in IRPA. The IRPA also does not require the panel to provide reasons why it [has] chosen one ground or several grounds.

[29] The premise that the absence of an express legislative provision requiring reasons exonerates an administrative decision maker from its obligation to explain its analysis and conclusions is without merit. The RPD's statement [at paragraph 24] that it is not required to explain the exercise of its discretion because "the legislative regime governing cessation proceedings does not require the panel to explain its choice" is not consistent with the fundamental administrative law principle that a decision maker must justify its decision. Whether or not Justice Norris's guidance in *Ravandi* is *obiter dicta*, as the Respondent argues, the guidance reflects and distils the jurisprudence of the Supreme Court, the FCA and this Court in the specific context of section 108 of the IRPA.

[30] It is clear that the IRPA allows the RPD discretion to consider any one or more of the grounds of cessation set out in subsection 108(1) (*Al-Obeidi*, at paragraphs 14 and 21). A panel may elect to apply only paragraph 108(1)(e) depending on the facts of a particular case or may elect to apply one or more additional grounds of cessation found in paragraphs 108(1)(a) through (d). The RPD is not constrained to consider only the ground(s) of cessation raised by the Minister, nor is it constrained by the ground(s) agreed between the Minister and affected person.

[31] It is equally clear that Parliament has determined that the loss of permanent resident status and inadmissibility to Canada do not follow for all persons whose protection is found to have ceased; rather, they follow only for persons whose protection ceases by virtue of paragraphs 108(1)(a) through (d). The distinction reflects the fact that a person who loses refugee protection under paragraph 108(1)(e) may do so for reasons beyond their control and without any action on their part. Parliament has recognized through its structuring of subsection 108(1) and the related IRPA provisions that a person in those circumstances should not lose their permanent resident status

and become inadmissible. Depending on the other facts in play in a given case, such a result could be unfair.

[32] The duty of an administrative decision maker to provide reasons is a common law principle that exists independent of any statutory requirement and figures consistently in the jurisprudence of the Supreme Court (*Vavilov*, at paragraph 128):

> Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[33] The Supreme Court has also emphasized the importance of reasons as a shield against arbitrariness, particularly where the consequences of a decision to the individual are severe (*Vavilov*, at paragraphs 79 and 134). In cessation applications, the stakes for the affected person are very high and must be factored into the RPD's decision (*Camayo FCA*, at paragraph 84). The RPD is required to demonstrate that it has factored those stakes into its decision and to explain why its decision best reflects the legislature's intention (*Vavilov*, at paragraph 133; *Singh v. Canada (Citizenship and Immigration)*, 2022 FC 1481, at paragraph 28).

[34] The Respondent submits that the RPD considered the severity of the consequences to the Applicant of its cessation finding under paragraph 108(1)(a) of the IRPA and that its analysis is consistent with *Ravandi*.

[35] I do not agree. The RPD referred to the collateral consequences that result from a finding of cessation pursuant to any of paragraphs 108(1)(a) through (d). However, the RPD provided no explanation in the decision of why, factoring in those consequences, it exercised its discretion to assess the Minister's application under paragraph 108(1)(a) when the parties and the panel accepted that refugee protection should cease under paragraph 108(1)(e). The decision is silent in this regard.

[36] The Applicant submits that the RPD was able to apply the subsection 108(1) cessation grounds temporally in his case and unreasonably failed to do so. He distinguishes the facts in *Lu v. Canada (Citizenship and Immigration)*, 2019 FC 1060 (*Lu*) and *Tung*, where the applicants' need for refugee protection ceased because of their respective decisions to stop practising Falun Gong. In both cases, the timing of those decisions was in question. In *Tung*, the Court noted the RPD's assessment of the temporal aspect of the case and concluded that the panel did not make a reviewable error in finding that it was impossible to determine the timing of the relevant events. In contrast, the RPD in the present case accepted that there had been a clear and identifiable regime change in Pakistan.

[37] I agree with the Respondent that neither the provisions of the IRPA nor this Court's jurisprudence require the RPD to apply the grounds of cessation set forth in

subsection 108(1) on a temporal basis. However, where there exists a chronological distinction in the facts relevant to the application of any of paragraphs 108(1)(a) to (d), on the one hand, and paragraph 108(1)(e), on the other, the RPD must address the sequence of events and explain the exercise of its discretion. Otherwise, the decision fails to meet the standards of intelligibility and justification that are the hallmarks of a reasonable decision (*Vavilov*, at paragraphs 105 and 135). There will be cases where a decision to consider more than one ground of cessation is justified. Inevitably, there will also be cases 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 solely to a change in the reasons for which refugee protection was granted (paragraph 108(1)(e)) (*Lu*, at paragraph 48).

[38] In this case, I find that the RPD was required to consider the sequence of events that led to the Applicant's return trips to Pakistan and explain the basis on which it nevertheless applied paragraph 108(1)(a) and its attendant serious consequences. The panel's failure to do so is a reviewable error.

2. *Was the RPD's analysis of reavailment consistent with the guidance of the FCA in Camayo FCA?*

[39] The Applicant first submits that the RPD unreasonably conflated "intention", the second element of the test for reavailment within the meaning of paragraph 108(1)(a), with that of "voluntariness" in direct contradiction of the guidance of the FCA in *Camayo FCA*. The Applicant argues that the RPD's finding that he intended to avail himself of the protection of his country of origin because he voluntarily obtained a Pakistani passport and used it to travel to the country on several occasions is a reviewable error.

[40] I agree with the Applicant. In fairness to the RPD, I note that the FCA issued its *Camayo FCA* decision on March 29, 2022, some months after the RPD's September 2021 decision. Both parties filed supplemental memoranda with the Court specific to the application of the FCA decision to this matter.

[41] The RPD considered the purposes for which the Applicant acquired and renewed his Pakistani passports and his use of those passports to travel to Pakistan. The panel found [at paragraph 53] that the Applicant had "clearly and voluntarily represented himself to Pakistani border officials, as a citizen of that country" when using the passports. The RPD concluded its assessment of intention as follows [at paragraphs 54–55]:

> The panel finds that the [Applicant's] act of obtaining a new passport, after he had been determined to be a Convention refugee in 2008, is persuasive evidence that he voluntarily intended to avail himself of the protection of his country of nationality.
>
> The panel also finds that the [Applicant] has failed to discharge the presumption that he intended to re-avail, because his reasons for obtaining the passport and using it to travel to Pakistan do not allow for a determination that he acted involuntarily.

[42] In *Camayo FCA*, Justice Mactavish emphasized the importance of maintaining the distinction between *voluntariness* and *intention* to reavail. The question of intention to reavail "has nothing to do with whether the motive for travel was necessary or justified" (*Camayo FCA*, at paragraph 72). The RPD cannot merely extrapolate from its findings that a person obtained a passport of their country of nationality and returned to

that country voluntarily to also conclude that the person intended to reavail themselves of the protection of the country.

[43] Here, the RPD did just that. The panel concluded that the Applicant "voluntarily intended" to avail himself of the protection of Pakistan. The Respondent's suggestion that, at worst, the addition of the word "voluntarily" to the RPD's conclusion was superfluous is not persuasive. The panel's analysis of intention focused only on two facts: that the Applicant voluntarily obtained a Pakistani passport and that the reasons for his return trips to the country "do not allow for a determination that he acted involuntarily" [at paragraph 55]. The RPD effectively leapt without explanation from the Applicant travelling on a Pakistani passport to finding he intended to reavail himself of the protection of the Pakistani government (*Camayo FCA*, at paragraph 60(c)).

[44] The Respondent submits that the Applicant's case obviously raises the presumption of intentional and voluntary reavailment to the diplomatic protection of Pakistan. I agree only insofar as the facts raise the issues of voluntariness and intention and require the RPD to analyse the Applicant's actions and submissions against the presumption of reavailment. The fact that the Applicant returned to Pakistan voluntarily does not excuse the RPD from considering his subjective intention when returning and his submissions in rebuttal of the presumption (*Camayo FCA*, at paragraph 66).

[45] The Applicant's second submission challenging the RPD's reavailment analysis centres on the identity of his agents of persecution—Musharraf and the Musharraf regime—and the fall of the regime before he returned to Pakistan. He argues that the RPD erred in failing to consider the identity of his agents of persecution as part of its assessment of intention (*Camayo FCA*, at paragraph 84; *Thapachetri v. Canada (Citizenship and Immigration)*, 2020 FC 600, at paragraph 14). The Applicant states that neither his application for a passport nor his return to Pakistan exposed him to his agents of persecution. As a result, he cannot be said to have subjectively intended to reavail himself of the protection of the Musharraf regime. The Applicant emphasizes that he did not have the protection of the state before he fled and would effectively be availing himself of a new government's protection. In his view, he returned to a different Pakistan in 2009.

[46] The Respondent argues strenuously that the Applicant's submissions ignore the consistent jurisprudence of this Court that distinguishes state protection from diplomatic protection for purposes of cessation applications (*Chowdhury v. Canada (Citizenship and Immigration)*, 2021 FC 312, at paragraphs 23–24; *Okojie v. Canada (Citizenship and Immigration)*, 2019 FC 1287, at paragraphs 30–31). It is diplomatic protection that is at stake in cessation cases; whether or not state protection was sought or available is relevant only at the refugee claim stage. The Applicant's argument that a refugee cannot "reavail" if there was never an "availment" is not new (*Chokheli v. Canada (Citizenship and Immigration)*, 2020 FC 800, 76 Imm. L.R. (4th) 291, at paragraph 65):

> This argument and similar ones have consistently been rejected by this Court observing that the argument conflates the lack of state protection underpinning a refugee claim with the diplomatic protection which is part of a reavailment consideration: *Okojie* at paragraph 30, citing *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 at paragraph 13 and *Lu* at paragraph 60.

[47] The Respondent also argues that the Applicant's attempted distinction between an illegal regime and a constitutional or legitimate government has no basis in law and creates impractical uncertainty. First, there is no link to or definition of a particular form of government in the Convention [*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6] or the IRPA in the context of cessation of refugee protection. Reavailment puts in issue diplomatic protection of the affected person's country of origin and not that of a particular government or regime. Second, governments and regime changes happen worldwide and can involve great or little change.

[48] The Respondent has accurately and comprehensively described the Court's jurisprudence that establishes diplomatic protection as opposed to state protection as the relevant consideration in cessation proceedings. The distinction presents a significant hurdle for the Applicant's arguments of availment and reavailment. However, the question before the Court is not whether the RPD reasonably found that the Applicant reavailed himself of the protection of Pakistan within the meaning of paragraph 108(1)(a). The issue in this application is whether the RPD erred in omitting to consider the Applicant's arguments regarding reavailment (and availment) in its assessment of his subjective intention in returning to Pakistan.

[49] The Respondent submits that the RPD implicitly addressed the Applicant's arguments regarding actual reavailment by considering whether he made any effort to hide from his agents of persecution during his trips to Pakistan, his use of his Pakistani passports to travel to other countries and the broad scope of diplomatic protection. Having carefully reviewed the RPD's analysis of actual reavailment, I do not find the submission persuasive.

[50] I agree with the Applicant that the RPD's failure to engage with his submissions is a reviewable error. Whether or not the Applicant's arguments regarding reavailment are ultimately accepted, the RPD was required to consider the Applicant's insistence that he had not actually reavailed himself of the protection of the government of Pakistan. In my view, the RPD's statement that it had considered whether the Applicant had taken steps to evade his agents of persecution indicates a lack of critical analysis when it was clear that the risk of persecution by the Musharraf regime no longer existed.

[51] The Applicant's temporal argument also figures in his submissions regarding the RPD's reavailment analysis and is linked to the identity of his agents of persecution in the sense that they were defunct as a political power in the country when he returned. This argument reinforces the importance of the chronology of events in the Applicant's case and the requirement for an explanation from the RPD of its reasons for applying paragraph 108(1)(a) as an additional ground of cessation.

IV. Conclusion

[52] The Applicant has established serious shortcomings in the RPD's decision "such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at paragraph 100). The RPD's surprising statement that it would ignore the jurisprudence of the Supreme Court, the FCA and this Court and provide no reasons for its decision to apply paragraph 108(1)(a) and its attendant serious collateral consequences results in a decision that lacks transparency and justification. The panel's reliance on the fact that the IRPA does not require it to provide reasons for the exercise

of its discretion is, as stated above, without merit. The RPD also conflated voluntariness and intention in its assessment of reavailment and ignored the chronology of events that resulted, in 2009, in the Applicant first returning to Pakistan. This error led to a flawed consideration of the Applicant's intention in returning to the country using a Pakistani passport.

[53] The application will be allowed only in respect of the RPD's analysis and conclusions regarding the application of paragraph 108(1)(a) of the IRPA. The parties are in agreement in this regard. The RPD's finding that there had been a change in circumstances in Pakistan such that the reasons for the Applicant's 2002 refugee claim had ceased to exist and that his refugee protection should cease on the basis of paragraph 108(1)(e) remain unaffected, as does the RPD's ultimate conclusion allowing the Minster's application and deeming the Applicant's claim for protection rejected pursuant to subsection 108(3).

V. Questions proposed for certification

[54] At the hearing of this matter, Applicant's counsel requested the opportunity to propose one or more certified questions and I received written submissions from both parties within an agreed schedule. The Applicant proposes three questions for certification pursuant to paragraph 74(d) of the IRPA, each of which the Respondent opposes.

[55] To be eligible for certification under paragraph 74(d), a question must: (1) be a serious question that is dispositive of the appeal; (2) transcend the interests of the parties; and (3) raise an issue of broad significance or general importance (*Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229, at paragraph 36; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674 (*Lunyamila*), at paragraph 46; *Canada (Public Safety and Emergency Preparedness) v. XY*, 2022 FCA 113, 89 Imm. L.R. (4th) 173, at paragraph 7).

[56] The FCA explained what is meant by "dispositive of the appeal" in *Lunyamila* (at paragraph 46):

> … 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 paragraph 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 paragraphs 15, 35).

[57] The premise of a certified question must fully accord with the facts of the case (*Camayo FCA*, at paragraph 34). Further, the question should be posed in a manner that recognizes the proper standard of review (*Camayo FCA*, at paragraph 45).

A. Question 1: In cases where a cessate member finds that there has been a paragraph 108(1)(e) change of circumstances arising from a temporally distinct event—e.g., a regime change—is it reasonable for the member to also find that the refugee's protection has ceased under paragraph

108(1)(a) as a result of the refugee's post-change of circumstance availment of the country of origin's protection?

[58] I decline to certify Question 1 because it does not meet the requirements for certification. The question is not dispositive of the case. The determinative errors in the RPD's decision are its failure to explain the exercise of its discretion to consider paragraph 108(1)(a) and its conflation of voluntariness and intention in its analysis of reavailment. The Applicant acknowledged in his written reply submissions to the Court that the RPD was "not absolutely bound to apply the cessation grounds temporally" but stated that, where a temporal application is possible, it is a relevant consideration in the exercise of the RPD's discretion.

[59] I also agree with the Respondent that an unequivocal answer to the proposed question is not possible. The question of whether it is reasonable for an RPD member to find that a person's refugee protection has ceased under paragraph 108(1)(a) as a result of the person's post-change of circumstance return to their country of origin is a factual question that will depend in each case on all of the facts before the member (*Lu*, at paragraph 37; see also *Tung*, at paragraph 24). The Applicant's proposed Question 1 effectively seeks to place a temporal requirement on the exercise of the RPD's discretion that is not contemplated in subsection 108(1). I rejected a similar argument in *Lu* [at paragraph 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.

[60] I would add that the facts of this case underline the importance of the requirement that the RPD intelligibly and transparently explain the reasons for the exercise of its discretion in each cessation case in which the chronology of events permits the application of paragraph 108(1)(e) to the Minister's application.

B. Question 2: Does a cessate member have discretion to halt its analysis if satisfied that one of the paragraph 108(1)(a) through (e) cessation grounds is made out?

   Question 3: If the discretion described under Question 2 does exist, is it reasonable for a cessate member to interpret the IRPA as excusing them from justifying why it has opted for a ground that carries deleterious collateral consequences for the individual, instead of a ground that does not entail those consequences?

[61] I also decline to certify Questions 2 and 3.

[62] Question 2 is not dispositive of this application. The RPD did not stop its analysis after determining either that the Minister had established reavailment under paragraph 108(1)(a) or that the reasons for the Applicant's refugee protection had ceased under paragraph 108(1)(e). As the Respondent notes, if the answer to Question 2 is "no", the RPD committed no reviewable error. Conversely, if the answer is "yes", the RPD did not suggest in its decision that it was precluded from considering only one ground of

cessation. Rather, the panel stated that the IRPA and the relevant jurisprudence authorize it to consider any of the grounds of cessation. The fact that the RPD did not exercise its discretion to consider paragraph 108(1)(e) alone is not a reviewable error.

[63] I am not aware of jurisprudence that indicates the RPD does not have discretion to consider only one ground of cessation. The Court's decision in *Al-Obeidi* is cited as indicating that the RPD should consider an additional ground if the evidence is compelling but the Court's full analysis is instructive [at paragraph 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. [Emphasis added.]

[64] In my view, Question 2 does not pose a question that is the subject of dispute or uncertainty. Although the existence of the discretion highlighted in the question is an important one that is of general importance, the Question does not require certification because it is one that is settled in the jurisprudence (*Dubrézil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 142, at paragraph 16).

[65] Question 3 poses a question that is central to the Applicant's case and to my decision. The RPD's failure to explain the exercise of its discretion to consider and apply paragraph 108(1)(a) is a determinative error. I do not agree with the Respondent's argument that, whether or not the RPD was required to explain its choice of grounds, it effectively did so.

[66] I agree with the Applicant that the question is of general importance but I am not convinced it is a question that requires clarification by the FCA. The obligation of a decision maker to explain the material elements of its analysis and conclusions is unequivocal. At the risk of repetition, the obligation has been discussed at length by all courts, most notably the Supreme Court in its jurisprudence dating back many years, as chronicled in *Vavilov*. The obligation has been considered recently in the context of cessation cases by this Court in *Ravandi* and by the FCA in *Camayo FCA* in the course of Justice Mactavish's guidance regarding the factors to be considered, and explained, by the RPD.

JUDGMENT in IMM-6888-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part.

2. The decision of the Refugee Protection Division (RPD) dated September 23, 2021, allowing the Respondent's application for cessation of the Applicant's refugee protection is set aside in part and the matter is referred back to a differently constituted panel of the RPD to reconsider, based on the Court's reasons, only that part of the Minister's application for cessation made pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

3. No question of general importance is certified.