

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20160429**

**Docket: A-205-15**

**Citation: 2016 FCA 134**

**CORAM: NADON J.A.  
RENNIE J.A.  
GLEASON J.A.**

**BETWEEN:**

**OBAIDULLAH SIDDIQUI**

**Appellant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

Heard at Vancouver, British Columbia, on April 19, 2016.

Judgment delivered at Ottawa, Ontario, on April 29, 2016.

**REASONS FOR JUDGMENT BY:**

**RENNIE J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
GLEASON J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160429

Docket: A-205-15

Citation: 2016 FCA 134

CORAM: NADON J.A.  
RENNIE J.A.  
GLEASON J.A.

BETWEEN:

OBAIDULLAH SIDDIQUI

Appellant

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

Respondent

**REASONS FOR JUDGMENT**

**RENNIE J.A.**

[1] This is an appeal from a decision of the Federal Court, (2015 FC 329 *per* Noël J.), dismissing an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada. In that decision, the RPD granted the Minister's application for an order under paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), that the appellant's status as a protected person and

permanent resident had ceased. At the conclusion of his reasons, the judge certified the following question for determination by this Court:

[... D]o the same or substantially the same legal considerations, precedents and analysis apply to persons found to be Convention refugees as to persons found to be in need of protection as members of the Country of asylum class?

[2] I would answer the question in the affirmative. However, a brief review of the facts which underlie this appeal provides helpful context to the issue raised by the certified question.

[3] The appellant was born in Afghanistan. In 2010, he was accepted for re-settlement in Canada under the “country of asylum” or “humanitarian protected person abroad” class, a category of refugee protection distinct from Convention refugees and more commonly known as the re-settlement program. The re-settlement program is a discretionary program which extends refugee protection to persons who are determined to be in need of protection but are outside of Canada: see *Citizenship and Immigration Canada Processing Manual - OP5: Overseas Selection and Processing of Convention Refugees Abroad and Members of the Humanitarian Protected Person Abroad Classes*. He became a permanent resident of Canada in January, 2011.

[4] The appellant obtained an Afghani passport in October, 2011, and between then and the end of 2013 made three trips to Afghanistan. The first trip was in 2012 for six weeks with his two sons. On the second, in 2013, he travelled alone to Afghanistan for nine weeks. The third, in July of 2013, lasted six months. This later trip, on which his son accompanied him, was for business and to enrol his son in school in Afghanistan. He also travelled to China and India on his Afghani passport and used his Afghani passport for identification when checking into hotels.

[5] In November 2013, the Minister of Citizenship and Immigration initiated cessation proceedings pursuant to paragraph 108(1)(a) of the IRPA. This section provides:

**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 themselves of the protection of their country of nationality;

**Rejet**

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

[6] The RPD granted the Minister's application. The RPD applied the established three-part test to determine whether a Convention refugee has reavailed himself of his country of nationality, and found all three criteria to be satisfied: *Nsende v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 531; [2009] 1 F.C.R. 49. Consequently, pursuant to paragraph 108(1)(a), the appellant was found to have reavailed himself of Afghanistan's protection, and pursuant to subsection 108(2) his refugee protection ceased. So too did his status as a permanent resident.

[7] The appellant applied to the Federal Court for judicial review of the RPD's decision. He argued that paragraph 108(1)(a) did not apply to him as a member of the humanitarian protected person abroad class, and that by virtue of his permanent resident status which he gained on arrival in Canada, was excluded from cessation proceedings. He contended that the RPD decision was flawed as the Board did not correctly understand that the appellant was not a Convention refugee, but was a member of the country of asylum class. In support, he points to various paragraphs of the RPD decision where the appellant is described as a Convention

refugee, a refugee or a protected person. He urges that the RPD incorrectly understood the appellant to be a Convention refugee, and since the cessation provisions in section 108 do not apply to the country of asylum class, there was no legal basis to make a cessation order. He also argued that the RPD erred in not considering whether paragraph 108(1)(e) applied. Unlike cessation orders under paragraphs 108(1)(a)-(d), a finding of cessation of protection under paragraph 108(1)(e) does not trigger a loss of permanent residency.

[8] The Federal Court dismissed the application, finding that paragraph 108(1)(a) does apply to country of asylum refugees, and that on a finding of cessation, country of asylum refugees lose their permanent resident status pursuant to paragraph 46(1)(c.1). This provision reads:

**Permanent resident**

46 (1) A person loses permanent resident status

[...]

(c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d);

[...]

**Résident permanent**

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

[...]

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;

[...]

[9] The Court also declined to hear argument with respect to paragraph 108(1)(e) as that ground had not been raised before the RPD.

[10] The appellant maintains these arguments before this Court.

[11] The task of this Court on an appeal from an application for judicial review is to assess whether the judge correctly selected and applied the standard of review in the decision below: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559. Here, the judge correctly held that the RPD decision to grant the Minister's application for cessation is a question of mixed fact and law, and thus attracted a reasonableness standard, as did the Board's interpretation of the relevant provisions of IRPA.

[12] The answers to the challenges to the decision lie in a principled reading of the statute. If the relevant provisions of IRPA are read in their grammatical and ordinary sense, harmoniously with the scheme of the Act, it is clear that there is no merit to the appellant's arguments. The statutory scheme demonstrates that the cessation provisions of section 108 are not limited to Convention refugees or persons in need of protection but encompass "persons in similar circumstances" such as members of the country of asylum class.

[13] The starting point of this analysis is subsection 12(3) of IRPA which provides:

**Refugees**

12 (3) A foreign national, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances, taking into account Canada's humanitarian tradition with respect to the displaced and the persecuted.

**Réfugiés**

12 (3) La sélection de l'étranger, qu'il soit au Canada ou non, s'effectue, conformément à la tradition humanitaire du Canada à l'égard des personnes déplacées ou persécutées, selon qu'il a la qualité, au titre de la présente loi, de réfugié ou de personne en situation semblable.

[14] A country of asylum refugee is a foreign national abroad, who is selected for re-settlement in Canada. He is thus a “person in similar circumstances.” Once selected for re-settlement in Canada, paragraph 95(1)(a) confers refugee protection on that person:

#### **Conferral of refugee protection**

95 (1) Refugee protection is conferred on a person when

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(b) the Board determines the person to be a Convention refugee or a person in need of protection; or

[...]

[Emphasis added]

#### **Asile**

95 (1) L’asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu’elle est, à la suite d’une demande de visa, un réfugié au sens de la Convention ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d’un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de personne à protéger;

[...]

[je souligne]

[15] Further, subsection 95(2) makes clear that section 108, the cessation provision, applies to protected persons, regardless of the route or mechanism by which they obtain status as a protected person:

#### **Protected person**

95 (2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

#### **Personne protégée**

95 (2) Est appelée personne protégée la personne à qui l’asile est conféré et dont la demande n’est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

[16] Subsection 108(2) also expressly links the cessation provisions back to section 95.

Importantly, it does not refer to Convention refugee status, but to “refugee protection”:

**Cessation of refugee protection**

108 (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).

[Emphasis added]

**Perte de l’asile**

108 (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).

[je souligne]

[17] In sum, a reading of IRPA leads to the unequivocal conclusion that the cessation provisions of section 108 apply to both Convention refugees and country of asylum or re-settlement class. Section 95 provides protection to both Convention refugees and members of the country of asylum class. What ceases under section 108 is the protection that is conferred under section 95 and Parliament expressly crafted section 108 so as to apply the cessation provisions to “protected persons,” regardless of the means by which protection is granted.

[18] I see no reason why the principle of reavilment and its associated criteria should vary according to the route by which status as a protected person is originally obtained. It must be remembered that all refugee protection is surrogate protection, the presumption at international law being that a person’s country of nationality will protect its nationals. The application of the principle of reavilment to country of asylum class refugees is consistent with this principle.

[19] This disposes of the appellant’s principal arguments, but it also demonstrates why the nomenclature used by the RPD to describe the appellant is of no consequence. For the purposes



of cessation orders, subsection 12(3) and section 95 effectively merge Convention refugees, the country of asylum class or “persons in similar circumstances” into a single category of protected persons. As section 108 applies to protected persons, the means or vehicle by which protection was conferred is irrelevant.

[20] I turn to the appellant’s second argument. The appellant says that as a country of asylum class member, he had permanent resident status on arrival in Canada, whereas a Convention refugee claimant does not. It could not have been Parliament’s intention, having granted permanent residency on arrival, that status could be lost through reavilment. Any act that could have triggered cessation must, he contends, have occurred prior to the granting of permanent resident status.

[21] This argument has no foundation in the legislative scheme. Paragraph 46(1)(c.1) expressly provides that permanent resident status is lost after a successful application pursuant to subsection 108(2). The appellant’s argument that paragraph 46(1)(c.1) would not apply to him as a member of the country of asylum class would render the provision meaningless.

[22] In an effort to avoid the clear language of the Act, the appellant urges that the cessation provision be read narrowly, so as to exclude country of asylum class refugees from the cessation provisions. The appellant contends that this interpretation would be consistent with the objectives of IRPA and the Convention. But it is settled law that where the language of Parliament is unequivocal, as it is here, no resort can be had to principles of international law to undermine what Parliament has expressly provided. As noted in *Febles v. Canada (Citizenship*

*and Immigration*), 2014 SCC 68, [2014] 3 S.C.R. 431, broad statements of purposes and objectives, whether found in international or domestic statute, do not justify interpretations that are unsupported by, or inconsistent with the language of Parliament.

[23] The appellant also contends that his status as a protected person was lost when he was granted permanent resident status, and, as such, section 108 cannot apply.

[24] This argument has no support in the statute. Paragraph 95(1)(a) provides that refugee protection is conferred “when” the person becomes a permanent resident. It is illogical to suggest that a person gains and loses refugee protection at the very moment that they become a permanent resident. Once protected person status has been granted it may be lost under the IRPA in one of two ways: a cessation order under subsection 108(2) or pursuant to the vacation provisions in subsection 109(1).

[25] I conclude with the appellant’s argument that the Board erred in not considering whether cessation could have been made under paragraph 108(1)(e).

[26] No error arises in the decision of the RPD not to entertain a ground of cessation which was neither advanced by the Minister or the appellant. Indeed, as noted by the judge, the appellant objected before the RPD to any reference to paragraph 108(1)(e). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the Court noted that a court has a discretion not to consider an issue raised for the first time on judicial review. Here, the absence of both an evidentiary foundation and the views

of the tribunal of first instance on that record strongly militate against consideration of this issue in the Federal Court. The judge below committed no reviewable error in declining to consider the issue upon judicial review.

[27] I would answer the certified question in the affirmative and dismiss the appeal with costs.

"Donald J. Rennie"

---

J.A.

"I agree

M. Nadon J.A."

"I agree

Mary J.L. Gleason J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED  
March 17, 2015, NO. IMM-5302-15**

**DOCKET:** A-205-15

**STYLE OF CAUSE:** OBAIDULLAH SIDDIQUI V. THE  
MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH  
COLUMBIA

**DATE OF HEARING:** APRIL 19, 2016

**REASONS FOR JUDGMENT BY:** RENNIE J.A.

**CONCURRED IN BY:** NADON J.A.  
GLEASON J.A.

**DATED:** APRIL 29, 2016

**APPEARANCES:**

Douglas Cannon FOR THE APPELLANT

Helen Park FOR THE RESPONDENT  
Brett Nash

**SOLICITORS OF RECORD:**

Elgin, Cannon & Associates FOR THE APPELLANT  
Barristers & Solicitors  
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Vancouver, British Columbia