Federal Court  Cour fédérale

Date: 20250203

Docket: IMM-11671-23

Citation: 2025 FC 218

Ottawa, Ontario, February 3, 2025

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

YUEHAO CAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This judicial review application arises out of the Refugee Protection Division's [RPD] decision allowing the Minister of Public Safety and Emergency Preparedness' [Minister] application for refugee cessation under paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RPD determined that by returning to China on her Chinese passport, the Applicant voluntarily reavailed herself of that country's diplomatic

protection. As a result, the RPD deemed that she no longer required refugee protection in Canada.

[2] I am allowing the application because the RPD misapplied the legal test for reavailment set out by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Galindo Camayo*]. That test has three requirements: (i) the refugee must have acted voluntarily; (ii) the refugee must have intended to reavail themselves of their country of nationality's protection; and (iii) the refugee must have actually obtained that nation's protection: *Galindo Camayo* at para 18.

[3] In my view, the RPD made three errors in applying this test. First, the RPD disregarded the Applicant's subjective knowledge about the consequences of her actions in assessing whether she intended to reavail. Second, the RPD conflated voluntariness and intent. Third, the RPD erred in requiring the Applicant to demonstrate on a balance of probabilities that she had been "in hiding" while in China.

II. Background

[4] The Applicant was granted asylum in Canada in 2014 based on her practice of Falun Gong. After obtaining permanent residency in October 2016, the Applicant applied for Canadian citizenship in January 2021. In her application, she disclosed travelling to China for 93 days between November 2018 and February 2019 on her Chinese passport, issued before she claimed refugee protection. She renewed this passport through the Chinese Consulate in Toronto in May

2021. Based on the Applicant's travel to China, the Minister made an application for cessation of refugee protection.

[5] At the RPD cessation hearing, the Applicant testified that she travelled to China with her three children (aged five years old and younger) to care for her ailing mother. Her father was her mother's primary caregiver. Her sister lived in Canada, and her brother living in China was hiding from his debtors. The Applicant explained that while in China, she and her children remained at her parents' house and did not go out often. They welcomed no visitors. The only people who knew of the Applicant's presence were her parents and brother. She further testified that she did not practice Falun Gong while in China nor bring any identifying materials with her.

[6] The RPD concluded that the three requirements of the reavailment test had been established. On voluntariness, the RPD found that the Applicant was not forced to use her Chinese passport, or to return to China, and thus "acted freely and voluntarily": Reasons and Decision of the Refugee Protection Division dated September 1, 2023, at para 23 [RPD Decision].

[7] Regarding the Applicant's intent, the RPD found that "her travel was planned, that it was voluntary and not necessary, and that her actions indicate a lack of subjective fear in returning to her country of persecution": RPD Decision at para 24. The RPD did not dispute the Applicant's lack of subjective knowledge of the consequences of returning to China but determined that she should have known better based on her "level of sophistication": RPD Decision at paras 48–54.

Further, in assessing intent, the RPD found that there was no evidence that the Applicant was "in hiding" during her time in China: RPD Decision at paras 39–41.

[8] The RPD concluded that by travelling on her Chinese passport, the Applicant had in fact reavailed herself of China's diplomatic protection: RPD Decision at paras 58–61. This finding was supported by the Applicant's failure to establish that she had been "in hiding" while in China: RPD Decision at paras 57, 60–61.

III. Analysis

[9] The issue for determination is whether the RPD erred in applying the legal test for reavailment. There is no dispute that the applicable standard of review is reasonableness. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8.

A. *The RPD erred in assessing the Applicant's intention to reavail*

[10] In finding that the Applicant had intended to reavail herself of China's protection, the RPD failed to follow the Federal Court of Appeal's guidance in *Galindo Camayo* in two ways. First, the RPD assessed the Applicant's intention based on what she should have known about the immigration consequences of her travel. Second, it conflated voluntariness and intent.

(1) The RPD erred in basing its finding on what the Applicant should have known

[11] The Applicant argued that she did not have the requisite knowledge to have formed intent. Before the RPD, the Applicant "testified that she was subjectively unaware of the consequences" of returning to China on a Chinese passport: RPD Decision at para 53. She stated that she did not know: (i) that she was travelling as a refugee after obtaining permanent residency; (ii) that she could obtain a refugee travel document; and (iii) about cessation: RPD Decision at para 48.

[12] Notably, the RPD made no adverse credibility findings regarding the Applicant's subjective knowledge and determined that the Applicant should have known the consequences of returning to China, based on her personal attributes:

> [51] […] The Respondent is 36-year-old woman who was granted refugee protection in June 2014, claiming to have been persecuted by the Chinese government. The [Applicant] is an educated woman that possesses a college education in accounting. At her cessation hearing, she was able to answer all the questions through an interpreter, well remembering times, events, and situations. When she did not know an answer, she said so. The panel found that notwithstanding the cultural factors and possible stress associated with responding to oral questions through an interpreter, the [Applicant's] level of sophistication was satisfactory. The panel also notes that the [Applicant] had access to persons in Canada, namely her former counsel at her RPD hearing, all of whom were able to provide her with information regarding her rights and responsibilities to travel as a recognized Convention refugee. The fact that she elected not to engage in those conversations demonstrates to the panel that she intended to return to China knowing that there were possible risks in doing so. […]

[13] I agree with the Applicant that this is the same erroneous analysis of intent as in *Galindo Camayo*. In that case, the applicant had also testified that she was unaware that travelling to her

country of nationality on that country's passport could have consequences for her immigration status in Canada. As in this case, the RPD did not make a credibility finding, but found that the applicant was "an educated and sophisticated individual who could have sought information as to the requirements that she had to uphold in order to maintain her status in Canada": *Galindo Camayo* at para 67.

[14] The Federal Court of Appeal concluded that, having failed to find that the applicant lacked credibility, the RPD should have considered what she subjectively intended, not what she "should have known":

> [68] If it were acting reasonably, at this point in its analysis, the RPD should have considered not what Ms. Galindo Camayo should have known, but rather whether she did subjectively intend by her actions to depend on the protection of Colombia. Having failed to find that Ms. Galindo Camayo's testimony on this point lacked credibility, the RPD is deemed to have accepted her claim that she did not know that using her Colombian passport to return to Colombia and to travel elsewhere could result in her being deemed to have reavailed herself of Colombia's protection, and that this was not her intent.
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> [Emphasis in original]

[15] In this case, as in *Galindo Camayo*, the RPD thus erred in focussing its inquiry on what the Applicant should have known based on her personal attributes. I note that this particular error has been the subject of two very recent decisions: *Moradi v Canada (Citizenship and Immigration)*, 2025 FC 157 at paras 13–17 [*Moradi*]; ***Gorgis v Canada (Public Safety and Emergency Preparedness)***, 2025 FC 117 at para 29 [*Gorgis*].

[16] Subjective knowledge of the immigration consequences of returning to one's country of nationality "may not be determinative" of an intention to reavail: *Galindo Camayo* at para 70. However, as Justice Battista explains in *Moradi*, it is nonetheless a key factual consideration to which the RPD is "required to apply the correct analytical lens": *Moradi* at para 17. Here, the RPD failed to do so.

(2) The RPD erred in conflating voluntariness and intent

[17] The RPD further repeated another error set out in *Galindo Camayo* by conflating the voluntariness of the Applicant's actions with her intention to reavail. The Federal Court of Appeal cautioned that "the question of whether one intended to reavail oneself of the protection of one's country of origin has nothing to do with whether the motive for travel was necessary or justified": *Galindo Camayo* at para 72.

[18] Here, the RPD repeatedly used its voluntariness finding as an indicator of the Applicant's intention to reavail: RPD Decision at paras 24, 30–31, 37–38. Indeed, the RPD grounded its finding on intent in its conclusion that the Applicant's "travel was planned, that it was voluntary and not necessary": RPD Decision at para 24. In that vein, "[m]uch of the RPD's analysis of the intention issue is taken up with an examination of the reasons cited by [the Applicant] for returning to [her country of nationality]": *Galindo Camayo* at para 72.

[19] This is another error that the Court has repeatedly found in the RPD's cessation decisions: *Singh v Canada (Citizenship and Immigration)*, 2024 FC 1662 at para 13; *Strack v Canada (Citizenship and Immigration)*, 2024 FC 90 at para 10; *Yao v Canada (Citizenship and*

Immigration), 2023 FC 920 at paras 26–27; *Abbas v Canada (Citizenship and Immigration)*, 2023 FC 871 at paras 42–43.

B. *The RPD erred in requiring the Applicant to establish she was "in hiding" while in China*

[20] Precautionary measures are a relevant consideration in assessing reavailment. In this case, the RPD erred by requiring that the Applicant prove, on a balance of probabilities, that she had been "in hiding" during her visit to China when it assessed both intention and actual reavailment: RPD Decision at paras 39–41, 57, 60–61.

[21] The RPD relied on two decisions from this Court which, significantly, pre-date the Federal Court of Appeal's decision in *Galindo Camayo*: *Abechkhrishvili v Canada (Citizenship and Immigration)*, 2019 FC 313 [*Abechkhrishvili*]; *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 [*Yuan*]. In *Yuan*, the Court did not find that hiding was a requirement to rebut reavailment, but rather, that the applicant had in fact established that he had been in hiding: *Yuan* at para 35. In *Abechkhrishvili*, the Court did not accept that the applicant had been in hiding because she was "staying at a family cottage where [she] could easily be located": *Abechkhrishvili* at para 26.

[22] Justice Ahmed recently considered this very issue in *Gorgis.* He concluded that requiring applicants to establish that they had been "in hiding" does not accord with the *Galindo Camayo* decision. I agree with his conclusion and adopt it in its entirety:

> [30] Similarly, the RPD erred by requiring the Applicants to have been "in hiding" during their travels. The relevant consideration is

> "[w]hether the [Applicants] took any precautionary measures while [they were] in [their] country of nationality" (*Galindo Camayo* at para 84). The Applicants were not obliged to show they were "actually hiding." The RPD's assessment of this factor does not accord with the consideration set out in *Galindo Camayo*.

[23] Specifically, in its discussion about precautionary measures, the Federal Court of Appeal recognized that a range of actions taken by an applicant may rebut the presumption of reavailment:

> […] Evidence that an individual took steps to conceal her return, such as remaining sequestered in a home or hotel throughout the visit or engaging private security while in the country of origin, may be viewed differently than evidence that the individual moved about freely and openly while in her country of nationality;
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> *Galindo Camayo* at para 84.

[24] On this basis, the *Galindo Camayo* decision does not support the RPD's finding that the Applicant was required to show on a balance of probabilities that she was "in hiding". Rather, it is a highly contextual assessment that requires consideration of the totality of the precautionary measures taken in light of the nature of the risk in question. It is not a binary determination as the RPD treated it in this case.

[25] The RPD accepted the Applicant's evidence about the precautions she took while in China. This included spending most of her time at her parents' home aiding her mother and attending to her three young children, avoiding police authorities, not welcoming any visitors, and not travelling with any Falun Gong materials or engaging in any Falun Gong activities: RPD Decision at paras 33–36; 39–40. However, the RPD's preoccupation with whether the Applicant

had been “in hiding” prevented it from properly considering these precautionary measures in assessing whether she has rebutted the presumption of reavailment.

IV. Conclusion

[26] For these reasons, the RPD’s decision is not justified in light of the relevant legal constraints: *Vavilov* at para 99. As such, the decision is unreasonable and must be set aside. The matter is returned to the RPD for redetermination by another member.

[27] The parties did not propose any questions for certification and I agree that none arise.

JUDGMENT in IMM-11671-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The Refugee Protection Division's decision dated September 1, 2023, is set aside and the matter is remitted for determination by a differently constituted panel.
3. No question is certified for appeal.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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