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2022 FCA 50

Minister of Citizenship and Immigration (*Appellant*)

v.

Maria Camila Galindo Camayo (*Respondent*)

and

United Nations High Commissioner for Refugees and **Canadian Association of Refugee Lawyers** (*Interveners*)

INDEXED AS: CANADA (CITIZENSHIP AND IMMIGRATION) V. GALINDO CAMAYO

Federal Court of Appeal, Stratas, Rivoalen and Mactavish JJ.A.—By videoconference, December 8, 2021; Ottawa, March 29, 2022.

Citizenship and Immigration — Status in Canada — Convention Refugees and Persons in Need of Protection — Appeal from Federal Court decision setting aside Immigration and Refugee Board, Refugee Protection Division (RPD) decision — RPD finding that respondent, person in need of protection in Canada, intended to reavail herself of protection of Colombian government — On judicial review, Federal Court determined that RPD's finding unreasonable, ordered that matter be remitted to differently constituted RPD panel for redetermination — Questions were also certified — Appellant asserted that Federal Court erred in finding RPD's decision unreasonable — Whether reasonable for RPD to rely on evidence of refugee's lack of subjective (let alone any) knowledge that use of passport confers diplomatic protection to rebut presumption that refugee who acquires, travels on passport issued by their country of origin has intended to avail themselves of that state's protection — Whether reasonable for RPD to rely upon evidence that refugee took measures to protect themselves against their agent of persecution (or that of their family member who is principal refugee applicant) to rebut presumption that refugee who acquires (or renews) passport issued by their country of origin, uses it to return to their country of origin has intended to avail themselves of that state's protection — Seriousness of impact of RPD's decision on respondent increased duty on RPD to explain its decision — Loss of refugee or protected person status unquestionably having serious consequences for respondent — RPD's decision not reasonable — Many questions arose

as to proper interpretation of Act, s. 108 — RPD simply stated its own view of what s. 108 requiring without any real analysis — Although due allowance must be made for fact that RPD is administrative decision maker with own way of dealing with legal issues, even affording that allowance, RPD falling short of mark in this case — While presumption existing that refugees who acquire, travel on passports issued by their country of nationality to travel to that country or to third country have intended to avail themselves of protection of their country of nationality, presumption is rebuttable — RPD should have carried out individualized assessment of all evidence before it in determining whether presumption of reavailment had been rebutted in this case — Respondent testified that she was not aware that using her Colombian passport to travel to Colombia, elsewhere could have consequences for her immigration status in Canada — But RPD rejected this claim finding that ignorance of law not valid argument — RPD was required to take account of state of respondent's actual knowledge, intent before concluding that she had intended to reavail herself of Colombia's protection — Federal Court was right in determining that without this analysis, RPD's conclusion on reavailment not defensible outcome; that it was thus unreasonable — RPD also conflated question of voluntariness with that of intention to reavail leading in part to unreasonable decision — RPD making unreasonable finding regarding respondent's use of private security while travelling to Columbia — RPD understood this evidence to support its conclusion that by travelling to Colombia, respondent intended to reavail herself of that country's protection — Such evidence spoke not to her intention to entrust her protection to Colombia, but was rather to opposite effect — It was evidence of respondent's ongoing subjective fear of situation in Colombia and her lack of confidence in state's ability to protect her — RPD had to at least consider this evidence properly; if it found it not to be probative or persuasive, to explain why that was the case — Certified questions answered in affirmative — Appeal dismissed.

Citizenship and Immigration — Judicial Review — Standard of review — Appeal from Federal Court decision setting aside Immigration and Refugee Board, Refugee Protection Division (RPD) decision — RPD finding that respondent, person in need of protection in Canada, intended to reavail herself of protection of Colombian government — On judicial review, Federal Court determined that RPD's finding unreasonable, ordered that matter be remitted to differently constituted RPD panel for redetermination — Questions concerning reavailment of state protection by protected persons were certified — Standard of review applicable to certified questions at issue — Federal Court correctly identified reasonableness as standard to be applied in reviewing RPD's cessation findings — Focus was therefore on way that Federal Court applied reasonableness standard to RPD's decision — Certified questions generally raise questions of law, including, as in present case, questions of statutory interpretation — However, questions, as phrased by Federal Court, required yes or no answer — This invited correctness review — Potential misfit between reasonableness analysis, definitive correct answer required by certified question can, however, be avoided if Federal Court were to formulate certified questions in manner that asks whether particular statutory interpretation or approach is reasonable — In present case, two certified questions called for correctness response — They were therefore reformulated to ask whether particular statutory interpretation or approach suggested by question was or was not reasonable.

This was an appeal from a Federal Court decision setting aside a decision of the Immigration and Refugee Board, Refugee Protection Division (RPD). The RPD found that the respondent, a person in need of protection in Canada, intended to reavail herself of the protection of the Colombian government. On judicial review, the Federal Court determined that the RPD's finding was unreasonable and ordered that the matter be remitted to a differently constituted RPD panel for redetermination. It also certified three questions. While the first question was no longer relevant, the other two questions, which involved a minor who obtains refugee protection as a dependant under a parent's claim, were: (1) whether evidence of the refugee's lack of subjective (let alone any) knowledge that use of a passport confers diplomatic protection can be relied on to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin to travel to a third country has intended to avail themselves of that state's protection; (2) whether

evidence that a refugee took measures to protect themselves against their agent of persecution (or that of their family member who is the principal refugee applicant) can be relied on to rebut the presumption that a refugee who acquires (or renews) a passport issued by their country of origin and uses it to return to their country of origin has intended to avail themselves of that state's protection. The appellant asserted that the Federal Court erred in finding the RPD's decision to be unreasonable. The Federal Court found that the respondent's lack of knowledge of the Canadian immigration consequences of travelling internationally using a Colombian passport was sufficient to rebut the presumption of intent to reavail (question (1) above). With respect to the third question (question (2) above), the appellant argued that the Federal Court erred in considering the fact that the respondent obtained private security while she was in Colombia as evidence that she did not intend to reavail herself of the protection of the state.

The respondent was a minor when she arrived in Canada. She received protected person status in Canada in 2010 when she was 15 years old. She returned to Colombia five times since 2010, taking her last trip in late 2016 and early 2017, when she was a 21-year-old college student. The respondent travelled on a Colombian passport on each of these occasions. She initially used the passport that her mother had obtained for her. However, when she turned 18 during her second trip to Colombia, she applied for and received a new adult Colombian passport, returning to Canada shortly thereafter. [9] In addition to the five trips to Colombia that the respondent took after receiving protected person status, she visited Mexico, the United States and Cuba, travelling on her Colombian passport on each occasion.

The appellant applied to cease the respondent's protected person status pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*. Paragraph 108(1)(a) of the Act provides that "[a] claim for refugee protection shall be rejected, and a person is not … a person in need of protection … [if] the person has voluntarily reavailed themself of the protection of their country of nationality". The appellant asserted that the respondent had voluntarily and intentionally reavailed herself of the protection of her country of nationality by obtaining a Colombian passport and by using it to travel to Colombia and elsewhere. As a result, the appellant stated that the respondent's claim for protected person status should be deemed to have been rejected. Before the RPD, the respondent argued in particular that she did not voluntarily reavail herself of Colombia's protection under section 108 of the Act by acquiring Colombian passports and further stated that she did not avail herself of Colombia's protection while she was there since she hired armed private security guards to provide her with protection during each of her trips. The RPD noted there are three implied criteria to be considered in determining whether cessation has occurred. These are voluntariness; intention; and reavailment. The RPD agreed with the appellant's finding that the respondent had voluntarily reavailed herself of Colombia's protection as described in paragraph 108(1)(a) of the Act. The appellant's application for the cessation of the respondent's status as a protected person was therefore allowed [16] and the respondent's protection claim was deemed to have been rejected.

As for the Federal Court, it was satisfied that the RPD had reasonably found that while the respondent's acquisition of her Colombian passports was involuntary, her subsequent use of them to return to Colombia and to travel to other countries was voluntary. The Federal Court further found that the RPD had reasonably relied on the presumption of reavailment; [29] however, it observed that this presumption was a rebuttable one. The Federal Court developed its own view of section 108 of the Act and how it should operate and then applied it to the RPD's decision. In so doing, it departed from its role as a reviewing court and delved into issues that were for the RPD to consider. In the end, as mentioned above, the Federal Court granted the respondent's application.

At issue on appeal was the standard of review applicable to certified questions; whether it is reasonable for the RPD to rely on evidence of the refugee's lack of subjective (let alone any) knowledge that use of a passport confers diplomatic protection to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin has intended to

avail themselves of that state's protection and whether it is reasonable for the RPD to rely upon evidence that a refugee took measures to protect themselves against their agent of persecution (or that of their family member who is the principal refugee applicant) to rebut the presumption that a refugee who acquires (or renews) a passport issued by their country of origin and uses it to return to their country of origin has intended to avail themselves of that state's protection.

Held, the appeal should be dismissed.

In an appeal from a Federal Court decision on judicial review, the Court's task is to determine first whether the Federal Court identified the appropriate standard of review and second whether it properly applied that standard. The Federal Court correctly identified reasonableness as the standard to be applied in reviewing the RPD's cessation findings. The focus was therefore on the way that the Federal Court applied the reasonableness standard to the RPD's decision. Certified questions generally raise questions of law, including, as in this case, questions of statutory interpretation. However, the questions, as phrased by the Federal Court, required a yes or no answer. This invited correctness review. The potential misfit between reasonableness analysis and the definitive correct answer required by a certified question can, however, be avoided if the Federal Court were to formulate certified questions in a manner that asks whether a particular statutory interpretation or approach is reasonable. In this case, the second and third questions, as stated, called for a correctness response. They were therefore reformulated to ask whether the particular statutory interpretation or approach suggested by the question was or was not reasonable.

The seriousness of the impact of the RPD's decision on the respondent increased the duty on the RPD to explain its decision. In particular, the loss of refugee or protected person status unquestionably had serious consequences for the respondent and a cessation finding could not be appealed to either the Immigration Appeal Division or the RPD. The decision of the RPD was not reasonable. Many questions arose as to the proper interpretation of section 108 of the Act. The RPD simply stated its own view of what section 108 requires, without any real analysis. In broad terms, it set out the text of section 108, fastened onto the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* and then asserted its own views of what section 108 requires, without considering the text, context and purpose of section 108. It also failed to analyze and consider the Federal Court's case law in order to see whether its decision was legally constrained in any way. It then stated its conclusion on various issues but did not provide a sufficient pathway of reasoning to explain how it got there. [58] While due allowance must be made for the fact that the RPD is an administrative decision maker with its own way of dealing with and articulating legal issues, even affording that allowance to the RPD, it fell short of the mark in this case.

In the course of its reasons, the RPD made certain assertions that were, in reality, bottom-line views of what section 108 of the Act means. However, it adopted these views without conducting any statutory interpretation analysis. Key to the assessment of the reasonableness of the RPD's decision was whether it could rely on evidence of a refugee's lack of subjective knowledge that use of a passport confers diplomatic protection to rebut the presumption that a refugee who acquires and travels on a passport issued by her country of nationality has intended to avail herself of that state's protection. There were no issues respecting the first element of the test for cessation relating to the voluntariness of the individual's actions. There is a presumption that refugees who acquire and travel on passports issued by their country of nationality to travel to that country or to a third country have intended to avail themselves of the protection of their country of nationality. This is because passports entitle the holder to travel under the protection of the issuing country. This presumption is even stronger where refugees return to their country of nationality. However, the presumption is a rebuttable one. The onus is on the refugee to adduce sufficient evidence to rebut the presumption of reavailment. The RPD should therefore have carried out an individualized assessment of all of the evidence before it, including the evidence adduced by the respondent as to her subjective intent, in

determining whether the presumption of reavailment had been rebutted in this case. The respondent testified that she was not aware that using her Colombian passport to travel to Colombia and elsewhere could have consequences for her immigration status in Canada. The RPD rejected this claim, not because the respondent was not credible, but because it found that ignorance of the law was not a valid argument. The RPD should have considered not what the respondent should have known but rather whether she did subjectively intend by her actions to depend on the protection of Colombia. In order for it to make a reasonable decision, the RPD was required to take account of the state of the respondent's actual knowledge and intent before concluding that she had intended to reavail herself of Colombia's protection. The Federal Court was right in determining that without this analysis, the RPD's conclusion on reavailment was not a defensible outcome based on the constraining facts and law, and that it was thus unreasonable. The RPD also conflated the question of voluntariness with that of intention to reavail and this led, in part, to an unreasonable decision.

Key to the assessment of the reasonableness of the RPD decision was whether it could rely on evidence that the respondent took measures to protect herself against her agent of persecution while she was in Colombia to rebut the presumption of reavailment. According to the respondent, her family engaged the services of professional security guards to protect her on each of her trips to Colombia. The RPD appeared to have accepted the respondent's evidence on this point. [75] Given that the discussion with respect to the respondent's use of private security was located in the section of the RPD's reasons dealing with intention, it appeared that the RPD understood this evidence to support its conclusion that by travelling to Colombia, the respondent intended to reavail herself of that country's protection. This was an unreasonable finding: the evidence with respect to the respondent's use of private security while she was in Colombia spoke not to her intention to entrust her protection to Colombia, but was rather to the opposite effect. It was evidence of the respondent's ongoing subjective fear of the situation in Colombia and her lack of confidence in the ability of the state to protect her. While the respondent's evidence on this point was not necessarily determinative of the issue of intent, the RPD had to at least consider it properly and, if it found it not to be probative or persuasive, to explain why that was the case. Its failure to do so in this case was a further reason for concluding that the RPD's decision was unreasonable. Moreover, the RPD appeared to have considered the respondent's use of her passport to travel to Colombia as satisfying all three elements of the test for reavailment (voluntary, intentional, and actual reavailment). This approach left little room for the respondent to demonstrate that even though she had used her Colombian passport for travel, she did not intend to avail herself of the protection of that country.

The certified questions were answered in the affirmative.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(3)(f), 25(1.2)(c)(i), 40.1, 46(1)(c.1), 48(2), 63(3), 74(d), 95(1), 101(1)(b), 108, 110(2), 112(2)(b.1).

Protecting Canada's Immigration System Act, S.C. 2012, c. 17, ss. 18, 19.

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, 189 U.N.T.S. 137, Art. 1C(1)

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653, affg 2017 FCA 132, [2018] 3 F.C.R. 75; *Newfoundland and Labrador Nurses' Union v.*

Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3.

CONSIDERED:

Canada (Citizenship and Immigration) v. Tobar Toledo, 2013 FCA 226, [2015] 1 F.C.R. 215; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113, [2015] 1 F.C.R. 335; *Ortiz Garcia v. Canada (Citizenship and Immigration)*, 2011 FC 1346.

REFERRED TO:

Hilo v. Canada (Minister of Employment and Immigration) (1991), 15 Imm. L.R. (2d) 199, 130 N.R. 236 (F.C.A.); *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, [2021] 1 F.C.R. 271; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, [2019] 2 F.C.R. D-3; *Canada (Citizenship and Immigration) v. Nilam*, 2015 FC 1154; *Li v. Canada (Citizenship and Immigration)*, 2015 FC 459, 479 F.T.R. 22; *Cerna v. Canada (Citizenship and Immigration)*, 2015 FC 1074, 258 A.C.W.S. (3d) 156; *Mayell v. Canada (Citizenship and Immigration)*, 2018 FC 139, 289 A.C.W.S. (3d) 601; *Sexsmith v. Canada (Attorney General)*, 2021 FCA 111, [2021] 2 F.C.R. D-1; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754.

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).

APPEAL from a Federal Court decision (2020 FC 213, [2020] 2 FCR 575) setting aside a decision of the Refugee Protection Division of the Immigration and Refugee Board finding that the respondent, a person in need of protection in Canada, intended to reavail herself of the protection of the Colombian government. Appeal dismissed.

APPEARANCES

Michael Butterfield and *Nicole Rahaman* for appellant.

Mario D. Bellissimo, C.S. and *Justin Jian-Yi Toh, J.D.* for respondent.

Anthony Navaneelan and *Benjamin Liston* for intervener United Nations High Commissioner For Refugees.

Lorne Waldman and *Sumeya Mulla* for intervener Canadian Association of Refugee Lawyers.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Bellissimo Law Group Professional Corporation,Toronto, for respondent.

United Nations High Commissioner for Refugees and *Legal Aid Ontario Refugee Law Office*

Toronto, for intervener United Nations High Commissioner For Refugees.

Waldman & Associates, Toronto, for intervener Canadian Association of Refugee Lawyers.

The following are the reasons for judgment rendered in English by

[1] MACTAVISH J.A.: Maria Camila Galindo Camayo is a citizen of Colombia. As a child, she and members of her family were found to be people in need of protection in Canada, based upon her mother having been targeted for extortion by the Fuerzas Armadas Revolucionarias de Colombia.

[2] When it came to the attention of the Minister of Citizenship and Immigration that Ms. Galindo Camayo had used a Colombian passport to take numerous trips to Colombia and other countries, the Minister commenced an application for the cessation of her protected person status. The Refugee Protection Division (RPD) of the Immigration and Refugee Board found that Ms. Galindo Camayo had voluntarily reavailed herself of the diplomatic protection of Colombia. As a result, the Minister's application was granted, and Ms. Galindo Camayo's claim for protection was deemed to have been rejected.

[3] In reasons reported as 2020 FC 213, [2020] 2 F.C.R. 575, the Federal Court set aside the RPD's decision on the basis that the RPD's finding that Ms. Galindo Camayo intended to reavail herself of the protection of the Colombian government was unreasonable. The Federal Court ordered that the matter be remitted to a differently constituted RPD panel for redetermination. The Federal Court did, however, certify the following questions [at paragraph 56]:

(1) Where a person is recognized as a Convention refugee or a person in need of protection by reason of being listed as a dependant on an inland refugee claim heard before the Refugee Protection Division (RPD), but where the RPD's decision to confer protection does not confirm that an individual or personalized risk assessment of the dependant was performed, is that person a Convention refugee as contemplated in subsection 95(1) of the [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA")] and therefore subject to cessation of refugee status pursuant to subsection 108(2) of the IRPA?

(2) If yes to Question 1, can evidence of the refugee's lack of subjective (let alone any) knowledge that use of a passport confers diplomatic protection be relied on to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin to travel to a third country has intended to avail themselves of that state's protection?

(3) If yes to Question 1, can evidence that a refugee took measures to protect themselves against their agent of persecution (or that of their family member who is the principal refugee applicant) be relied on to rebut the presumption that a refugee who acquires (or renews) a passport issued by their country of origin and uses it to return to their country of origin has intended to avail themselves of that state's protection?

[4] I understand from the parties that the first question is no longer in issue as this Court has previously held that a minor who obtains refugee protection as a dependant under a parent's claim is indeed subject to the same immigration consequences as the parent claimant: *Canada (Minister of Citizenship and Immigration) v. Tobar Toledo*, 2013 FCA 226, [2015] 1 F.C.R. 215.

[5] Insofar as the second question is concerned, the Minister asserts that the Federal Court erred in finding the RPD's decision to be unreasonable. The Federal Court found that Ms. Galindo Camayo's lack of knowledge of the Canadian immigration consequences of travelling internationally using a Colombian passport was sufficient to rebut the presumption of intent to reavail. According to the Minister, the state of the individual's knowledge is not the legal test for cessation nor is it a factor for consideration under that test.

[6] With respect to the third question, the Minister observes that refugee protection is available to individuals who can establish on a balance of probabilities that they would be at risk of facing persecutory treatment in their country of nationality. Implicit in such a finding is that the person cannot protect themselves from their agent of persecution or obtain such protection anywhere in that country. It is therefore inconsistent with a finding that a person is in need of protection for the individual to later claim that they are able to protect themselves sufficiently as to allow them to return to their country of nationality. The Minister says that the Federal Court thus erred in considering the fact that Ms. Galindo Camayo obtained private security while she was in Colombia as evidence that she did not intend to reavail herself of the protection of the state.

[7] For the reasons that follow, I have concluded that the Federal Court did not err in finding that the Board's decision was unreasonable. Consequently, I would dismiss the appeal. I would only answer the second and third questions and I would answer them in the affirmative.

I. Background

[8] Ms. Galindo Camayo was a minor when she arrived in Canada. She received protected person status in Canada in 2010, when she was 15 years old (for the sake of simplicity, the terms "person in need of protection", "protected person", and "refugee" will be used interchangeably in these reasons). Ms. Galindo Camayo returned to Colombia five times since 2010, taking her last trip in late 2016 and early 2017, when she was a 21-year-old college student.

[9] Ms. Galindo Camayo travelled on a Colombian passport on each of these occasions. She initially used the passport that her mother had obtained for her. However, she turned 18 during her second trip to Colombia and she was advised by Colombian authorities that she had to apply for an adult passport in order to be able to return to Canada. Ms. Galindo Camayo received a new adult Colombian passport in August of 2013, returning to Canada shortly thereafter.

[10] In addition to the five trips to Colombia that Ms. Galindo Camayo took after receiving protected person status, she visited Mexico three times, and she took trips to the United States and Cuba. Ms. Galindo Camayo travelled on her Colombian passport on each occasion.

[11] On January 27, 2017, the Minister applied to cease Ms. Galindo Camayo's protected person status, pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). Subsection 108(2) provides that "[o]n application by the Minister, the Refugee Protection Division may determine that refugee protection … has ceased for any of the reasons described in subsection (1)".

[12] Paragraph 108(1)(a) of IRPA provides that "[a] claim for refugee protection shall be rejected, and a person is not … a person in need of protection … [if] the person has voluntarily reavailed themself of the protection of their country of nationality". The full text of these and other relevant statutory provisions is attached as an appendix to these reasons.

[13] The Minister asserts that Ms. Galindo Camayo had voluntarily and intentionally reavailed herself of the protection of her country of nationality by obtaining a Colombian passport and by using it to travel to Colombia and elsewhere. As a result, the Minister says that Ms. Galindo Camayo's claim for protected person status should be deemed to have been rejected.

II. The RPD's Decision

[14] Ms. Galindo Camayo argued before the RPD that she did not voluntarily reavail herself of Colombia's protection under section 108 of IRPA by acquiring Colombian passports. It was her mother, and not Ms. Galindo Camayo herself, who had applied for her first passport while she was still a minor, and Ms. Galindo Camayo was compelled to obtain her second Colombian passport in 2013 in order to be able to return to Canada.

[15] Ms. Galindo Camayo testified that she travelled to Colombia to assist her sick father and to volunteer for a humanitarian mission, and that she did not understand the

consequences of her travel for her status in Canada. Ms. Galindo Camayo further stated that she did not avail herself of Colombia's protection while she was there, as she hired armed private security guards to provide her with protection during each of her trips.

[16] The RPD agreed with the Minister, finding that Ms. Galindo Camayo had voluntarily reavailed herself of Colombia's protection as described in paragraph 108(1)(a) of IRPA. The Minister's application for the cessation of Ms. Galindo Camayo's status as a protected person was therefore allowed, and her claim for protection was deemed to have been rejected in accordance with subsection 108(3) of IRPA.

[17] In coming to the conclusion that the Minister's application should be granted, the RPD only focused on the cessation principles discussed in the *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) (Refugee Handbook). Although it acknowledged (at paragraph 19) that it was "not bound" by the Refugee Handbook and the guidelines set out in it, the RPD found them "useful and relevant".

[18] The RPD noted that in accordance with Article 1C(1) of the 1951 *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6, 189 U.N.T.S. 137 (Refugee Convention) there are three implied criteria to be considered in determining whether cessation had occurred. These are:

(1) Voluntariness: The refugee must have acted voluntarily;

(2) Intention: The refugee must have intended by his or her actions to reavail him or herself of the protection of their country of nationality; and

(3) Reavailment: The refugee must actually obtain state protection.

[19] In reality, when the RPD decision is examined in its totality in light of the record before it, it is clear that the RPD fastened onto the Refugee Handbook and the particular wording of the Refugee Handbook as if it was domestic law that was binding

on the RPD. At paragraph 17 of its reasons, the RPD set out the text of section 108 of IRPA, but it did not interpret it. Indeed, at no time did the RPD attempt to interpret section 108 by examining its text, context and purpose.

[20] Accepting that on a proper interpretation of section 108 of IRPA the three criteria of voluntariness, intention and reavailment are part of the inquiry required by law, what do these terms mean? For example, what acts or statements are relevant to voluntariness or intention?

[21] The questions can multiply and become more focused, especially in a fact-laden case such as the one at bar. Is the RPD to look solely at the actual subjective intention of the relevant individual and accept it, or is the RPD able to import an objective element into the analysis, such as the reasonableness of the actions and intentions of the relevant individual? These and other questions that can arise in a particular case involve questions of statutory interpretation: exactly when does section 108, properly interpreted, apply to allow the RPD to deem a person's claim for refugee protection to have been rejected?

[22] Insofar as the question of voluntariness was concerned, the RPD accepted that Ms. Galindo Camayo did not act voluntarily in obtaining her Colombian passports. Her first passport was acquired by her mother when she was a minor, which was a matter outside Ms. Galindo Camayo's control, and she was compelled to obtain her second Colombian passport in order to be able to leave the country.

[23] The RPD asserted, however, without any analysis of the requirements of section 108, that the acquisition of passports is not the only relevant factor to consider in assessing the voluntariness of Ms. Galindo Camayo's actions, and that her use of those passports also had to be considered. In this regard, the RPD found that Ms. Galindo Camayo acted voluntarily when she used her Colombian passports to travel to Colombia, Mexico, Cuba and the United States between 2012 and 2016, and there was insufficient evidence before it to establish that Ms. Galindo Camayo was compelled to use her Colombian passports to take any of these trips.

[24] With respect to the question of Ms. Galindo Camayo's intention in using her Colombian passports, the RPD was concerned with respect to her evidence regarding the need for her to care for her father in Colombia. It observed that Ms. Galindo Camayo's father (who was a permanent resident of Canada) was actually in Canada during one of the periods that Ms. Galindo Camayo was in Colombia, purportedly caring for him there, and that he had visited Canada on numerous other occasions. The RPD further noted that Ms. Galindo Camayo claimed that her father had stayed in Colombia rather than come to Canada with the rest of his family, as he did not want to impose a burden on his family. It found, however, that this assertion was undermined by the fact that her father's conduct regularly exposed Ms. Galindo Camayo to a dangerous situation in Colombia, thus imposing a significant burden on her.

[25] Notwithstanding its concerns with respect to Ms. Galindo Camayo's evidence on this point, the RPD did not find in clear and unmistakeable terms that her evidence lacked credibility: *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, 15 Imm. L.R. (2d) 199 (F.C.A.). Thus, the facts the RPD had to work with were those presented by the parties, and the case turned solely on whether the facts met the requirements of section 108.

[26] In the course of its reasons, the RPD made certain assertions that were, in reality, bottom-line views of what section 108 means. I will return to these assertions later on in these reasons.

[27] The RPD thus found that the Minister had established that Ms. Galindo Camayo had acted voluntarily when she used her Colombian passports to travel to Colombia, Mexico, Cuba and the United States between 2012 and 2016. The Minister had further established that Ms. Galindo Camayo had intended by her actions to reavail herself of Colombia's protection as contemplated by paragraph 108(1)(a) of IRPA, and that she had in fact done so.

[28] Consequently, the RPD allowed the Minister's application for cessation and Ms. Galindo Camayo's protection claim was deemed to have been rejected.

III. The Federal Court's Decision

[29] The Federal Court was satisfied that the RPD had reasonably found that while Ms. Galindo Camayo's acquisition of her Colombian passports was involuntary, her subsequent use of them to return to Colombia and to travel to other countries was voluntary. The Federal Court further found that the RPD had reasonably relied on the presumption of reavailment—both with respect to Ms. Galindo Camayo's intention to reavail, and whether she actually had reavailed. The RPD also observed that the presumption of reavailment arises when a protected person acquires, renews, or uses a passport issued by their country of nationality.

[30] However, the Federal Court observed that the presumption of reavailment is a rebuttable one. The RPD thus had to consider whether Ms. Galindo Camayo had rebutted the presumption in this case. The Federal Court identified the question for determination as being whether the RPD had reasonably considered Ms. Galindo Camayo's subjective intent to reavail and her efforts to obtain private security to protect her during her visits to Colombia as evidence that could rebut the presumption of reavailment.

[31] The Federal Court noted that the outcome in each cessation case will be largely fact-dependent. However, by interpreting Ms. Galindo Camayo's use of her passport as satisfying all three essential and conjunctive elements of the reavailment test (voluntary, intentional, and actual reavailment), no room was left for Ms. Galindo Camayo to demonstrate that despite her acquisition and use of her Colombian passport, she did not intend to avail herself of the protection of the state. In other words, intention in the cessation context cannot be based solely on intending to complete the underlying act itself; one also has to understand the consequences of one's actions.

[32] As can be seen, the Federal Court developed its own view of section 108 and how it should operate, and then applied it to the RPD's decision. In so doing, it departed from its role as a reviewing court and delved into issues that were for the RPD to consider.

[33] In the end result, the Federal Court granted Ms. Galindo Camayo's application for judicial review, certifying the three questions identified at the beginning of these reasons.

IV. The Certified Questions and the Standard of Review

[34] As noted earlier, the first of the questions certified by the Federal Court is no longer in issue. The second question was not appropriate for certification in its original form, as its premise does not fully accord with the facts of this case.

[35] It will be recalled that the second question certified by the Federal Court was:

> If yes to Question 1, can evidence of the refugee's lack of subjective (let alone any) knowledge that use of a passport confers diplomatic protection be relied on to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin to travel to a third country has intended to avail themselves of that state's protection? [My emphasis]

[36] It is undisputed that Ms. Galindo Camayo did not just use her Colombian passport to travel to third countries, but that she also used it to travel to Colombia on five separate occasions. Consequently, I would first reformulate this question as follows:

> Can evidence of the refugee's lack of subjective (let alone any) knowledge that use of a passport confers diplomatic protection be relied on to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin has intended to avail themselves of that state's protection?

[37] It is well established that the certification requirement in subsection 74(d) of IRPA is to serve as a control on the types of cases that can be placed before this Court. However, once a question is certified for the consideration of this Court, this Court is entitled to deal with all of the issues that arise in the appeal: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, [2021] 1 F.C.R. 271, at paragraph 28; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344, at paragraph 50.

[38] Often, as here, the central issue before the reviewing court is whether the RPD's decision was reasonable. In an appeal from a decision of the Federal Court in an application for judicial review, this Court's task is to determine first, whether the Federal Court identified the appropriate standard of review, and second, whether it properly applied that standard: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585, at paragraph 10; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45–47. This has often been described as requiring that this Court "step into the shoes" of the Federal Court judge, and focus on the administrative decision. This is the approach to be followed even where the Court is dealing with questions of general importance that have been certified by the Federal Court: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 (*Kanthasamy SCC*), at paragraph 44.

[39] I understand the parties and the interveners to agree that the Federal Court correctly identified reasonableness as the standard to be applied in reviewing the RPD's cessation findings. The focus is therefore on the way that the Federal Court applied the reasonableness standard to the RPD's decision.

[40] However, the fact that we have certified questions before us gives rise to an awkward situation. Certified questions generally raise questions of law, including, as in this case, questions of statutory interpretation. However, the questions, as phrased by the Federal Court, require a yes or no answer. This invites correctness review by this Court. That said, as described above, this Court is required to engage in reasonableness review on questions of statutory interpretation. This creates the possibility that, in some cases, this Court may find the RPD's interpretation of a statutory provision to be reasonable, yet this Court may say something entirely different in providing its own view of the matter in answering the certified question—something that the Supreme Court expressly tells us not to do: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov SCC*), at paragraph 83, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (*Delios*), at paragraph 28.

[41] This Court raised this awkward situation—the misfit between answering the certified question properly and conducting reasonableness review—in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113, [2015] 1 F.C.R. 335, at paragraphs 30–37. One solution suggested by this Court in *Kanthasamy* was to regard the Court's need to answer certified questions as a statutory indication that correctness should be the standard of review. This solution would seem to gain greater credence now that the Supreme Court has held that statutory standards can have a bearing on the standard of review: *Vavilov SCC*, at paragraphs 34–35.

[42] Nevertheless, the Supreme Court subsequently confirmed that certified questions are not decisive of the standard of review, and that reasonableness should remain the standard of review applied by this Court: see *Kanthasamy SCC*, above, at paragraphs 43–44. The Supreme Court appeared to recognize that this effectively renders the answer to the certified question mere surplusage, relegating the role of such questions to fulfilling a gatekeeping function.

[43] This situation was replicated in *Vavilov*. The certified question in *Vavilov v. Canada (Citizenship and Immigration)*, 2017 FCA 132, [2018] 3 F.C.R. 75 posed a yes-no question. This Court conducted a reasonableness review of the administrative decision but gave a precise answer, akin to a correctness review answer, to the question. In dismissing the appeal, the Supreme Court in effect ratified how this Court approached the certified question.

[44] The potential misfit between reasonableness analysis and the definitive correct answer required by a certified question can, however, be avoided if the Federal Court were to formulate certified questions in a manner that asks whether a particular statutory interpretation or approach is reasonable. In this case, the second and third questions, as stated, call for a correctness response. I would therefore amend them to ask whether the particular statutory interpretation or approach suggested by the question is or is not reasonable.

[45] Consequently, I have reformulated the second and third questions as follows:

(2) Is it reasonable for the RPD to rely on evidence of the refugee's lack of subjective (let alone any) knowledge that use of a passport confers diplomatic protection to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin has intended to avail themselves of that state's protection?

(3) Is it reasonable for the RPD to rely upon evidence that a refugee took measures to protect themselves against their agent of persecution (or that of their family member who is the principal refugee applicant) to rebut the presumption that a refugee who acquires (or renews) a passport issued by their country of origin and uses it to return to their country of origin has intended to avail themselves of that state's protection?

V. What makes a Decision Reasonable?

[46] The Supreme Court stated in *Vavilov* that "[r]easonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law": *Vavilov SCC*, above, at paragraph 82.

[47] Reasonableness review involves both an assessment of the outcome of the case and of the reasoning process leading to that outcome: *Vavilov SCC*, above, at paragraph 83. The Supreme Court further affirmed that it is not sufficient for the outcome of a decision to be justifiable. Where reasons are required, the decision must also be justified by the decision maker to those to whom the decision applies: *Vavilov SCC*, above, at paragraph 86.

[48] *Vavilov* teaches that reasons "must not be assessed against a standard of perfection" and that administrative decision makers should not be held to the "standards of academic logicians": *Vavilov SCC*, above, at paragraphs 91 and 104. Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis": *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (*Newfoundland*

Nurses), at paragraph 25; *Vavilov SCC*, above, at paragraph 128. Nor are they required to "make an explicit finding on each constituent element, however subordinate, leading to [their] final conclusion": *Newfoundland Nurses*, above, at paragraph 16.

[49] That said, reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable": *Vavilov SCC*, above, at paragraph 81. The principles of justification and transparency thus require that administrative decision makers' reasons "meaningfully account for the central issues and concerns raised by the parties": *Vavilov SCC*, above, at paragraph 127. The failure of a decision maker 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": *Vavilov SCC*, above, at paragraph 128. As a result, "where reasons are provided but they fail to provide a transparent and intelligible justification ... the decision will be unreasonable": *Vavilov SCC*, above, at paragraph 136.

[50] Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The 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 SCC*, above, at paragraph 133. The failure to grapple with the consequences of a decision should thus be considered: *Vavilov SCC*, above, at paragraph 134, citing *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

[51] In this case, the seriousness of the impact of the RPD's decision on Ms. Galindo Camayo increases the duty on the RPD to explain its decision. Specifically:

a) The loss of refugee or protected person status unquestionably has serious consequences for the affected individual and persons like her, and legislative changes have made those consequences harsher in the last decade. In the past, protected persons who became permanent residents and who were then subject to cessation findings were able to maintain their permanent resident

status in Canada. However, with changes brought about by the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17, sections 18 and 19, this is no longer the case.

b) Moreover, a cessation finding cannot be appealed to either the Immigration Appeal Division or the Refugee Appeal Division of the Immigration and Refugee Board: IRPA, subsections 63(3) and 110(2). Individuals whose refugee protection has been ceased are also barred from seeking a Pre-removal Risk Assessment or an application for permanent residence on humanitarian and compassionate grounds for at least one year: IRPA, sections 25(1.2)(c)(i), 40.1, 46(1)(c.1), 63(3), 101(1)(b), 108(3), 110(2), and 112(2)(b.1). They are also inadmissible to Canada for an indeterminate period: IRPA, subsection 40.1(2) and paragraph 46(1)(c.1), and are subject to removal from Canada "as soon as possible": IRPA, subsection 48(2).

[52] Where, as here, the administrative decision maker has to deal with issues of statutory interpretation, certain additional considerations must be kept in mind by both the administrative decision maker and the reviewing court.

[53] First, the administrative decision maker must deal with any statutory interpretation issues by examining the text, context and purpose of the relevant provisions. Its analysis need not be the sort of formalistic statutory interpretation exercise that a court would perform: *Vavilov SCC*, above, at paragraphs 92 and 119; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3, at paragraph 39. Due allowance must be made for the fact that Parliament has given the responsibility to interpret the statutory provisions to an administrative decision maker, not a court, and certainly not to the reviewing court.

[54] Second, in conducting reasonableness review, a reviewing court must be on guard not to engage in what is called "disguised correctness" review. It should not interpret the statutory provision itself and then use its own interpretation as a yardstick to measure the interpretation reached by the administrative decision maker: *Delios*, above, at paragraph 28; *Mason*, above, at paragraph 12. Reviewing courts can adopt

specific techniques to avoid doing this: *Mason*, above, at paragraphs 15–20, citing *Hillier v. Canada (Attorney General)*, 2019 FCA 44, [2019] 2 F.C.R. D-3, at paragraphs 13–17.

[55] Third, largely in pre-*Vavilov* jurisprudence, the Federal Court has offered interpretations of section 108 that shed light on when cessation under section 108 will be warranted. While in some cases, decisions of the Federal Court disagree with each other, it must again be remembered that under *Vavilov*, the Federal Court is not the body that interprets section 108. Rather, it is restricted to the role of a reviewing court.

[56] Nevertheless, the leading interpretations of section 108 offered by the Federal Court that are relevant to the case at hand should be considered and assessed by the RPD, with supporting reasoning. As a general matter, judicial interpretations of statutory provisions bind the RPD unless the RPD can distinguish them or explain why a departure from them is warranted.

[57] In the end result, in cases where the administrative decision maker has to consider the proper meaning of a statutory provision, the reviewing court must be satisfied that the administrative decision maker is "alive [either implicitly or explicitly] to [the] essential elements" of text, context and purpose and has touched on at least "the most salient aspects of the text, context [and] purpose": *Vavilov SCC*, above, at paragraphs 120–122; *Mason*, above, at paragraph 42.

VI. Was the RPD's Decision Reasonable?

[58] In my view, the decision of the RPD was not reasonable. As set out above, many questions arise as to the proper interpretation of section 108 of IRPA. The RPD simply stated its own view of what section 108 requires, without any real analysis. In broad terms, it set out the text of section 108, fastened onto the Refugee Handbook, and then asserted its own views of what section 108 requires, without considering the text, context and purpose of section 108. It also failed to analyze and consider the Federal Court's jurisprudence in order to see whether its decision was legally constrained in any

way. It then stated its conclusion on various issues, but did not provide a sufficient pathway of reasoning to explain how it got there.

[59] In saying this, I recognize that due allowance must be made for the fact that the RPD is an administrative decision maker, often staffed by lay people, with its own way of dealing with and articulating legal issues. That said, even affording that allowance to the RPD, it fell short of the mark in this case.

(a) *The Interpretation of Section 108 of IRPA*

[60] In the course of its reasons, the RPD made certain assertions that were, in reality, bottom-line views of what section 108 of IRPA means. However, it adopted these views without conducting any statutory interpretation analysis. Examples include the following:

(a) The RPD rejected Ms. Galindo Camayo's claim that she was unaware of the potential consequences of using her Colombian passport. Noting that ignorance of the law was no excuse, the RPD observed that Ms. Galindo Camayo was an educated, sophisticated adult who could have sought information about the steps that she needed to take to secure her status in Canada. At root here was the bare assertion that ignorance of the law is no excuse under section 108, an assertion adopted without any statutory interpretation analysis.

(b) Referring to Ms. Galindo Camayo's evidence that she had engaged private security to protect her while she was in Colombia, the RPD stated that Ms. Galindo Camayo knew enough about the threats or harm that she faced in that country to hire private security to accompany her while she was there. According to the RPD, this indicated that Ms. Galindo Camayo recognized the dangers associated with travel to Colombia. However, the RPD never explains what the legal relevance of this was for the analysis under section 108. An interpretation of section 108 in light of its text, context and purpose would have assisted in this regard.

(c) The RPD noted that refugee protection lasts only as long as the reasons for fearing persecution in the country of nationality persist. It accepted that merely obtaining a Colombian passport may not, by itself, be evidence of an individual's intent to use it. However, Ms. Galindo Camayo's repeated use of her Colombian passport to visit Colombia and other countries was an indication that she intended to travel under the protection of the Colombian government and that she intended to reavail herself of the protection afforded her by her Colombian passport. However, the leap from merely carrying a Colombian passport to a finding that Ms. Galindo Camayo intended to reavail herself of the protection of the Colombian government was unexplained. The RPD's reasoning implies some undisclosed and unexplained understanding of what "intention" means, and by extension, an undisclosed and unexplained interpretation of section 108 of IRPA.

(d) Finally, insofar as actual reavailment was concerned, the RPD found that Ms. Galindo Camayo's years of travel to third countries on Colombian passports (where she could seek the assistance of the Colombian government if something went wrong), and her repeated trips to Colombia for reasons that were neither necessary nor compelling, demonstrated that she had actually reavailed herself of Colombia's protection. This involved an unexplained determination of what falls within or outside section 108, and, more particularly, the meaning of the elements of intention, voluntariness and reavailment.

(b) *The Significance of the State of a Protected Person's Knowledge with Respect to the Immigration Consequences of Their Actions*

[61] Key to the assessment of the reasonableness of the RPD's decision is whether it could rely on evidence of a refugee's lack of subjective knowledge that use of a passport confers diplomatic protection to rebut the presumption that a refugee who acquires and travels on a passport issued by her country of nationality has intended to avail herself of that state's protection. On this point, there is jurisprudence in the Federal Courts that constrains the RPD's decision-making in this area.

[62] It will be recalled that the first element of the test for cessation relates to the voluntariness of the individual's actions. The RPD found that Ms. Galindo Camayo did not act voluntarily when she obtained and renewed her Colombian passports, but that she did act voluntarily when she used those passports to return to Colombia. No issue has been taken with respect to this latter finding. The question for the RPD then was whether Ms. Galindo Camayo intended by her actions to reavail herself of Colombia's protection.

[63] As noted earlier, there is a presumption that refugees who acquire and travel on passports issued by their country of nationality to travel to that country or to a third country have intended to avail themselves of the protection of their country of nationality. This is because passports entitle the holder to travel under the protection of the issuing country. This presumption is even stronger where refugees return to their country of nationality, as they are not only placing themselves under diplomatic protection while travelling, they are also entrusting their safety to governmental authorities upon their arrival.

[64] As the Federal Court observed in *Ortiz Garcia v. Canada (Citizenship and Immigration)*, 2011 FC 1346, "[r]eavailment typically suggests an absence of risk or a lack of subjective fear of persecution. Absent compelling reasons, people do not abandon safe havens to return to places where their personal safety is in jeopardy": at paragraph 8.

[65] Constraining case law from the Federal Court, suggests, however, that the presumption is a rebuttable one. The onus is on the refugee to adduce sufficient evidence to rebut the presumption of reavailment: *Canada (Citizenship and Immigration) v. Nilam*, 2015 FC 1154, at paragraph 26; *Li v. Canada (Citizenship and Immigration)*, 2015 FC 459, 479 F.T.R. 22, at paragraph 42.

[66] The RPD should therefore have carried out an individualized assessment of all of the evidence before it, including the evidence adduced by the refugee as to her subjective intent, in determining whether the presumption of reavailment has been rebutted in this case.

[67] Ms. Galindo Camayo testified that she was not aware that using her Colombian passport to travel to Colombia and elsewhere could have consequences for her immigration status in Canada. The RPD rejected this claim, not because Ms. Galindo Camayo was not credible, but because it found that ignorance of the law was not a valid argument. The RPD noted that Ms. Galindo Camayo 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. With respect, this misses the point.

[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.

[69] The Minister contends that the cessation provisions of IRPA would be stripped of any meaning if it was sufficient for an individual faced with a cessation application to simply state that they did not know that their actions could put their status in Canada in jeopardy. Not only did the Federal Court explicitly reject this argument, it also overstates the issue.

[70] An individual's lack of actual knowledge of the immigration consequences of their actions may not be determinative of the question of intent. It is, however, a key factual consideration that the RPD must either weigh in the mix with all of the other evidence, or properly explain why the statute excludes its consideration.

[71] In order for it to make a reasonable decision, the RPD was required to take account of the state of Ms. Galindo Camayo's actual knowledge and intent before concluding that she had intended to reavail herself of Colombia's protection. I agree with the Federal Court that without this analysis, the RPD's conclusion on reavailment

was not a defensible outcome based on the constraining facts and law, and that it was thus unreasonable: *Cerna v. Canada (Citizenship and Immigration)*, 2015 FC 1074, at paragraphs 18–19; *Mayell v. Canada (Citizenship and Immigration)*, 2018 FC 139, at paragraphs 17–19.

[72] The RPD also conflated the question of voluntariness with that of intention to reavail and this led, in part, to an unreasonable decision. Much of the RPD's analysis of the intention issue is taken up with an examination of the reasons cited by Ms. Galindo Camayo for returning to Colombia. I agree with Ms. Galindo Camayo 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: Federal Court decision, at paragraph 31.

(c) *The Significance of the Fact that Ms. Galindo Camayo Took Measures to Protect Herself in Colombia*

[73] Key to the assessment of the reasonableness of the RPD decision is whether it could rely on evidence that Ms. Galindo Camayo took measures to protect herself against her agent of persecution while she was in Colombia to rebut the presumption of reavailment.

[74] According to Ms. Galindo Camayo, her family engaged the services of professional security guards to protect her on each of her trips to Colombia, and documentary evidence from security companies was provided to support her evidence in this regard.

[75] The RPD appears to have accepted Ms. Galindo Camayo's evidence on this point. It found however that while she might not have been fully aware of the reasons why her family had fled Colombia, Ms. Galindo Camayo knew enough about the dangers associated with travel to Colombia to engage private security personnel to accompany her while she was there.

[76] Given that the discussion with respect to Ms. Galindo Camayo's use of private security takes place in the section of the RPD's reasons dealing with intention, it

appears that the RPD understood this evidence to support its conclusion that by travelling to Colombia, Ms. Galindo Camayo intended to reavail herself of that country's protection.

[77] I agree with Ms. Galindo Camayo that this was an unreasonable finding: the evidence with respect to her use of private security while she was in Colombia speaks not to her intention to entrust her protection to Colombia, but is, rather, to the opposite effect. It is evidence of Ms. Galindo Camayo's ongoing subjective fear of the situation in Colombia, and her lack of confidence in the ability of the state to protect her.

[78] Once again, Ms. Galindo Camayo's evidence on this point was not necessarily determinative of the issue of intent, and it was open to the RPD to reject it. However, it had to at least consider it properly and, if it found it not to be probative or persuasive, to explain why that was the case. Its failure to do so in this case is a further reason for concluding that the RPD's decision was unreasonable.

[79] Before concluding this portion of these reasons, I would note that the RPD appears to have considered Ms. Galindo Camayo's use of her passport to travel to Colombia as satisfying all three elements of the test for reavailment (voluntary, intentional, and actual reavailment). This is evident from paragraph 22 of its reasons, where it found that Ms. Galindo Camayo's use of her Colombian passport for travel was voluntary. Similarly, at paragraph 31 of its reasons the RPD found that Ms. Galindo Camayo's use of her Colombian passport showed her intention to travel under the protection of Colombia, and paragraph 34 of its reasons, where the RPD found that Ms. Galindo Camayo's use of her Colombian passport to travel to Colombia and elsewhere was evidence of actual reavailment. This approach left little room for Ms. Galindo Camayo to demonstrate that even though she had used her Colombian passport for travel, she did not intend to avail herself of the protection of that country.

VI. Some Final Comments

[80] This case represents the first opportunity that our Court has had to deal with a cessation case since the Supreme Court's decision in *Vavilov*. As such, the RPD may

benefit from our guidance in this area. It would also be unfortunate if we remitted this case for redetermination and the RPD was to repeat some of the errors that occurred in this case, potentially leading to the “endless merry-go-round of judicial reviews and subsequent reconsiderations” that the Supreme Court cautioned against in *Vavilov*: above, at paragraph 142.

[81] It should be noted, however, that in providing this guidance, the Court is not recommending or suggesting any outcome one way or the other in relation to the cessation application involving Ms. Galindo Camayo. The merits of the redetermination are for the RPD to determine.

[82] As noted earlier, the RPD’s reasons on the redetermination need not involve a microscopic examination of everything that could possibly be said on the matter. There need only be a reasoned explanation concerning the relevant evidence and key issues, including the key arguments made by the parties: *Sexsmith v. Canada (Attorney General)*, 2021 FCA 111, [2021] 2 F.C.R. D-1, at paragraph 36.

[83] Moreover, as the Federal Court observed in this case, the outcome in each cessation proceeding will be largely fact-dependent. I further agree with the submission of the intervener, United Nations High Commissioner for Refugees, that the test for cessation should not be applied in a mechanistic or rote manner. The focus throughout the analysis should be on whether the refugee’s conduct—and the inferences that can be drawn from it—can reliably indicate that the refugee intended to waive the protection of the country of asylum.

[84] Thus, in dealing with cessation cases, the RPD should have regard to the following factors, at a minimum, which may assist in rebutting the presumption of reavailment. No individual factor will necessarily be dispositive, and all of the evidence relating to these factors should be considered and balanced in order to determine whether the actions of the individual are such that they have rebutted the presumption of reavailment.

- The provisions of subsection 108(1) of IRPA, which operate as a constraint on the RPD in arriving at a reasonable decision: *Vavilov SCC*, above, at paragraphs 115–124;

- The provisions of international conventions such as the Refugee Convention and guidelines such as the Refugee Handbook, as international law operates as an important constraint on administrative decision makers such as the RPD. Legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with the values and principles of customary and conventional international law": *Vavilov SCC*, above, at paragraph 114, citing *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at paragraph 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paragraph 40; see also IRPA, paragraph 3(3)(f).

- The severity of the consequences that a decision to cease refugee protection will have for the affected individual. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes: *Vavilov SCC*, above, at paragraphs 133–135;

- The submissions of the parties. The principles of justification and transparency require that an administrative decision maker's reasons meaningfully engage with the central issues and the concerns raised by the parties: *Vavilov SCC*, above, at paragraphs 127–128;

- The state of the individual's knowledge with respect to the cessation provisions. Evidence that a person has returned to her country of origin in the full knowledge that it may put her refugee status in jeopardy may potentially have different significance than evidence that a person is unaware of the potential consequences of her actions;

- The personal attributes of the individual such as her age, education and level of sophistication;

- The identity of the agent of persecution. That is, does the individual fear the government of her country of nationality or does she claim to fear a non-state actor? Evidence that a person who claims to fear the government of her country of nationality nevertheless discloses her whereabouts to that same government by applying for a passport or entering the country may be interpreted differently than evidence with respect to individuals seeking passports who fear non-state actors. In this latter situation, applying for a passport or entering the country will not necessarily expose the individual to their agent of persecution. This may be especially so when all the individual has done is apply for a passport: applying for a passport may have little bearing on the risk faced by a victim of domestic violence, for example, or her level of subjective fear;

- Whether the obtaining of a passport from the country of origin is done voluntarily;

- Whether the individual actually used the passport for travel purposes. If so, was there travel to the individual's country of nationality or to third countries? Travel to the individual's country of nationality may, in some cases, be found to have a different significance than travel to a third country;

- What was the purpose of the travel? The RPD may consider travel to the country of nationality for a compelling reason such as the serious illness of a family member to have a different significance than travel to that same country for a more frivolous reason such as a vacation or a visit with friends;

- The frequency and duration of the travel;

- What the individual did while in the country in question;

- Whether the individual took any precautionary measures while she was in her country of nationality. 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;

- Whether the actions of the individual demonstrate that she no longer has a subjective fear of persecution in the country of nationality such that surrogate protection may no longer be required; and

- Any other factors relevant to the question of whether the particular individual has rebutted the presumption of reavailment in a given case.

VII. Conclusion

[85] For these reasons, I would dismiss the appeal. I would answer the certified questions and, in the case of the second and third questions, the questions are reformulated, as follows:

> (1) Where a person is recognized as a Convention refugee or a person in need of protection by reason of being listed as a dependent on an inland refugee claim heard before the Refugee Protection Division (RPD), but where the RPD's decision to confer protection does not confirm that an individual or personalized risk assessment of the dependent was performed, is that person a Convention refugee as contemplated in paragraph 95(1) of the (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27) and therefore subject to cessation of refugee status pursuant to subsection 108(2) of IRPA?

This question no longer needs to be answered.

> (2) Is it reasonable for the RPD to rely upon evidence of the refugee's lack of subjective (let alone any) knowledge that use of a passport confers diplomatic protection to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin has intended to avail themselves of that state's protection?

Yes.

> (3) Is it reasonable for the RPD to rely upon evidence that a refugee took measures to protect themselves against their agent of persecution [or that of their family member who is the principal refugee applicant] to rebut the presumption that a refugee who acquires [or renews] a passport issued by their country of origin and uses it to return to their country of origin has intended to avail themselves of that state's protection?

Yes.

STRATAS J.A.: I agree.

RIVOALEN J.A.: I agree.

APPENDIX

Paragraph 3(3)(f) of IRPA

Objectives — immigration

3 (1) […]

Application

(3) This Act is to be construed and applied in a manner that

…

(f) complies with international human rights instruments to which Canada is signatory.

Subparagraph 25(1.2)(c)(i) of IRPA

Humanitarian and compassionate considerations — request of foreign national

25 (1) […]

Exceptions

(1.2) The Minister may not examine the request if

…

(c) subject to subsection (1.21), less than 12 months have passed since

(i) the day on which the foreign national's claim for refugee protection was rejected or determined to be withdrawn — after substantive evidence was heard — or abandoned by the Refugee Protection Division, in the case where no appeal

was made and no application was made to the Federal Court for leave to commence an application for judicial review …

Section 40.1 of IRPA

Cessation of refugee protection — foreign national

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

Cessation of refugee protection — permanent resident

(2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d).

Paragraph 46(1)(c.1) of IRPA

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); …

Subsection 48(2) of IRPA

Enforceable removal order

48 (1) …

Effect

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.

Subsection 63(3) of IRPA

Right to appeal — visa refusal of family class

63 (1) …

Right to appeal removal order

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Paragraph 101(1)(b) of IRPA

Ineligibility

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if

…

(b) a claim for refugee protection by the claimant has been rejected by the Board; …

Subsections 108(1), (2) and (3) of IRPA

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;

(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.

Cessation of refugee protection

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

Effect of decision

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

Subsection 110(2) of IRPA

Appeal

110 (1) …

Restriction on appeals

(2) No appeal may be made in respect of any of the following:

(a) a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a designated foreign national;

(b) a determination that a refugee protection claim has been withdrawn or abandoned;

(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded;

(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if

(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and

(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;

(d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);

(e) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased;

(f) a decision of the Refugee Protection Division allowing or rejecting an application by

the Minister to vacate a decision to allow a claim for refugee protection.

Paragraph 112(2)(b.1) of IRPA

Application for protection

112 (1) …

Exception

(2) Despite subsection (1), a person may not apply for protection if

…

(b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since

(i) the day on which their claim for refugee protection was rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division, in the case where no appeal was made and no application was made to the Federal Court for leave to commence an application for judicial review, or

(ii) in any other case, the latest of

(A) the day on which their claim for refugee protection was rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or, if there was more than one such rejection or determination, the day on which the last one occurred,

(B) the day on which their claim for refugee protection was rejected — unless it was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Appeal Division or, if there was more than one such rejection or determination, the day on which the last one occurred, and

(C) the day on which the Federal Court refused their application for leave to commence an application for judicial review, or denied their application for judicial review, with respect to their claim for refugee protection, unless that claim was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention; …