Federal Court Cour fédérale

**Date: 20240215**

**Docket: IMM-10683-22**

**Citation: 2024 FC 249**

**Ottawa, Ontario, February 15, 2024**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**ALICERITAH NABACWA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Aliceritah Nabacwa, was found by the Refugee Protection Division ("RPD") to be a Convention refugee in March 2018. Shortly after this decision, the Canada Border Services Agency received a Document Analysis Report (the "Report") about the passport Ms. Nabacwa used to travel to the United States and Canada. The Report concluded that though there were no alterations to the biodata pages of the passport, some alterations were made to

pages 3 to 8 of the passport. Based on this Report, the Minister of Public Safety and Emergency Preparedness (the "Minister") brought an application to the RPD under section 109 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [*IRPA*] to vacate Ms. Nabacwa's refugee status.

[2] The Minister's position was that Ms. Nabacwa had knowingly altered her passport and that this act was a serious, non-political crime, making her ineligible for refugee protection. Ms. Nabacwa disputed that she altered her passport. The RPD rejected the Minister's argument that Ms. Nabacwa committed a serious, non-political crime that should exclude her from refugee protection. It did, however, find that Ms. Nabacwa knowingly altered her passport and concealed this fact from the original refugee panel. The RPD found this misrepresentation material because it went to Ms. Nabacwa's credibility.

[3] On judicial review, Ms. Nabacwa raises a number of arguments challenging the RPD's decision. In my view, a key problem permeates the decision; though the RPD correctly set out the legal test in section 109 of *IRPA* and the elements required to grant a vacation application, the RPD did not follow the steps and blended distinct phases of the test in its analysis. The RPD's decision neither clearly addresses the statutory requirements nor adheres to binding authority on where in the process new evidence can be considered (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 112).

[4] For the reasons below, I grant the application for judicial review.

## II. Procedural History

[5] Ms. Nabacwa's claim for refugee protection was based on her work in a non-profit organization in Uganda serving people with HIV; Ms. Nabacwa claimed that based on this work, the authorities had targeted her as a supporter or perceived member of the LGBT community. While Ms. Nabacwa was attending an HIV health conference in the United States in 2015, she learned from a co-worker that the Ugandan authorities were cracking down on LGBT supporters and had been searching for her.

[6] Ms. Nabacwa then made a claim for refugee protection in the US. In March 2017, while her US claim was still pending, she came to Canada and made a refugee claim here.

[7] The Minister intervened at Ms. Nabacwa's original refugee claim on the basis of credibility. The Minister argued based on a notation in the Global Case Management System ("GCMS") notes that in 2014, Ms. Nabacwa had previously been denied a visitor visa to Canada for the purpose of attending a health conference because she was found to be inadmissible for misrepresentation. The notation indicated that the misrepresentation related to a fraudulent Malaysian visa. Ms. Nabacwa testified that she did not know about either the misrepresentation finding or a Malaysian visa. The Member accepted Ms. Nabacwa's testimony and found the Minister had provided insufficient evidence relating to the alleged misrepresentation. Further, the Member found that Ms. Nabacwa was a credible witness on her involvement with the LGBT community in Uganda. Ms. Nabacwa's refugee claim was accepted on this basis.

[8] Approximately six weeks later, the Minister received a Document Analysis Report about the passport Ms. Nabacwa used to enter the United States and Canada. The Report indicated that the passport issued in Ms. Nabacwa's name was genuine but had been altered through the unauthorized removal and addition of data on pages 3 to 8 of the passport. Based on this Report, the Minister applied to the RPD to vacate Ms. Nabacwa's refugee protection under subsection 109(1) of *IRPA*.

[9] In August 2019, the RPD allowed the Minister's application and excluded Ms. Nabacwa under Article 1F(b) of the *Refugee Convention* finding that she had altered the passport and this was a serious non-political crime making her ineligible for refugee protection. This decision was challenged. The parties consented to the RPD redetermining the matter.

[10] The RPD considered the Minister's application for a second time at a hearing on March 4, 2022. Ms. Nabacwa testified that she had not known about the alterations to her passport when she used it to travel. Ms. Nabacwa explained that a travel agent arranged group travel, including visas, for herself and her fellow conference participants in 2014. As a result, there was a period of time when the passport was not in her possession.

[11] The RPD granted the Minister's application. The RPD did not exclude Ms. Nabacwa under Article 1F(b) of the *Refugee Convention* for committing a serious non-political crime as the Minister argued. The RPD determined that Ms. Nabacwa misrepresented, that she had altered her passport, and that this misrepresentation was sufficient to taint her overall credibility. The

RPD concluded that the effect of this misrepresentation on Ms. Nabacwa's credibility left nothing that could independently corroborate the basis of her refugee claim.

## III. Issues and Standard of Review

[12] The determinative issue on judicial review relates to the substance of the RPD's determination under section 109 of *IRPA*. The parties agree, as do I, that I am to review the merits of the RPD's decision on a reasonableness standard.

[13] The Supreme Court of Canada in *Vavilov* described a reasonable decision as "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" (*Vavilov* at para 85). Administrative decision makers must ensure that their exercise of public power is "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95). In light of the serious consequences of losing one's status as a Convention refugee, the reasons provided by the RPD must reflect the profound consequences to the affected individual (*Vavilov* at para 133).

[14] The Applicant framed one of her arguments as a matter of procedural fairness, namely that the RPD raised a new issue with respect to her credibility and provided no opportunity for her to respond. In my view, the unfairness problem the Applicant is describing is really because of the manner in which the RPD blended distinct phases of the analysis set out under section 109 of *IRPA*, which in turn had implications on the evidence the RPD could consider. In light of my findings on the substance of the RPD's analysis, I find it unnecessary and unhelpful to address the procedural fairness argument as it was framed by the Applicant.

## IV. Analysis

[15] A vacation proceeding under section 109 of *IRPA* is triggered by an application by the Minister to the RPD. The vacation provisions in *IRPA* have two distinct stages of analysis. At the first stage, the RPD has to decide whether refugee protection "was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter" (*IRPA*, s 109(a)). The Minister bears the burden to demonstrate that these elements of subsection 109(1) of *IRPA* are satisfied (*Ede v Canada (Citizenship and Immigration)*, 2021 FC 804 at para 27). Both parties can present new evidence at this stage – the Minister in order to demonstrate that there is a material misrepresentation, and the person concerned in order to dispute it (*Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18 [*Bafakih*] at para 40).

[16] If the RPD finds refugee status was obtained as a result of a misrepresentation of material facts relating to a relevant matter, it can proceed to the second stage. The second stage requires the RPD to put itself in the shoes of the original decision maker and ask whether, at the time of the original refugee decision, there was "other sufficient evidence" "to justify refugee protection." If the RPD finds there was such evidence, it can reject the vacation application and the person's refugee status would be maintained. At this second stage, new evidence is not permitted (*Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554 [*Wahab*] at para 36; *C*oomaraswamy v Canada (Minister of Citizenship and Immigration), 2002 FCA 153 at para 16).

A. *Materiality Analysis at Stage One*

[17] At the first stage, the Federal Court of Appeal recently re-confirmed in *Bafakih* at paragraph 35 that the RPD must make the following determinations to find that a refugee claim can be vacated under subsection 109(1) of *IRPA*:

> (i) that there be "a misrepresentation or withholding of material facts;" (ii) that those facts "relate to a relevant matter; and" (iii) that there be "a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other" [Emphasis in original.]

[18] That there had been some misrepresentation or withholding of facts from the original panel was not at issue. Based on the Report produced by the Minister, Ms. Nabacwa accepted that the passport she used to enter the United States and Canada had been altered and this information had not been before the original panel. The Report indicated that the passport had been "altered by means of unauthorized removal and addition of data on visa" on pages 3 to 8.

[19] The key point of dispute was the significance – the materiality – of the misrepresentation. Unlike many passport misrepresentation cases, identity or citizenship was not at issue in this case; the biodata pages of the passport had not been altered, and the passport was found to be genuine. In this case, while the Report described the kinds of alterations made to the passport, the substance of what was specifically added or removed is not known.

[20] The RPD found the passport alteration to be a "material fact" not because of the alteration in and of itself but because it meant Ms. Nabacwa could no longer be considered a

credible witness. The RPD's materiality analysis depended on finding Ms. Nabacwa responsible for altering her passport, and then knowingly concealing this fact to the original panel.

[21] Ms. Nabacwa disputed that she knew the passport had been altered, that she was responsible for having it altered, or that she misled the original panel on this issue. Ms. Nabacwa testified and provided evidence to the RPD on this point. The RPD did not consider this testimony and evidence at the first stage of the analysis because it found this irrelevant to its task under subsection 109(1) of *IRPA*. Relying on the jurisprudence of this Court, the RPD noted that *mens rea* and intention are not considered when evaluating whether there was a misrepresentation under subsection 109(1) of *IRPA*.

[22] Certainly, intention does not matter when considering whether there was a withholding of information (see for example *Wahab* at para 29). Regardless of whether Ms. Nabacwa intended to deceive the original panel, the RPD was not aware that she had travelled on an altered passport. Ms. Nabacwa accepts that there was a withholding of information on this point. The real issue is the RPD's finding on the materiality of the misrepresentation.

[23] The RPD's finding that the misrepresentation is material depends on Ms. Nabacwa intentionally altering her passport and then deceiving the original panel about it. In the RPD's view, the alteration is material because it affects Ms. Nabacwa's credibility. The underlying assumption is that Ms. Nabacwa knew and lied about the alteration. In these circumstances, it is illogical to say that Ms. Nabacwa's intention did not matter and that this question need not be

resolved. The entire basis of the RPD's finding that the misrepresentation was material depends on Ms. Nabacwa intending to alter her passport and deceiving the original panel about it.

[24] As this Court noted in *Wahab* and was recently confirmed by the Federal Court of Appeal in *Bafakih*, "the RPD must give sufficient details in its reasons as to which misrepresented or withheld fact(s) it found material and in respect of what relevant matter." This exercise at the first stage "involves consideration of all the evidence on file, including the new evidence presented by both parties." (*Wahab* at para 29; *Bafakih* at para 40).

[25] Given that at the second stage, the RPD can no longer consider the new evidence except to identify what parts of the original claim remain untainted by the misrepresentation, it is critical that the RPD provide details at this first stage about the nature of the misrepresentation finding and how it is material and causally connected to the original grant of refugee protection. In the decision under review, the RPD failed to do this detailed analysis, finding Ms. Nabacwa's evidence on a critical issue to be irrelevant. This is a sufficient basis to set aside the RPD's decision.

B. *"Other Sufficient Evidence" at Stage Two*

[26] The lack of detail and analysis at the first stage has implications for the RPD's determination on the second stage as well. The RPD again noted that "intention was not relevant" but that it would nevertheless consider, at the second stage, Ms. Nabacwa's "defences." The RPD did not find Ms. Nabacwa's testimony regarding her lack of knowledge of the

alterations to be credible. Again, at the second stage, the RPD is not to consider any new evidence. This is not simply an error of form, but rather is a substantive problem.

[27] By considering Ms. Nabacwa's testimony and evidence at the second stage, it is not clear whether the RPD understood the distinct task it was required to perform at the second stage—to consider whether there was sufficient evidence that remained untainted to justify refugee protection at the time of the original refugee decision. This part of the reasons reads as if the misrepresentation finding was a triggering event for the RPD to re-open the claim and consider it afresh, not as a full redetermination but rather one where the RPD could use the new evidence at the vacation hearing to re-evaluate the original panel's findings and consider how it now would have determined the claim.

[28] The RPD's approach is not consistent with the language in section 109 of *IRPA* or the jurisprudence that recognizes the careful approach required at each stage with respect to evaluating the new evidence and the substance of the original claim (*Bhuchung v Canada (Citizenship and Immigration*) 2023 FC 1009 at paras 43-48).

## V. Conclusion

[29] In summary, the RPD failed to follow the requirements of section 109 of *IRPA* in granting the Minister's application to vacate Ms. Nabacwa's Convention refugee status. The RPD did not consider Ms. Nabacwa's testimony and evidence under subsection 109(1) of *IRPA* despite it being of central relevance to its determination that the misrepresentation was material. Further, the RPD erred when it considered new evidence at the second stage under subsection

109(2) of *IRPA* when it was only to consider whether the untainted evidence from the original hearing was sufficient to justify refugee protection.

[30] The deficiencies identified are not minor missteps but go to the heart of the task before the RPD in deciding a vacation application. Ms. Nabacwa's application for judicial review must therefore be allowed and the matter redetermined. The parties did not raise any question for certification and I agree that none arise.

**JUDGMENT in IMM-10683-22**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed;

2. The RPD decision dated October 7, 2022 is set aside and the matter is sent back to be redetermined by a different RPD member; and

3. No serious question of general importance is certified.

"Lobat Sadrehashemi"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-10683-22 |
| **STYLE OF CAUSE:** | ALICERITAH NABACWA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | CALGARY, ALBERTA |
| **DATE OF HEARING:** | JULY 6, 2023 |
| **JUDGMENT AND REASONS:** | SADREHASHEMI J. |
| **DATED:** | FEBRUARY 15, 2024 |

**APPEARANCES:**

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|---|---|
| Lucinda Wong | FOR THE APPLICANT |
| Meenu Ahluwalia | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Caron & Partners LLP<br>Barristers and Solicitors<br>Calgary, Alberta | FOR THE APPLICANT |
| Attorney General of Canada<br>Calgary, Alberta | FOR THE RESPONDENT |