Federal Court  Cour fédérale

Date: 20250214

Docket: IMM-5586-24

Citation: 2025 FC 289

Ottawa, Ontario, February 14, 2025

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

OLADELE BAMIDEL ALAYBIYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of the Refugee Protection Division [RPD] allowing an application from the Minister of Public Safety and Emergency Preparedness for the cessation of the refugee status of the Applicant, Oladele Bamidel Alabiyi, and rejecting the Applicant's claim for refugee protection, pursuant to ss 108(2)-(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant is a citizen of Nigeria. She was granted refugee protection in 2005. In her Basis of Claim [BOC] narrative, she asserted that she feared her father who intended to marry her to an abusive older man and who would force her to undergo female genital mutilation [FGM]. The Applicant was granted permanent residence status in 2006. Her testimony was that, when she applied for permanence residence, Immigration, Refugees and Citizenship Canada [IRCC] requested that she obtain a Nigerian passport. She then renewed her passport in 2011 and again in 2016 for the purposes of international travel to the United States and Benin. The Applicant also used her Nigerian passport to return to Nigeria four times, in 2006, 2007, 2009, and 2010.

[3] In June 2021, the Minister brought the subject cessation and related application to have the Applicant's refugee claim rejected. The RPD granted the applications by decision dated on March 13, 2024 [Decision]. This is the judicial review of that Decision.

[4] For the reasons that follow, I have determined that this application must be granted as the Decision was unreasonable.

Relevant Legislation

[5] ***Immigration and Refugee Protection Act*, SC 2001, c 27**

> **Cessation of Refugee Protection**
>
> **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.
>
> …….

Decision Under Review

[6] The RPD began its analysis by noting that it was guided by the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Galindo Camayo*], summarizing factors that *Galindo Camayo* found must be considered and weighed by the RPD when making a cessation determination. The RPD stated that it was also guided by the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status [UNHCR Handbook], in particular, paragraphs 118-25, which outline the test for reavailment being voluntariness, intention, and actual reavailment. The RPD held that the Minister had established each of these criteria on a balance of probabilities.

Voluntariness

[7] The RPD referred to paragraph 120 of the UNHCR Handbook with respect to voluntariness. It described the Applicant's immigration and travel history, noting her testimony that she had not applied for a Canadian Refugee Travel Document and did not know what this is. The RPD then described the Applicant's testimony as to the purpose of her four visits to Nigeria and the safety measures she took against her agent of persecution. The RPD found that the Applicant voluntarily renewed her passport on three occasions in 2006, 2011, and 2016. It further held she had not rebutted the presumption that she voluntarily returned to Nigeria. Rather, she fully understood the nature of her actions, she returned to Nigeria of her own free will and that she was motivated to do so in order to support her immediate family members who experienced medical problems.

Intention to Reavail

[8] The RPD stated it had considered the arguments of the Applicant's counsel as well as her testimony and the number, duration, and purpose of her return trips. The RPD accepted as credible the Applicant's testimony that she was completely unaware that, by returning to Nigeria, her refugee protection could be taken away from her. The RPD acknowledged the argument by the Applicant's counsel that the Applicant took numerous safety precautions and generally refrained from engaging in public or community life during her stays in Nigeria; that is, the Applicant conducted herself with a subjective fear during the return visits. The RPD noted that while the Applicant's testimony on this issue was consistent with her counsel's position, it was

also true that she entered and exited Nigeria on four occasions and remained in the country for a period of more than one hundred and thirty days during her visits.

[9] The RPD rejected the submission of Applicant's counsel that her return trips to Nigeria were for compelling and not frivolous reasons, finding instead that the Applicant's "family members living in Nigeria were being cared for by family members and by paid caregivers and that the Respondent had paid for these services over a period of many years." While her first two return trips in 2006 and 2007 may have been based on compelling reasons, the Applicant failed to demonstrate that the last two visits were justified and compelling. The RPD further rejected the submission that interactions with Nigerian officials was irrelevant given that the agent of persecution was not the state. The RPD also considered that the Applicant had lived and worked in Canada for a long time, was well educated, and was a credible witness.

[10] The RPD concluded that the Applicant's act of obtaining and renewing her Nigerian passport and using it to return repeatedly to Nigeria, after she had been determined to be a protected person by Canada, was persuasive evidence that she intended to avail herself of the diplomatic protection of her country of nationality.

Actual Reavailment

[11] On actual reavailment, the RPD again considered the UNHCR Handbook at paragraph 122, which states that "obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status." It also considered UNHCR document *The Cessation Clauses: Guidelines on their*

Application UNHCR, Geneva, April 1999 which at paragraph 7 notes that "renewal of passports… may also constitute re-availment of national protection." Citing *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 [*Yuan*], the RPD stated that the RPD must consider efforts made by the Applicant to hide from the agents of persecution during the period of actual reavailment.

[12] The RPD then stated that it considered the totality of evidence before it respecting the Applicant's return visits, the extended periods of time she spent in Nigeria, and her testimony that she entered Nigeria through the normal airport entry process and did not experience any difficulties with authorities or any other state or non-state actors during her visits. The RPD gave "considerable weight to the purpose of the Respondent's return visit to her country… find[ing], based on a balance of probabilities that the Respondent did not have a compelling reason that would warrant her return to trips to Nigeria, during her third and fourth return trips to Nigeria." It also considered whether, before undertaking numerous return trips to Nigeria, the Applicant was aware of the potential for a refugee cessation process and consequences, and again found the Applicant's evidence that she was unaware of the risks that she was taking to be credible. However, while awareness of reavailment consequences is one consideration that must be considered, "it was not a central aspect of the proceeding and determination."

[13] The RPD found that the Applicant had failed to rebut the presumption of actual reavailment.

[14] In sum, the RPD found that the Applicant had acted voluntarily regarding her return travels to Nigeria, intended to reavail of the protection of her country of nationality when she returned, and had actually reavailed herself of the diplomatic protection of that country.

Constitutional Question

[15] The RPD noted that, after the hearing, counsel for the Applicant filed written submissions challenging the *IRPA* cessation regime.

[16] The RPD held that while it had jurisdiction to resolve constitutional questions that were properly before it, the Applicant was asking the RPD to make a finding about the constitutionality of the consequences – set out in s 46(1)(c.1) of the *IRPA* – of a cessation determination. The RPD rejected the Applicant's argument that there is a causal connection between a s 108(1) determination and the severe consequences which could result from that determination, on the basis that s 108 triggers the loss of permanent resident status, as well as other adverse consequences for the concerned person.

[17] The RPD noted that its statutory mandate is limited to the determination of Convention refugee and protected person status. No *IRPA* provisions expressly grant the RPD jurisdiction over s 46(1)(c1). Rather, the *IRPA* scheme provides that once the RPD has made its cessation determination, there is no further determination for the RPD to make. As the RPD does not have the power to decide legal questions arising out of s 46(1)(c.1), it similarly does not have the authority to decide constitutional questions arising out of that provision.

[18] The RPD noted that in *Norouzi v Canada (Citizenship and Immigration)*, 2017 FC 368 at paras 23-32, this Court observed that there are several post-section 108 recourses available to individuals whose refugee protection has ceased.

Issues and Standard of Review

[19] In my view, the issues arising in this matter can be framed as:

i. Was the RPD's decision on the merits reasonable?

ii. Was the RPD's decision with respect to the constitutional question correct?

[20] The standard of review for the RPD's decision on the merits is reasonableness. Reasonableness review asks this court to: "develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

[21] Here the Applicant argues that the RPD has erred in law in deciding that the effect of its decision allowing the cessation application does not engage s 7 of the *Charter* in a manner which is not consistent with fundamental justice. In my view, constitutional questions are exceptions to the presumption that administrative decisions will be reviewed on the reasonableness standard. As necessitated by respect for the rule of law, they are to be reviewed on the correctness standard

(see *Shahid v Canada (Citizenship and Immigration)*, 2021 FC 1335, at para 11, citing *Vavilov* at paras 53, 69).

Notice of Constitutional Question

[22] In this application for judicial review, the Applicant has given notice of the following constitutional question:

> 1. Take notice that the Applicant intends to question the constitutional validity, applicability and/or effect of the legislative scheme including sections 108(1)(a to d), 46(1)(c.1), 40.1(1), 40.1(2), ss. 25 (1.03)(b); 24(4); and 112 (2)(b.1) of IRPA, in a hearing in person at the Federal Court, 180 Queen Street West, in the City of Toronto, in the Province of Ontario, on Wednesday, February 5, 2025, to commence at 9:30 a.m. (Eastern Time), for a duration not exceeding ninety (90) minutes.
>
> 2. The section triggering the unconstitutional effects is s. 108, applied directly by the RPD in a cessation decision.

Was the RPD's decision reasonable?

Applicant's position

[23] The Applicant makes two main submissions. The first is concerned with the RPD's treatment of subjective fear. The second is concerned with the RPD's treatment of Applicant's reasons for return to Nigeria.

[24] With respect to subjective fear, the Applicant submits that re-availment is, fundamentally, a consideration of whether the person concerned remains at risk or has a subjective fear of risk of persecution, which, once established, means that there can be no finding of cessation (citing

Galindo Camayo at para 64). The taking of protective measures, such as hiding from the agent of persecution, does not mean that the applicant no longer needs international protection. It means they remain in fear and cannot rely on their own state to protect them (citing *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154; *Kanji v Canada*, 1997 CanLII 5052 (FC); *Abawajiv Canada*, 2006 FC 1065; *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 at paras 35-36; *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434, at para 37; *Galindo Camayo* at para 77).

[25] The RPD accepted as credible that the Applicant was subjectively afraid of persecution by a non-state actor, her father, and that she undertook significant safety precautions when she returned to Nigeria. Yet, it found the Applicant's acquisition, renewal, and use of a Nigerian passport to travel to Nigeria was determinative of intention to re-avail. The Applicant submits these findings are mutually exclusive and demonstrate a decision that is unreasonable and perverse. While the RPD cited and described *Galindo Camayo* in its reasons, it did not appear to understand it, nor did it grapple with the issue of subjective fear.

[26] The Applicant also submits the RPD repeatedly minimizes the importance of the facts as presented, including the details of the Applicant's subjective fear and the precautions she took in Nigeria.

[27] The RPD did not analyse or explain why the Applicant's evidence was insufficient to rebut the presumption that she had the subjective intention to rely on the protection of Nigeria (citing *Aydemir v Canada (Citizenship and Immigration*), 2022 FC 987 at para 76). Merely

mentioning the self-protection measures is insufficient. The RPD must explain how it weighed the key factors in reaching its determination as to re-availment (citing *Levi v Canada (Citizenship and Immigration)*, 2024 FC 64 at para 37).

[28] The RPD's reliance on the Applicant's interactions with Nigerian officials, in obtaining and using her passport, to determine that she had re-availed was also unreasonable. These interactions did not expose her to her agent of persecution and were irrelevant considerations.

[29] Further, the Applicant submits the RPD took an unreasonably narrow view of her motivation for returning to Nigeria, being the illness of her young sister and of her mother, finding her reasons for her last two trips not compelling because her sister and mother were being well cared for by others. The RPD failed to explain why her evidence was insufficient or consider how compelling her reasons were from her own perspective (citing *Shah v Canada (Citizenship and Immigration)*, 2023 FC 1332 at para 14). The Applicant submits that the serious illness of a family member is explicitly recognized as a "compelling reason" in *Galindo Camayo* (at para 84; *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at para 29). The RPD offered no explanation for departing from Federal Court jurisprudence which has expressly identified visiting or caring for sick family as being not frivolous.

[30] According to the Applicant, the "compelling reasons" issue is merely a guidepost for a decision-maker to assess whether or not a refugee who has returned to their home country continues to have a genuine, and credible subjective fear of persecution and is unable to rely on state protection. It does not stand alone as a separate ground that must be established to

overcome cessation. In this case, the RPD accepted that the Applicant was credible in her subjective fear. In this circumstance, the reason she gave for returning home has no relevance. The lack of compelling reasons should not factor into the RPD's decision that the Applicant had no subjective fear, unless it was relied on by the RPD to not believe her.

Respondent's position

[31] The Respondent submits that the Applicant's entire argument boils down to her contention that she always had subjective fear of persecution in Nigeria, and that she took precautions to ensure that her father, whom she continued to fear, did not become aware of her presence in that country. She claims that because the RPD accepted her evidence as credible, it therefore erred in finding that she intended to reavail and did reavail. The Respondent submits that the Applicant's focus on the precautions she took while in Nigeria with respect to her last two trips is misplaced. A refugee cannot return to the persecutory country absent compelling reasons (citing *Ortiz Garcia v Canada (Citizenship and Immigration)*, 2011 FC 1346, cited with approval in *Galindo Camayo* at para 64). In the absence of such reasons, it does not matter what precautionary steps they take while in their country of origin.

[32] The nature and effectiveness of such precautionary measures become relevant once it is established that the refugee had justifiably exceptional or compelling reasons for returning to the country that persecuted them or failed to protect them from their persecutors.

[33] The Respondent submits the Applicant's contention that the RPD erred by finding she had reavailed because it had accepted her evidence that she was mistrustful of the Nigerian

police and was in hiding when in Nigeria must fail for its logical incongruence. The Applicant cannot claim fear of her father and his associates in Nigeria, mistrust of the police, and lack of faith in the Nigerian government's willingness or ability to protect her when she repeatedly returned to that country without compelling reason for doing so, as the RPD found regarding her third and fourth visits.

[34] The idea that refugees can return to the countries that persecuted them, or failed to protect them from their persecutors, absent compelling reasons so long as they take precautionary measures has no place under the Convention or the case law. In the end, the mere fact that a refugee claims to have taken precautionary measures is not dispositive of the inquiry into their intention and whether they reavailed.

[35] The Respondent argues *Yuan* and *Carmargo* are distinguishable from the case at bar. The RPD found that the Applicant's third and fourth trips back to Nigeria were neither necessary or compelling because her mother and sister, whose respective illnesses she claims caused her to return, were cared for by competent care providers in hospital and at home. This matter is therefore distinguishable from the line of cases holding that trips back to the persecutory country to care for ailing relatives may negate an intent to reavail.

Analysis

[36] Broadly speaking, when refugees return to their home country using the passport of their nationality, there is a strong presumption that they intended to reavail themselves of the protection of their country of nationality. "Reavailment 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 security is in jeopardy" (*Galindo Camayo* at para 64 citing *Ortiz Garcia v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346 at para 8). However, a refugee may rebut this presumption with evidence.

[37] The three elements of reavailment are: (1) voluntariness: the refugee must act voluntarily; (2) intention: the refugee must intend by their action to reavail themself of the protection of the country of their nationality; and, (3) reavailment: the refugee must actually obtain such protection (UNHCR Handbook at para 119, cited in Decision at para 32).

[38] I would first note that, in this matter, the Applicant does not challenge the RPD's finding that she voluntarily returned to her country of origin, Nigeria. What is at issue is whether the Applicant intended to and actually did reavail herself of Nigeria's protection.

[39] Second, the Applicant, in her written submissions and by way of her counsel's submissions at the hearing before me, places great and repeated emphasis on the RPD's credibility findings. To the extent that the Applicant submits that the RPD explicitly found her submissions as to her subjective fear and her reasons for return to be credible, I do not agree. However, this is of no matter. The RPD did explicitly find the Applicant to be a credible witness. Viewed from the opposite direction, the RPD "did not find in clear and unmistakeable terms that [the Applicant's] evidence lacked credibility" (*Galindo Camayo* at para 25, citing *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236, 15 Imm LR (2d) 199 (FCA)).

[40] In *Galindo Camayo* the FCA held:

> [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.
>
> [Emphasis in original]

[41] In this matter, the RPD accepted that the Applicant did not know that using her Nigerian passport to return to that country could result in her being found to have reavailed. Additionally, however, in the absence of a clear adverse credibility finding, the RPD is also deemed to have accepted as credible Applicant's evidence as to why she returned to Nigeria, the circumstances surrounding the illness of her young sister and her mother and, the precautions she took in Nigeria with respect to her agent of persecution (*Galindo Camayo* at para 68).

[42] Third, I do not agree with the Applicant that if the RPD makes no adverse credibility finding and an applicant provides evidence of ongoing subjective fear, such as safety precautions taken in their country of origin, that there can then be no finding of cessation and that the reasons for returning have no relevance. Rather, as held in *Galindo Camayo*, the focus throughout the cessation analysis should be on whether the applicant's conduct ― and the inferences that can be drawn from it ― can reliably indicate that they intended to waive the protection of their country of asylum. Accordingly, the RPD is to consider the factors set out by the Federal Court of Appeal in assessing whether the presumption of reavailment has been rebutted. "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" (*Galindo Camayo* at paras 83-84). These factors include whether any precautionary measures were taken and the purpose of the return.

[43] Thus, the mere fact that precautionary measures were taken is not sufficient to defeat a cessation application. Similarly, the mere fact that the reasons for return may not be found to be compelling is alone not enough to end the required analysis — although it may well ultimately prevail.

[44] That said, I do agree with the Applicant that although the RPD described *Galindo Camayo* and the factors that it prescribes that must be considered, the RPD failed to meaningfully engage with certain factors that were highly relevant to the application before it. In particular, the precautionary measures taken by the Applicant while in Nigeria.

[45] Evidence of steps taken by a returning refugee to protect themselves from their agent of persecution does not speak to their intention to entrust protection to the home state. Rather, it speaks to ongoing subjective fear and a lack of confidence in the ability of that state to protect them (*Galindo Camayo* at para 77).

[46] In its analysis of voluntariness, the RPD described the precautionary measures taken by the Applicant during each of her four trips to Nigeria. In its section on intention, it later states:

> [55] Respondent counsel also argues that, during her return travels to Nigeria, the Respondent took numerous safety precautions and

> that she generally refrained from engaging in public or community life during her stays in the country. Consequently, the Respondent conducted herself with a subjective fear during the return visits. While the Respondent's testimony on this issue is consistent with counsel's position, it is also true that the Respondent entered and exited Nigeria on four occasions and that she remained in the country for a period of more than one hundred and thirty days during her visits…..

[47] The RPD then again states it also considered the number of trips, the duration of each trip and the purpose of each trip. While it was open to the RPD to balance the precautionary measures taken by the Applicant with other factors in assessing subjective fear and whether such evidence rebutted the presumption of reavailment, it is not apparent from the reasons that the RPD actually did this. And while it states several times in the analysis that the Applicant returned to Nigeria on four occasions, it also found that the first two trips may have been based on compelling reasons. Thus, it is unclear why the fact that she returned four times still factors so heavily into the analysis. It is also not evident from the reasons on what basis the RPD distinguished the first two returns to Nigeria due to family illness from the third and fourth returns which were made for the same reason.

[48] Here, "[t]he problem with the RPD's reasoning is not that it failed to mention most of the relevant facts. Rather, it failed to show how the key facts, including the measures the Applicant took to protect herself, were weighed in the assessment of her subjective intention" (*Levi v Canada (Citizenship and Immigration)*, 2024 FC 64 at para 37; *Galindo Camayo* at para 78).

[49] Additionally, the RPD appears to have conflated the purpose of the travel to Nigeria (serious family illness) with intent to reavail. The main focus of the RPD's intent to reavail analysis is whether the Applicant had compelling reasons for her return.

[50] However, *Galindo Camayo* held 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 (at para 72). It also held that one of the factors that the RPD is to consider and balance when determining if the actions of the refugee rebut the presumption of reavailment is:

> 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…

[51] Here, the RPD had previously described, under its discussion of voluntariness, the Applicant's testimony about why she had returned to Nigeria. It noted that she testified that in December 2006, she spent three weeks in Nigeria to support her sister who had been hospitalized at the time (the record indicates that her sister was then 6 years old, suffered from Sickle Cell Anemia and was in intensive care for three weeks due to complications arsing from her condition. Supporting hospital records were provided). In 2007, she stayed for 28 days as her mother had suffered a stroke and was hospitalized. The Applicant's evidence was that she was under a family and cultural obligation to return. In December 2009, the Applicant travelled to Nigeria and remained in the country for a period of four weeks. The RPD stated that her evidence was that both her mother and sister were hospitalized in intensive care and she was required to support them in their time of need. In December 2010, the Applicant made her fourth

trip to Nigeria, remaining in the country for a period of two months. The RPD stated that her testimony was that she returned because her mother had suffered a heart attack, underwent surgery and the Applicant's presence in Nigeria was needed in order to support her ill mother.

[52] In its analysis of intention, the RPD disagreed with the Applicant's submission that these trips were for a compelling and not frivolous purpose. The RPD found that the latter two trips were not for compelling reasons as the family members "were being adequately cared for in hospitals, and also being cared for at home by paid caregivers and family friends". The RPD also took issue with the length of the stays, questioning why it was necessary and compelling to remain for such an extensive period during her fourth visit – although it does not explain what its actual conclusion was on this point and why.

[53] In my view, this suggests that RPD conflated its analysis of intent to reavail with whether the motive for travel was necessary or justified.

[54] The Respondent submits that because the RPD did not find the reason for the Applicant's third and fourth trips compelling, this case is distinguishable from the line of cases that hold that trips back to the persecutory country to care for ailing relatives may negate an intent to reavail. While this may be true, if the purpose for return speaks to whether the refugee has rebutted the presumption of intent to reavail arising from the obtaining and using of a passport from their country of origin, then it seems to me that the RPD is still required to conduct the required analysis of all of the factors and evidence in reaching its ultimate decision and that its assessment of the evidence as to the purpose of the return is subject to scrutiny.

[55] Here, the RPD did not find the Applicant's evidence that her young sister and mother were suffering from serious illness not to be credible, but it did find that this was not a compelling reason to reavail. It may be unreasonable to find that if one's young sister and mother suffering serious medical issues, including being in intensive care, this is not compelling merely because they are in hospital (thus receiving medical care) or receiving home care from paid personnel. This seems to suggest that the reasons for return will not be compelling in the absence of the need for physical care for that family member, which care can only be provided the returning refugee. That is, that their presence is absolutely necessary to care for the family member (see e.g. *Shah v Canada (Citizenship and Immigration)*, 2023 FC 1332 at paras 13-14). However, in my view, the RPD's consideration of this factor was unreasonable as it failed to explain why the first two visits due to serious illness "may" have been compelling while the second two visits for the same purpose and in the essentially the same circumstances were not.

[56] In sum, the RPD erred in conflating the Applicant's reasons for return (serious family illness) with an intent to reavail of the diplomatic protection of her country of nationality; in its assessing of whether those reasons were compelling; and in failing to properly consider and to weigh the Applicant's evidence as to her subjective fear. These errors are sufficient grounds upon which to grant this judicial review.

[57] However, in its intention to reavail analysis, the RPD also held that it did not agree with the Applicant's counsel that the fact that the Applicant had interactions with Nigerian officials was irrelevant given that her agent of persecutions was not the state. It found that the evidence demonstrated that over a period of thirteen years, the Respondent had in-person interactions with

numerous Nigerian officials and with officials from other countries and on each occasion she represented herself as a Nigerian citizen, and a holder of a Nigerian passport. The RPD offered nothing further on this point.

[58] While it is true that the Applicant had interactions with Nigerian officials in connection with the obtaining and use of her passport and her entry into Nigeria (speaking to intent to reavail/subjective fear), it is also true that the Applicant was not at risk from the state (a factor speaking to the rebutting of that intent and relevant to subjective fear). I am unable to ascertain from the RPD's reasons how it balanced these facts in its analysis. Like much of the RPD's decision, it offers statements of found facts without tying these to an analysis of the evidence and an explanation of why it determined that the presumption to reavail had not been rebutted.

[59] For all of these reasons, the RPD's decision is unreasonable.

Was the Decision correct?

[60] The Applicant's constitutional argument is made in the alternative. She submits that if I find the RPD's decision to be unreasonable then s 7 of the *Charter* is not engaged and the *Charter* has no application in this matter.

[61] I note that whether s 7 of the *Charter* is in fact engaged by way of a section 108 cessation decision, as the Applicant argues, is very much at issue.

[62] That said and given that I have found the decision to be unreasonable, it is not necessary or appropriate to engage with the Applicant's constitutional argument and I decline to do so (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 11; see also *Vavilov v Canada (Citizenship and Immigration)*, 2018 FC 450 at para 32).

Certified Question

[63] At the hearing the Applicant submitted the following proposed question for certification pursuant to s 74(d) of the *IRPA*:

> Does the Refugee Protection Division decision that the Applicant had reavailed of the protection of Nigeria rendered pursuant to a statutory scheme including sections 108(l)(a), 46(l)(c. 1), 25(1.03)(b), 24(4) and 112 (2)(b.l) of IRPA, and made notwithstanding evidence, accepted by the RPD as credible, that she had a subjective fear of her persecutor in Nigeria, breach section 7 of the Charter in a manner that does not comply with the principles of fundamental justice.

[64] The Respondent opposes certification on the basis that the question, as framed, does not meet the test.

[65] In *Tesfaye v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 2040, Justice Gascon recently provided a comprehensive summary of the test for a certified question:

> [76] According to paragraph 74(d) of the IRPA, a question can be certified by the Court if "a serious question of general importance is involved." To be certified, a question must be a serious one that: (i) is dispositive of the appeal; (ii) transcends the interests of the immediate parties to the litigation; and (iii) contemplate an issue of broad significance or general importance (*Mason* at para 37; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36;

> *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15–16 [*Mudrak*]; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9 [*Zhang*]). The question must also have been dealt with by the Court, and it must arise from the case rather than from the Court's reasons (*Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 at para 28 [*Obazughanmwen*]; *Mudrak* at para 16; *Zhang* at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at para 29). Finally, and as a corollary of the requirement that it be of general importance, it must not have been previously settled in an earlier appeal (*Obazughanmwen* at para 28; *Rrotaj v Canada (Citizenship and Immigration)* 2016 FCA 292 at para 6; *Mudrak* at para 36; *Krishan v Canada (Citizenship and Immigration)* 2018 FC 1203 at para 98; *Halilaj v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1062 at para 37).

[66] In this case, as set out above, I have found the RPD's decision to be unreasonable and so have not engaged with the Applicant's s 7 *Charter* arguments, including whether s 7 is engaged by the decision which is rendered pursuant to s 108 of the *IRPA*. Accordingly, because the proposed question was not dealt with by the Court, it does not meet the test for certification.

JUDGMENT IN IMM-5586-24

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the Decision set aside and the matter remitted for redetermination by a different panel;
2. There shall be no order as to costs; and
3. The question proposed is not accepted for certification.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5586-24
STYLE OF CAUSE:	OLADELE BAMIDEL ALAYBIYI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 5, 2025
JUDGMENT AND REASONS:	STRICKLAND J.
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APPEARANCES:

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