Federal Court  Cour fédérale

Date: 20251007

Docket: IMM-21831-24

Citation: 2025 FC 1651

Ottawa, Ontario, October 7, 2025

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MOSES NKULUNZIZA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, dated August 6, 2024 [Decision], allowing the Minister of Public Safety and Emergency Preparedness's [Minister] application to vacate the Applicant's *Convention* refugee protection pursuant to s. 109 of the *Immigration and Refugee Protection Act*,

SC 2001, c 27 [*IRPA*]. In my view, the Decision is reasonable and procedurally fair. The judicial review will be dismissed.

II. Facts

[2] The Applicant is a citizen of Uganda and a bisexual man. Under Uganda's *Anti-Homosexuality Act, 2023*, homosexual activities are listed offences and are punishable by death.

[3] The Applicant says he began to realize he was attracted to men during his early teens. In his Narrative, the Applicant describes several encounters and relationships with men, both in Uganda and Denmark. The Applicant claims he was forced out of his grandmother's home and ended up living on the street for a few days. He then lived with his friend and his friend's sister for two months until he begged his grandmother to allow him to return. Several times a week, the Applicant's "grandmother would beat [him] with solder wire or cables, or she would kick or punch [him]."

[4] The Applicant describes his involvement with the National Theater in Uganda and the incident which ultimately led to his sexual orientation becoming public. The Applicant and another member of his dance group became close and began an intimate relationship in early 2009. The two were caught kissing in June 2011 and were chased out of the theater. After learning the police were looking for him, the Applicant moved between Uganda and South Sudan.

[5] In February 2013, the Applicant met a woman who would later become his wife (and now ex-wife) and with whom they had a child in Denmark.

[6] However, according to his allegations, the Applicant found life in Denmark "overwhelming" and boring, so he "was drawn to searches on gay people and events in Denmark." He later met a group of Ugandan ex-pats, including a man who he would later begin an intimate relationship with from January 2016 to June 2017. The Applicant's ex-wife learned of the Applicant's infidelity and informed his family in Uganda.

[7] The Applicant returned to Uganda on June 23, 2017. The Applicant's sister made the necessary arrangements for his trip to Canada.

[8] The Applicant arrived in Montréal, Québec in November 2017. He arrived in Toronto by bus shortly thereafter and filed his refugee claim.

[9] While setting up his life in Canada, the Applicant says he learned of the passing of his mother which he claims led him to "[descend] into darkness." According to the Applicant, the "days became a blur" until April 2018 when he claims he "emerged from the grips of the darkness that had engulphed [him]." The death of his mother was a central feature of his refugee claim.

[10] In the RPD's original decision dated November 30, 2018 [Original Decision], the Applicant was found to be a *Convention* refugee and granted refugee status as a "gay" man as he

alleged he was. The RPD had before it the Applicant's medical report, psychiatric assessment, divorce decree, his mother's death certificate, his birth certificate, photos, and supporting letters. The RPD found the Applicant was able to "spontaneously describe things that were not in [his] Basis of Claim Form when asked," and his testimony was "specific" and "assured." The evidence provided by the Applicant, including his medical records and letters of support, confirm the injuries he described and are "evidence of [his] contributions to the LGBTI community through dance."

[11] Fived years later, on November 16, 2023, the Minister applied to vacate the Original Decision, alleging the Applicant had "not only misrepresented his sexual orientation, but misrepresented his entire claim." He was not gay but bisexual, his mother was not dead but alive, his mother's death certificate was fake, his own birth certificate was fraudulent, he was then in a relationship with a woman in Toronto, he had admitted to this women he fraudulently obtained refugee status, repeatedly asked her to help him find someone to lie for him at the hearing and was otherwise untruthful. He did not disclose that relationship at the original hearing as he was obliged to do, and in addition, he did not disclose he had permanent resident status in Denmark.

[12] This woman and former girlfriend [Witness] provided a detailed affidavit regarding their relationship and his fraudulent application. The Applicant and the Witness met in January 2018 and were in a romantic relationship from March 2018 to December 2020. The Witness stated the Applicant informed her he was not actually gay and had made a fraudulent refugee claim. She further stated the Applicant admitted to his friends and acquaintances that he provided non-genuine evidence to support his claim.

[13] The Canada Border Services Agency investigated and it found evidence the Applicant's mother was still alive (and not deceased as he said), and found evidence the Applicant was a permanent resident of Denmark in 2017. The Minister disclosed this and other evidence, including the Applicant's sworn testimony from Ontario Court of Justice proceedings.

III. Decision under review

[14] The RPD was satisfied the Minister met the elements of the s. 109 assessment and vacated his refugee status. Broadly, the RPD concluded:

> [39] Was there a misrepresentation or withholding of material facts during the Respondent's refugee hearing? I find that there was: the claimant did not disclose that he was in an intimate heterosexual relationship with a woman at the time; he provided at least one false document in support of his claim, and he provided false information about the identity of at least one family member.
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> [40] Does this fact relate to a relevant matter? I find that it does: the Respondent's refugee claim was focused on persecution he faces for his sexual orientation, and the panel of first instance was led to believe, through the Respondent's testimony, that he was a gay man. The false document and false information related to a family member is not directly relevant to the central issue of the Respondent's sexual orientation, but these misrepresentations would have been relevant for assessing the Respondent's general credibility.
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> [41] Is there a causal connection between the misrepresentation or withholding and the granting of the refugee claim? I find that there is: the accumulated misrepresentations and withholdings of facts would have, on a balance of probabilities, caused the panel of first instance to have made a negative determination for credibility concerns; most importantly, the Respondent would not have been able to establish that he was gay or bisexual.
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> [42] Was there sufficient remaining evidence before the original decision-maker to justify refugee protection? I find that there was no such evidence: in a case like this, where the Respondent's general credibility would have been undermined by the accumulated credibility concerns of the original panel, and where

> part of this concern would have stemmed from knowledge of false documents being submitted in support of the claim, there would have been no such remaining evidence that could justify refugee protection.
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> [43] In view of the above, I find that the Minister has met their burden of establishing the three elements of their application as outlined in *Gunasingam*.

A. *Finding of a misrepresentation or withholding of evidence*

(1) The Applicant's heterosexual relationship with the Witness

[15] The RPD found the Applicant was in a non-disclosed heterosexual relationship with the Witness. While the Applicant was adamant his relationship with the Witness did not commence until March 2019, after his initial RPD hearing, the RPD did not believe him, because there was objective evidence contradicting his claim. Not only did the Applicant testify during his Ontario Court of Justice proceedings the relationship began in March 2018, but the police reports state the relationship began in January 2018. Whether in January or March, the RPD found the evidence of the Witness more closely aligned with the objective evidence before the RPD.

(2) Irregularities with documentary evidence

[16] The RPD concluded the Applicant's birth certificate was a fraudulent document considering inconsistencies and an inadequate explanation by the Applicant.

[17] Similarly, the RPD found the death certificate of the Applicant's mother was fraudulent and was not satisfied with the Applicant's explanation that "he made efforts to rectify this error, but there was not enough time, and that the latest copy of the death certificate provided for this

application is certainly real." As noted below, the RPD did not accept his written and oral evidence that she was dead either.

(3) Evidence related to the identity of the Applicant's mother

[18] The RPD also found the Applicant made a misrepresentation when saying his mother had died. In fact, she was still alive. The Applicant provided DNA information for himself and the individual the Respondent alleges is his mother. However, the RPD noted no explanation was provided and the DNA information was not decipherable to the layperson.

[19] The Respondent questioned the Applicant about the inconsistencies in his testimony. One such inconsistency arose as the Applicant stated in his Narrative he could not go out and did not pursue his refugee claim after having learned of the passing of his mother in November 2017. As noted above, the basis for this allegation was simply not true – his mother was still alive.

[20] Indeed, the Applicant filed a death certificate in that regard, which the RPD found fraudulent.

[21] The RPD was not satisfied the Applicant had established the identity of his mother as he alleged. This was "another instance where the Minister's witness has established an allegation with other available evidence in contradiction to an allegation from the Respondent."

[22] The RPD concluded the Applicant had misrepresented several facts on his application and withheld others. Notably, he did not disclose the fact – which indeed he untruthfully denied

– he was in a relationship with a woman (the Witness) at the time of the hearing itself. The RPD concluded:

> [26] I find that the above is sufficient to demonstrate, first, a pattern from the Respondent of attempting to misrepresent aspects of his claim to both the panel of first instance and myself, and second, that a number of the allegations from the Minister's witness can be corroborated with other available evidence. I therefore find that the Minister's witness's account of the basic facts of this relationship, compared to the Respondent's account, and except where this account strays into certain value judgments about the Respondent, are trustworthy. I find that the misrepresentation related to the timeline of the Respondent's heterosexual relationship with the Minister's witness is especially relevant for this application, as his refugee claim was granted on the basis of his sexual orientation as a gay man.

B. *Whether there was sufficient evidence before the original panel*

[23] The RPD questioned the Applicant about his inconsistent use of terminology and his description of his relationships with women. In particular, the RPD noted "at one point the Respondent writes that 'I admitted to [DELETED] that I liked both women and men' and later writes, describing his attempt to have an intimate relationship with a woman, that 'I was always acutely aware of how difficult the entire act was for me, especially compared to the way I felt when I was with a man.'"

[24] In my view the RPD was sensitive to the variation in terminology, relying on the Chairperson's Guideline 9 which recognizes these inconsistencies may be reasonably explained.

[25] The RPD concluded the original panel would have viewed the evidence differently had it been aware of the irregularities and inconsistencies in the Applicant's evidence:

[34] In this application, I have found that the Respondent was in an intimate heterosexual relationship with the Minister's witness at the time of his refugee hearing. This was not disclosed to the panel, despite the panel directly asking the Respondent if he was in a relationship at the time. I have found that the Respondent submitted a fraudulent death certificate from his alleged biological mother to the original panel, and I have found that the Minister has established, on a balance of probabilities, that his biological mother is a different living woman. Had the original panel been aware of all this at the time of the refugee hearing, I find that the panel would have more closely scrutinized the Respondent's evidence at the time of the hearing.

[35] The panel of first instance, having reviewed the documentary evidence and listened to the Respondent's testimony, was satisfied that the Respondent was a gay man. Any contradictions to this found in the narrative appear to have been satisfied by the Respondent's testimony, which is entirely consistent about the Respondent's sexual orientation as a gay man. I find that, having been provided a narrative which contains apparently contradictory statements regarding the Respondent's sexual orientation and testimony which is consistent that the Respondent is a gay man, the panel would have more closely scrutinized this evidence and asked more questions about the claimant's sexual orientation if the panel was aware that the Respondent was in an intimate heterosexual relationship at the time. He more likely than not would have asked the Respondent questions similar to those raised at the hearing of this application. He would more likely than not have asked why the Respondent was not forthcoming with this information.

[38] The most important allegation in the Respondent's refugee claim is that he was a gay man. The Minister's application would more likely than not fail if all the Minister was able to establish is that the original panel would have found, on a balance of probabilities, that the Respondent was bisexual rather than gay if these withholdings and misrepresentations were brought to light, as the Respondent would still face persecution in Uganda for being bisexual. However, I find that, having been made aware of the foregoing withholdings and misrepresentations, the original panel more likely than not would have viewed the contradictory evidence between the narrative and the testimony related to the Respondent's sexual orientation as a major credibility concern cutting to the core of the refugee claim rather than a misunderstanding which could be cleared up with more testimony. The panel, having been made aware that the Respondent submitted a false death certificate for his mother and that his actual biological mother was another living woman, would more likely than not

> have raised grave concerns that the refugee claim itself may be fabricated. I find that, taken together, these would have been insurmountable credibility concerns for the original panel, and that the panel would have, on a balance of probabilities, rendered a negative decision on the basis of credibility concerns if these withholdings and misrepresentations were revealed at the time.

[26] Notably, the Applicant, who was represented by counsel, did not summons the Witness or police officers who authored the police reports.

IV. Issues

[27] The following issues arise:

1. Did the Panel breach procedural fairness by relying on the Minister's Witness's evidence, including her sworn affidavit and the police notes concerning her criminal accusations against the Applicant, without giving the Applicant an opportunity to cross-examine her and/or the police officers?

2. Did the Panel erred in conducting materiality analysis at stage one of the two-prong test under s. 109 of the IRPA?

3. At stage two of the two-prong test under s. 109 of the IRPA, did the Panel erred by unduly discounting corroborative, contradictory evidence without providing any reason for discounting it, and instead focusing only on the evidence that supports its finding?

V. Standard of review

[28] The parties agree, and I concur, the standard of review is reasonableness. On the issue of procedural fairness, the Applicant makes no submissions on the standard of review, only noting the present matter requires a high level of procedural fairness. The Respondent submits questions of procedural fairness do not lend themselves to a standard of review analysis; rather, the

reviewing Court must be satisfied the process was fair having regard to all the circumstances. For procedural fairness, the ultimate question is whether the applicant knew the case to meet and had a full and fair chance to respond.

A. *Reasonableness*

[29] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued contemporaneously with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65[*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "…what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[30] Per the Supreme Court of Canada's more recent judgment in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, the purpose of reasonableness review is to uphold the rule of law while according deference to administrative decision makers:

> [57] *Vavilov* explained that the purpose of reasonableness review is "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" (para. 82). Reasonableness review starts from a posture of judicial restraint and "a respect for the distinct role of administrative decision makers" (para. 13), arising from the legislature's institutional design choice to give administrative decision makers rather than courts the jurisdiction to decide certain issues (para. 24). Reasonableness review also serves to "maintain the rule of law" (para. 2) and "to safeguard the legality, rationality and fairness of the administrative process" (para. 13). Thus, the purpose of reasonableness review is to uphold "the rule of law, while according deference to the statutory delegate's decision" (*Canada Post*, at para. 29).
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> [Emphasis added]

[31] *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances." The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker":

> *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[32] To the same effect, the Federal Court of Appeal held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence unless there is a fundamental error:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

B. *Procedural fairness*

[33] The Respondent submits that although frequently referred to as a correctness standard, the Federal Court of Appeal has stated questions of procedural fairness are not decided according to any particular standard of review. More importantly, the Federal Court of Appeal conclusively determines, and I agree, that on procedural fairness "the ultimate question remains whether the

applicant knew the case to meet and had a full and fair chance to respond": see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 55-56 per Rennie JA:

> [55] Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. As Suresh demonstrates, the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, in my view, there are no compelling reasons why it should be jettisoned.
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> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice—was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.
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> [Emphasis added]

VI. Relevant legislation

[34] Section 109 of *IRPA* authorizes the RPD to vacate a previous refugee determination:

Vacation of refugee protection	**Demande d'annulation**
109 (1) The Refugee Protection Division may, on application by the Minister,	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre,

vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	**(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[35] Rule 45(1) of the *Refugee Protection Division Rules*, SOR/2012-256 requires a party to request a summons for the RPD to order an individual to testify:

Requesting summons	**Demande de citation à comparaître**
45 (1) A party who wants the Division to order a person to testify at a hearing must make a request to the Division for a summons, either orally at a proceeding or in writing.	**45 (1)** La partie qui veut que la Section ordonne à une personne de témoigner à l'audience lui demande, soit oralement lors d'une procédure, soit par écrit, de délivrer une citation à comparaître.

VII. Submissions of the parties

A. *The RPD did not breach the Applicant's right to procedural fairness*

[36] Briefly stated, the Applicant submits the original panel erred by relying on the evidence of the Minister's Witness and the police officers while denying him an opportunity to cross-examine them. The Applicant submits refugee vacation proceedings attract a high level of procedural fairness which includes "a full opportunity for refugees to challenge the evidence supporting the request to vacate status": *Ali v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 1085 at paragraphs 20-27. In particular, "procedural fairness requires that the right of cross-examination be afforded to a refugee claimant when confronted with testimony that is adverse to the claimant's position" as it is "fundamental to the truth seeking function of a court": *Rezmuves v Canada (Citizenship and Immigration)*, 2013 FC 973 at paragraph 29.

[37] Despite the RPD stating "[in] a raw and contentious interpersonal situation such as this," "there would be no sensible basis on which to prefer the allegations of one witness over the other," they "[assigned] significant weight to [the Witness's] evidence." The Applicant submits this was procedurally unfair.

[38] With respect, the Applicant is misquoting the RPD's conclusion. The quote in full reads:

> In a raw and contentious interpersonal situation such as this, and assessed in a vacuum, I find that there would be no sensible basis on which to prefer the allegations of one witness over the other apart from the existence of significant internal flaws in a witness's evidence. In this application, however, there exists other evidence,

> some of which may be considered relatively objective or unbiased, against which the allegations of both witnesses can be compared. I find that the more closely a witness's allegations align to other available evidence which may be considered comparatively objective or unbiased, the more reliable I may consider that witness's allegations in this application.
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> [Emphasis added]

[39] More generally, the Applicant's submission is without merit. As per Rule 45 of the *Refugee Protection Division Rules*, the Applicant was required to request a summons for the RPD to compel the Witness to testify at the hearing.

[40] As stated by the Respondent, the Applicant made no such request.

[41] Also in my respectful view, where a party fails to raise an issue of procedural fairness at the earliest opportunity (as here), they have impliedly waived any breach: *Alexander v Canada (Citizenship and Immigration)*, 2023 FC 438 at paragraph 21; *Gadwa v Kehewin First Nation*, 2016 FC 597 at paragraph 58; *Kamara v Canada (Citizenship and Immigration)*, 2007 FC 448 at paragraph 26. By not moving for a summons or otherwise attempting to compel the Minister's Witness and police officers to appear to be cross-examined, the Applicant impliedly waived the perceived breach of procedural fairness. The Respondent submits it would be disingenuous for the Applicant to complain of a procedural defect he should have addressed earlier.

[42] The Applicant nonetheless takes issue with RPD's comments on whether they would have compelled the Minister's Witness:

> While the Respondent did not make an application to compel this witness to appear for questioning, I find that, considering the

> acrimonious status of this relationship; the back-and-forth allegations of threats and harm between the Respondent and the Minister's witness, and the involvement of the police and the Ontario Court of Justice in their relationship, it would not have been appropriate to compel the Minister's witness to testify at the hearing of this application because of the possibility that she has experienced the kinds of harm she alleges at the hands of the Respondent, and the distress that placing her in a virtual hearing room with the Respondent may trigger.
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> [Emphasis added]

[43] But the Applicant's point is moot. The Applicant did not request a summons for either the Witness or the police officers. He cannot claim a breach of procedural fairness premised on his failure to act, nor on an *obiter* comment by the RPD. Indeed, we do not know why the Applicant did not request a summons; it may have been his strategic decision that cross-examination would not advance or even hurt his case.

[44] The Applicant argues police reports are hearsay and based on the complainant's account: the complaint was the Minister's Witness. I am not persuaded on the hearsay argument because the RPD is specifically authorized to admit hearsay. Notably, s. 170(g) of *IRPA* states that the RPD "is not bound by any legal or technical rules of evidence." In addition, the Supreme Court of Canada has declared a principled exception to hearsay where the proposed evidence meets the criteria of necessity and reliability: *R v Khan*, [1990] 2 SCR 531 at 546-547. Either allow the introduction of this evidence.

B. *The RPD did not misapply the s. 109 analysis*

[45] Broadly, the Applicant submits the RPD improperly applied the test to determine whether the Original Decision granting refugee status should be vacated. This Court recently stated the test in *Nabacwa v Canada (Citizenship and Immigration),* 2024 FC 249 at paragraphs 15-17 [*Nabacwa*] per Sadrehashemi J.:

> [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 (*Ed*e 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).
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> [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; *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 at para 16).

(1) The RPD was not required to consider intention under s. 109(1)

[46] The Applicant submits the RPD did not, but should have, considered whether the Applicant's misrepresentation was "intentional," although the Applicant concedes that intentionality is not relevant in respect of withheld information.

[47] However, in my respectful view, the preponderance of jurisprudence is to the opposite. As the Respondent submits, no assessment of intentionality or *mens rea* is required under the s. 109(1) analysis. In this the Applicant relies on established jurisprudence with which I agree.

[48] In *Zheng v Canada (MCI)*, 2005 FC 619 at paragraph 27, Justice Russell stated:

> [27] There is nothing in the wording of section 109, for instance, that requires that any misrepresentation or withholding of material facts must be deliberate and necessitate an inquiry into the Applicant's intent.

[49] Similarly, Justice Martineau stated in *Frias v Canada (MCI)*, 2014 FC 753 at paragraph 12:

> [12] Counsel for the applicant also argues before me that the panel did not take into account the presumption of good faith. That argument is irrelevant. Section 109 of the Act does not require that the applicant intended to misrepresent the facts. Instead, that provision sets out that the panel may vacate the decision " . . . if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." See *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554 at paragraph 29 (*Wahab*); *Canada (Minister of Citizenship and Immigration) v Pearce*, 2006 FC 492 at paragraph 36; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2005 FC 619 at paragraph 27. Moreover, the panel determined that the applicant's explanation that the officer had asked her only about the past 10 years is not credible: for

> example, the PIF was signed one month after her interview with the officer; she had the benefit of an interpreter and a lawyer when she stated that the information in her PIF was complete.

[50] This was applied by Justice Blanchard two decades ago in *Singh Chahil v Canada (MCI)*, 2007 FC 1214 at paragraphs 24-26 and with respect I am not persuaded it is in any way incorrect:

> [24] The Applicant had attempted to file as exhibits a number of documents including (a) income tax notices of assessment; (b) a work permit; (c) ration cards; (d) photographs showing bodily injuries; etc. As I understand the Applicant's submissions, this evidence would have served to explain why he acted as he did in respect to the misrepresentations and omissions at the first hearing.
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> [25] The Court of Appeal has established that a Board may only consider at a vacation hearing material that was before the original panel which allowed the refugee claim. It is also clear that the Minister may adduce evidence at the vacation hearing to establish that a claimant made misrepresentations at the determination hearing. Similarly, a claimant may adduce new evidence at the vacation hearing in an attempt to persuade the Board that the misrepresentations were not made. (*Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, [2002] F.C.J. No.603 (QL) at paragraphs 16 and 17).
>
> [26] Here, there is no issue that the misrepresentations were made by the Applicant and that the evidence at issue was not before the original panel. Consequently, the Board did not err in not admitting this new evidence.

[51] As noted, it seems to me the preponderance of jurisprudence supports the Respondent.

(2) The RPD did not grapple with the sufficiency of the evidence before the original panel per s. 109(2)

[52] The second stage of the s. 109 analysis 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.'": *Nabacwa* at paragraph 16. According to the Applicant, the RPD did not consider all the evidence before the original panel.

[53] The Applicant cites *Attakora v Canada (Minister of Employment and Immigration) (FCA)*, [1989] FCJ No 444 at paragraph 9 [*Attakora*] where the Court commented it would be inappropriate for the decision maker to demand refugees preserve their travel documents. The Federal Court of Appeal notes there is "nothing inherently incredible in a refugee saying that he has destroyed false travel documents in order to avoid detection and arrest once they have served their purpose": *Attakora* at paragraph 9. However, the issue of the destruction of false travel documents is not at issue in the present case.

[54] The Applicant also cites *Sethi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178 [*Sethi*] where this Court granted an application for judicial review despite the applicant making several misrepresentations. The Applicant submits *Sethi* is an example of applying a contextual approach which maintains the balance between the "preservation of the integrity of recognition of refugee protection" and "the provisions under section 96 and 97 of [*IRPA*] which grant protection to individuals who have a well-founded fear of persecution or a risk to their life if returned to their country of origin."

[55] The Applicant suggests, on a s. 109 analysis, “a relevant inquiry is whether an incorrect refugee determination was made not the intent of the persons whose words or actions led to the incorrect decision.” However, the Applicant cites no case law in support of their position and seems to contradict the Applicant’s position on considering intention under the first branch of the s. 109 assessment.

[56] The issue central to the Applicant’s submission is the RPD’s conclusion “there would have been no such remaining evidence that could justify refugee protection” despite the RPD recognizing its role and “responsibility to re-weigh evidence available before the original panel.”

[57] The Applicant submits the RPD ignored the medical and psychiatric reports, as well as the supporting letters which were before the original panel.

[58] I disagree. While I do agree the RPD may not selectively consider evidence, nor may it refuse to consider the evidence before the original panel where the misrepresentation was so fundamental as to taint the remaining evidence: *Tancos v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 7 at paragraphs 37-42. However, in my view, those propositions are not breached here.

[59] First of all, the RPD is deemed to have considered all the evidence before it and is under no obligation to mention every argument and fact in dispute. Moreover, given the falsity of the mother’s death certificate and of the Applicant’s own birth certificate, the obviously deliberate non-disclosure of his relationship with the Witness, the obvious non-disclosure of his permanent

resident status in Denmark, the RPD's disbelief of the alleged impact of his mother's death (particularly because she was alive), and other misrepresentations, it seems to me the RPD was reasonably entitled to discount the Applicant's remaining evidence. There were, as the RPD reasonably found in weighing and assessing the evidence before it, "insurmountable credibility concerns" with this Applicant and his response to the application to vacate. There would indeed have been "no such remaining evidence that could justify refugee protection."

[60] These credibility concerns went to the core of the Applicant's claims. Where the credibility issue is central to the matter and involves false documents, it is well settled that the RPD may (and in this case did) cast doubt on the other evidence tendered by an applicant: *Chen v Canada (MCI)*, 2020 FC 605 at paragraph 62; *Rahman v Canada (Citizenship and Immigration)*, 2019 FC 71 at paragraph 28; *Yasik v Canada (Citizenship and Immigration)*, 2014 FC 760 at paragraph 55.

[61] I close by noting there is nothing in the physician's report of relevance to the risk of persecution in Uganda or to his sexuality, nor is the report from his brief visit to a psychiatrist any more helpful to the Applicant's case.

VIII. Conclusion

[62] With respect, and despite the very able submissions of counsel for the Applicant, this Application must be dismissed.

IX. Certified question

[63] Neither party proposes a question for certification, and I agree none arises.

JUDGMENT in IMM-21831-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.
3. There is no order as to costs.
4. The style of cause is amended with immediate effect to show the Minister of Public Safety and Emergency Preparedness as Respondent.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-21831-24
STYLE OF CAUSE:	MOSES NKULUNZIZA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 1, 2025
JUDGMENT AND REASONS:	BROWN J.
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