Federal Court  Cour fédérale

Date: 20211019

Docket: IMM-7051-19

Citation: 2021 FC 1100

Ottawa, Ontario, October 19, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ECHEZONACHIKA OKOLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada granting an application, brought by the Respondent pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], vacating the Applicant's refugee protection.

Background

[2] The Applicant is a Nigerian national. He entered Canada in 2007 and made a claim for refugee protection based on his alleged fear of persecution by the Nigerian government as a result of his perceived support for the Movement for the Actualization of the Sovereign State of Biafra. In his Personal Information Form [PIF], and other documents filed in support of his claim for refugee protection, the Applicant stated that he had not used and was not known by any other names. He also answered "no" to the questions: "Have you ever been sought, arrested or detained by the police or military or any other authorities in any country, including Canada?" and, "Have you ever committed or been charged with or convicted of any crime in any country, including Canada?" On July 27, 2009, the RPD accepted the Applicant's claim and he was granted Convention refugee status. The Applicant became a permanent resident of Canada on September 21, 2010.

[3] In December 2014, the Canada Border Services Agency [CBSA] received an anonymous tip alleging the Applicant had altered the spelling of his name to avoid being linked to his criminal history in the United Kingdom [UK]. In response to an inquiry by CBSA, Interpol conducted a fingerprint verification and confirmed that the Applicant, under the name Chika Echezona Okolo, had been involved in a fatal car crash in the UK on December 18, 2004. In connection with that crash, he had been arrested, charged and released on bail. He subsequently failed to appear for trial and a warrant was issued for his arrest. On December 19, 2005, the Applicant was convicted in absentia of Causing Death by Dangerous Driving pursuant to section 1 of the *Road Traffic Act 1988* (UK). He was sentenced to three years of imprisonment and was

disqualified from driving for 2 years. Interpol also confirmed that the warrant for the Applicant's arrest remains in force as he has not served his sentence imposed in the UK.

[4] In 2017, pursuant to subsection 44(2) of the *IRPA*, the Minister of Public Safety and Emergency Preparedness referred to the Immigration Division [ID] a report prepared pursuant to subsection 44(1) of the *IRPA* alleging the Applicant was inadmissible for serious criminality. Following a hearing before ID on July 24, 2017, the ID found that the Respondent had failed to establish that the UK offence that the Applicant was convicted of, Causing Death by Dangerous Driving, was equivalent to the offence of Dangerous Driving Causing Death under subsection 249(1) of the *Criminal Code* of Canada RSC 1985, c C-46 as it appeared on December 18, 2004 [*Criminal Code 2004*]. The ID therefore declined to find the Applicant to be inadmissible.

[5] The Respondent appealed the ID's decision to the Immigration Appeal Division [IAD]. On March 5, 2018, the IAD upheld the ID's decision. The IAD stated that, by all appearances, the Applicant is a scoundrel who should be returned to the UK "to pay the price for his crime". However, that was not the role of the IAD. Its role was to determine whether the Respondent had met the onus of establishing on the balance of probabilities that the offence for which the Applicant was convicted in the UK is equivalent to an offence pursuant to subsection 249(1) of the *Criminal Code 2004*. Based on the evidence presented by the Respondent, the IAD found that it had not met its onus.

[6] On April 18, 2018, CBSA issued a Notice of Application to Vacate Refugee Status pursuant to subsection 109(1) of the *IRPA*. The application was brought on the basis that the

Applicant's protection in Canada was obtained by direct misrepresentations relating to his criminality and identity. The application asserted that the Applicant withholding his UK conviction for Causing Death by Dangerous Driving precluded the RPD from assessing his claim against the *United Nations Convention Relating to the Status of Refugees* [Convention] Article 1F(b) exclusion. Further, that his failure to disclose that he has used and is known by other names, including his conviction and outstanding warrant under the name Chika Okolo, prevented the RPD from accurately assessing his claim for refugee protection against his criminal and immigration history in the UK. These matters were also relevant to the success of the Applicant's refugee protection claim.

[7] By decision dated March 5, 2018, the RPD allowed the application to vacate the Applicant's refugee protection and nullified the earlier RPD decision that led to the conferral of refugee protection. The decision to vacate is the subject of this application for judicial review.

[8] By Order dated February 24, 2021, this Court denied the Applicant's motion for a stay of removal finding that he had failed to establish that he would be at risk of irreparable harm if removed to Nigeria. He was subsequently involuntarily removed to Nigeria.

Decision under review

[9] As to misrepresentation of his criminal history, the RPD rejected the Applicant's explanation that he misunderstood the questions in the PIF and other refugee intake forms. The RPD noted that the Applicant did not dispute that he was arrested and charged with a criminal offence prior to making his refugee claim. It found that, even if he did not know about his

conviction when he made his claim for refugee protection in 2007, as he testified before the RPD, he did know that he had been arrested and charged with an offence before making his claim. The RPD noted that the Applicant is fluent in English, having received a university degree in Nigeria in English, completed a master's degree in computing and information technology in the UK, and resided in the UK for nearly two years. Further, it stated that the questions in the PIF are clear and require criminal history information broader than just convictions. The RPD found the Applicant's claim that he misunderstood the questions lacked credibility given his high level of education, fluency in English, and the fact that he was represented by counsel in making his refugee claim.

[10] The RPD accepted the Applicant's testimony that people and institutions have mixed up the order of his names throughout his life. However, his denial of using a different name in his refugee claim to avoid being associated with his criminal history in the UK was deemed irrelevant. The RPD found that whether or not the Applicant intended to deceive, he knew he had been referred to by other names and was responsible for providing all names he had been known by in his claim documents.

[11] The RPD next considered whether the Applicant's misrepresentations were material. It stated that it was focusing on the omission of his criminal history, as this was determinative. The RPD noted the three elements of the test for material misrepresentation under subsection 109(1) of the *IRPA*, as outlined in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181. It found that the omission of the Applicant's criminal history met the test as those facts were material to whether the Applicant was excluded from refugee protection pursuant to

Article 1F(b) and section 98 of the *IRPA*. The RPD concluded that the original panel could and would have excluded the Applicant if his criminal history had been known. Therefore, there was a sufficient causal connection between the Applicant's omission of his UK criminal history and the grant of his refugee protection.

[12] The RPD next considered Article 1F(b). The RPD outlined the four elements to be established for exclusion under Article 1F(b) and noted that only the first two elements were at issue in the matter before it.

[13] As to whether there were serious reasons for considering that the Applicant engaged in the dangerous operation of a motor vehicle, the RPD stated that the fact of the car crash and the death of the other driver were not in dispute. The RPD noted that the Respondent asserted that the Applicant's acts would have been a crime under subsection 249(1) of the *Criminal Code 2004*. Conversely, the Applicant asserted that his actions would not have been a crime in Canada, pointing to the decisions of the ID and IAD on this issue. The RPD noted that the Applicant also argued that the application to vacate was *res judicata* as the ID and IAD had already made determinations on the issue of the Applicant's UK criminal conviction.

[14] The RPD rejected the Applicant's arguments. It found that the question of whether a claimant is excluded from refugee protection under Article 1F(b) is distinct from the question of whether a person is inadmissible for having been convicted of a criminal offence in a country outside of Canada under subsection 36(1)(b) of the *IRPA*. That is, the legal tests for determining

exclusion and inadmissibility are different. Therefore, the application to vacate was not *res judicata*.

[15] The RPD noted that most of the evidence regarding the collision is derived from the Bedfordshire Police, Road Policing Unit, Investigation Diary into a Fatal Road Collision [Investigation Diary]. The RPD reviewed the circumstances of the collision described in the Investigation Diary, which were largely not in dispute, and found that they were sufficient to demonstrate the *actus reus* of the Canadian offence. The RPD stated that the key question was the cause of the collision. The Applicant had testified that he does not know how or why he drove into oncoming traffic and does not recall falling asleep while he was driving. The RPD noted that the Applicant asserted that this occurred as a result of a momentary lapse of attention and, therefore, he lacked the *mens rea* required for the offence.

[16] The RPD reviewed the modified objective test used to determine the requisite *mens rea* for negligence based criminal offences, as set out in *R v Beatty*, 2008 SCC 5 [*Beatty*]. The RPD noted that there is limited information regarding the Applicant's state of mind at the time of the collision. The RPD acknowledged that the ID had found that the only reasonable inference that could be drawn was that the Applicant had fallen asleep and, therefore, lacked the *mens rea* for the offence. The RPD noted that the IAD found that the evidence that had been provided for the appeal did not establish that there was anything more than a momentary lapse of attention by the Applicant. However, the RPD found that the IAD's finding was not binding on it.

[17] The RPD distinguished the factual circumstances in *Beatty*, where the accused was found not to be at fault, and found there are serious reasons for considering the Applicant operated a vehicle in a manner that was dangerous to the public and caused the death of another person.

[18] The RPD stated that the offence is presumed to be serious enough to warrant exclusion because its maximum sentence is over ten years, citing *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*]. The RPD then analyzed the factors outlined by the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] at paragraph 44 that can rebut the presumption of seriousness: the elements of the crime, the mode of prosecution, the penalty prescribed, the facts, and mitigating and aggravating circumstances.

[19] The RPD concluded that, given the Applicant's significant disregard for public safety and flight from prosecution and justice, the Applicant's offence is serious within the meaning of Article 1F(b). It found that the Applicant would have been excluded if the original RPD panel hearing his refugee claim had known about the arrest and criminal charge relating to the collision and allowed the application to vacate.

Issues and standard of review

[20] The issue in this matter is whether the RPD's decision is reasonable. This requires the consideration of two sub-issues:

a. Did the RPD err in finding there were serious reasons to consider the Applicant committed a crime?

b. Did the RPD err in applying the *Jayasekara* factors to determine the seriousness of the offence?

[21] When appearing before me the Applicant conceded that he had misrepresented both his criminal history and his other known identities. Accordingly, these reasons will not address the arguments found in the Applicant's written submission asserting that the RPD erred in finding the Applicant committed a misrepresentation.

[22] The Applicant, in his written submissions, also argued that the application for judicial review is not rendered moot by the Applicant's removal to Nigeria. The Respondent agrees that the matter is not moot given that the Applicant's return to Nigeria was involuntary. Accordingly, these reasons will also not address that issue.

[23] The parties submit, and I agree, that the RPD's decision is to be reviewed on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25, and 33).

Legislation and legal backdrop

***Immigration and Refugee Protection Act**, SC 2001, c 27*

> **98. Exclusion — Refugee Convention**
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> A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.
>
> …
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> **109(1) Vacation of refugee protection**

The Refugee Protection Division may, on application by the Minister, 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.

109(2) Rejection of application

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.

109(3) Allowance of application

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.

…

Schedule [1] — Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees

(Subsection 2(1))

…

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Criminal Code, RSC 198, c C-46 (as it appeared on December 18, 2004)

Dangerous operation of motor vehicles, vessels and aircraft

249. (1) Every one commits an offence who operates

> (*a*) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;
>
> …
>
> **Dangerous operation causing death**
>
> (4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Did the RPD err in finding there were serious reasons to consider the Applicant committed a crime?

[24] The focus of the Applicant's argument is that the RPD erred in finding there was a marked departure from the standard of care expected of a reasonable person. The Applicant submits that this is because the collision was the result of a momentary lapse of concentration, relying on *Beatty* and *R v Roy*, 2012 SCC 26 [*Roy*] at paragraphs 24 and 28. Further, he asserts that there is no evidence on the record to contradict his claim that the collision was a result of a momentary lapse of concentration. The Applicant emphasizes that the ID and the IAD both came to this conclusion and that the RPD provides no analysis or reasons for not making the same finding. The Applicant submits that the RPD was too eager to jump to a criminal finding based simply on the fact of there having been a collision and that it failed to have proper regard for the circumstances of the collision, falling into the very error warned against in *Beatty* and *Roy*.

[25] The Respondent contends that the facts in *Beatty* are distinguishable and that the RPD reasonably concluded there were serious reasons to consider the Applicant's conduct was a

marked departure from the relevant standard of care. The Respondent submits that the RPD did not make its decision in an evidentiary vacuum, as the Applicant alleges, and that the Applicant ignores his own role in creating any evidentiary gaps by fleeing the UK before his criminal trial. Further, that the Applicant's arguments amount to a request to reweigh the evidence. The Respondent also submits that the RPD adequately explains why it came to a different conclusion than the IAD.

Analysis

[26] The role of the RPD is not to make determinations of guilt. Rather, Article 1F(b) directs it to decide whether there are "serious reasons for considering" that an individual has committed a serious non-political crime outside the country of refuge prior to their admissions to that country as a refugee. The standard of proof for "serious reasons for considering" is lower than the proof beyond a reasonable doubt applicable to criminal matters, or the general civil standard of the balance of probabilities, but it is higher than mere suspicion (*Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paras 101-102). This Court has held that the Minister merely has to show, "on a burden less than the civil standard of a balance of probabilities, that there are serious reasons for considering that the applicant committed the alleged acts" (*Abbas v Canada (Citizenship and Immigration)*, 2019 FC 12 at para 18).

[27] A non-political crime is presumptively serious where a maximum sentence of ten years or more could have been imposed, had the act been committed in Canada (*Febles* at para 62). However, this presumption is rebuttable. When assessing the seriousness of an offence the RPD must consider the elements of the offence, the mode of prosecution, the penalty prescribed, the

facts of the offence, and the mitigating and aggravating circumstances underlying the conviction (*Jayasekara* at para 44).

[28] In this case, the Respondent submits that the acts of the Applicant give rise to serious reasons for considering that the Applicant contravened subsection 249(1)(a) of the *Criminal Code 2004*, a serious non-political crime.

[29] The RPD acknowledged that both the ID and IAD found, when conducting an equivalency analysis under subsection 36(1)(b) of the *IRPA*, that the evidence supported only one reasonable inference: that the Applicant suffered a momentary lapse of attention. Therefore, the ID and the IAD concluded that the Applicant lacked the requisite *mens rea* of the offence. However, the RPD decided that it was not bound by the findings of the ID and IAD as it was required to "determine if there are serious reasons for believing that the respondent committed a serious crime". It found that the question of whether a claimant is excluded from refugee protection under Article 1F(b) of the Convention is distinct from the question of whether a person is inadmissible for having been convicted of a criminal offence in a country outside Canada under subsection 36(1)(b) of the *IRPA* and employs a different legal test. The test for equivalency, developed to determine inadmissibility determined under section 36 of the *IRPA*, is not the same as an exclusion determination under section 98 of the *IRPA*. The RPD stated that its focus was on whether the Applicant's acts could be considered crimes under Canadian law and that "the RPD must apply the facts in the crime to Canadian criminal law".

[30] The RPD acknowledged the application of the modified objective test for determining *mens rea* for negligence based criminal offences as confirmed by the Supreme Court of Canada in *Beatty*, but stated that it need not apply the test with the degree of rigour of a criminal or even the ID or IAD when assessing an offence. It concluded that *Beatty* was distinguishable on its facts and that, based on the evidence before it, there were serious reasons for considering that the Applicant had operated a motor vehicle in a manner that was dangerous to the public and caused the death of another person.

[31] In my view, as a starting point, it is helpful to summarize the Supreme Court's findings in *Beatty* to provide context to the RPD's findings.

[32] In *Beatty*, the accused was charged with dangerous operation of a motor vehicle causing death under subsection 249(4) of the *Criminal Code 2004.* The accident that gave rise to the charge occurred when Mr. Beatty's pick-up truck, for no apparent reason, suddenly crossed the solid centre line into the path of an oncoming vehicle, killing all three occupants. Witnesses driving behind the victims' car observed that Mr. Beatty's vehicle was being driven in a proper manner prior to the accident. The evidence was that his vehicle had not suffered from mechanical failure, nor were intoxicants a factor in the accident. Mr. Beatty stated that he was not sure what happened but that he must have lost consciousness or fallen asleep and collided with the other vehicle.

[33] The trial judge concluded that these few seconds of negligent driving could not, without more, support a finding of a marked departure from the standard of care of a reasonably prudent

driver. The Court of Appeal set aside the acquittals and ordered a new trial, finding that Mr. Beatty's conduct of crossing the centre line into the path of oncoming traffic could only be viewed as objectively dangerous and a "marked departure" from the requisite standard of care.

[34] The Supreme Court confirmed that the modified objective test from *Hundal*, [1993] 1 SCR 867 remained the appropriate test to determine the requisite *mens rea* for negligence based criminal offences, including driving offences, and restated the whole of the test as follows at para 43:

> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".
>
> (b) The *Mens Rea*
>
> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

[35] The Supreme Court agreed with the Court of Appeal that the evidence showed that there was only one lane for travel in each direction, the traffic was proceeding at or near the posted

speed limit of 90 kilometres per hour, the highway was well-travelled, there was limited visibility approaching the curve, and the collision occurred within a split second of Mr. Beatty crossing into the oncoming lane of traffic. Viewed objectively, Mr. Beatty's failure to confine his vehicle to its own lane of travel was in "all the circumstances" highly dangerous to other persons lawfully using the highway, and in particular those approaching in a westerly direction on their own side of the road.

[36] However, the Supreme Court held that that this conclusion only answered the *actus reus* part of the offence. The more difficult question was whether Mr. Beatty had the necessary *mens rea*. It noted that there was no evidence of any deliberate intention to create a danger for other users of the highway that could provide an easy answer to that question. Rather, the limited evidence that was adduced about Mr. Beatty's actual state of mind suggested that the dangerous conduct was due to a momentary lapse of attention. The Supreme Court found that, in those circumstances, the trial judge correctly found that the question of *mens rea* turned on whether Mr. Beatty's *manner* of driving, viewed on an objective basis, constituted a marked departure from the norm. The Supreme Court concluded:

> [52] In my respectful view, the Court of Appeal erred in faulting the trial judge for addressing her attention to Mr. Beatty's "momentary lack of attention" and his "few seconds of lapsed attention". The trial judge appropriately focussed her analysis on Mr. Beatty's manner of driving in all the circumstances. She noted that there was no evidence of improper driving before the truck momentarily crossed the centre line and that the "few seconds of clearly negligent driving" was the only evidence about his manner of driving (para. 36). She appropriately considered the totality of the evidence in finding that "the only reasonable inference" was that "he experienced a loss of awareness" that caused him to drive straight instead of following the curve in the road (para. 36). In her view, this momentary lapse of attention was insufficient to found criminal culpability. She concluded that there was

> "insufficient evidence to support a finding of a *marked* departure from the standard of care of a prudent driver" (para. 37).
>
> [53] Based on the totality of the evidence, I see no reason to interfere with the trial judge's assessment of Mr. Beatty's conduct in this case and her conclusion on Mr. Beatty's criminal liability. By contrast, it is my respectful view that the Court of Appeal leaped too quickly to the conclusion that the requisite *mens rea* could be made out from the simple fact of the accident occurring, leaving no room for any assessment of Mr. Beatty's conduct along the continuum of negligence.

[37] Accordingly, the Supreme Court allowed the appeal and restored the acquittals.

[38] Subsequently, in *Roy*, the Supreme Court again considering subsection 249(1) of the *Criminal Code 2004*. Its overview in that case also provides helpful context:

> [1] Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct — operating a motor vehicle in a dangerous manner resulting in death — and a required degree of fault — a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence.
>
> [2] Defining and applying this fault element is important, but also challenging, given the inherently dangerous nature of driving. Even simple carelessness may result in tragic consequences which may tempt judges and juries to unduly extend the reach of the criminal law to those responsible. Yet, as the Court put it in *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 34, "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy". Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.

[39] The Supreme Court in *Roy* found that the trial judge made a serious legal error in relation to the fault element when: the judge simply inferred from the fact that the appellant had committed a dangerous act while driving that his conduct displayed a marked departure from the standard of care expected of a reasonable person in the circumstances. The Court stated: "… the trial judge did exactly what the Court unanimously said in *Beatty* must not be done: without further analysis of the fault component of the offence, he inferred simply from the fact of driving that was, objectively viewed, dangerous, that the appellant's level of care was a marked departure from that expected of a reasonable person in the same circumstances" (at para 24).

[40] In *Roy,* the Supreme Court reaffirmed its analysis in *Beatty*, which it summarized at paragraph 28 of its reasons, and also commented on how to prove the marked departure fault element (at paras 39-42), which I have discussed further below.

[41] The Supreme Court in *Roy* concluded the record did not provide evidence on which a properly instructed trier of fact, acting reasonably, could conclude that Mr. Roy's standard of care was a marked departure from that expected of a reasonable person in the circumstances. The Court accepted that the driving, objectively viewed, was dangerous. But there was no evidence that the driving leading up to pulling into the path of oncoming traffic was other than normal and prudent driving. The focus, therefore, was on the momentary decision to pull onto the highway when it was not safe to do so. The Court held that the manner of driving, on its own, did not support a reasonable inference that Mr. Roy's standard of care was a marked departure from that expected of a reasonable driver in the same circumstances (at para 54). The Supreme Court concluded that Mr. Roy's "decision to pull onto the highway is consistent with simple

misjudgment of speed and distance in difficult conditions and poor visibility. The record here discloses a single and momentary error in judgment with tragic consequences. It does not support a reasonable inference that the appellant displayed a marked departure from the standard of care expected of a reasonable person in the same circumstances so as to justify conviction for the serious criminal offence of dangerous driving causing death" (at para 55).

[42] In this case, as noted by the RDP, the evidence about the collision comes almost exclusively from the Investigation Diary. It states that on December 18, 2004, the Applicant's vehicle was travelling in the single, northbound lane of the A6 when it crossed the solid double white lines and entered the adjacent southbound lane. The Applicant's vehicle crossed entirely through that lane and entered the second and outermost southbound lane, colliding head on with the victim's vehicle. The victim died at the scene, her husband was injured. The Applicant was reported as traveling at approximately 50 miles per hour [mph] in a 60 mph zone, traffic volume was moderate, visibility was good and the weather conditions were fine and dry. A breath test was negative and a vehicle inspection found no defects that contributed to the collision. Four witnesses saw the collision as well as the victim's husband who was a passenger in her car.

[43] A witness driving behind the victim's vehicle reported that she saw the Applicant's vehicle travel into her side of the road and collide head on with the victim's vehicle. She reported that the victim had no time to react or avoid the collision. She could not see why the Applicant's vehicle had made the maneuver. A witness driving a vehicle directly behind the Applicant's vehicle reported that the Applicant's vehicle was being driven in a steady manner travelling at about 50 mph. The Applicant's vehicle travelled onto the wrong side of the road. It did not brake

or change course prior to colliding with the victim's vehicle. The witness believed that the Applicant must have fallen asleep to drive in that manner. Two other witnesses, travelling together, were also driving behind the Applicant. They reported that the Applicant's vehicle travelled across the double white lines, on to the opposing carriageway, and collided head on with the victim's vehicle. They did not see the Applicant's vehicle brake and it was not erratic as it travelled to the wrong side of the road. They too formed the opinion that the Applicant had fallen asleep.

[44] The Applicant was arrested on January 4, 2005 on suspicion of causing death by dangerous driving. When interviewed, he denied the offence and blamed the deceased driver of the other vehicle. He was released on bail. The Applicant failed to attend at trial and a warrant for his arrest was issued. The trial proceeded in absentia.

[45] In its reasons, the RPD stated that the *actus reus* of the offence requires that the Applicant was driving in a manner that was "dangerous to the public, having regard to all of the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time or might reasonably be expected to be at that place". The RPD noted that the Investigation Diary indicated that road conditions were dry and the level of traffic was average and that there was no evidence to indicate that the Applicant was speeding, driving erratically, or intoxicated. However, the RPD found his failure to confine his vehicle to his own lane was dangerous to the public in the circumstances.

[46] The Applicant does not challenge finding that the *actus reus* of the offence was established.

[47] The RPD then referred to *Beatty* and identified that the modified objective test is to be utilized to determine the requisite *mens rea* for negligence based criminal offences. It acknowledged that the ID and IAD found that the Applicant suffered from a momentary lapse of attention and, therefore, lacked the *mens rea* necessary to make out the offence in subsection 249(1). However, the RPD stated that it need not apply *Beatty* with the rigour of a criminal court or even the ID or IAD in "assessing an offence". The RPD determined that the ID and IAD findings were not binding on it as the legal tests in determining exclusion under Article 1F(b) and inadmissibility for having been convicted of a criminal offence in a country outside Canada under subsection 36(1)(b) of the *IRPA* are different. When analyzing the question of exclusion, the RPD is not to look at equivalency but at the role of domestic law in determining what is serious (citing *Victor* 2013 FC 979). The focus is on whether the acts could be considered crimes under Canadian law. That is, the RPD must apply Canadian criminal law to the facts of the crime (citing *Vlad v Canada (Citizenship and Immigration)*, 2007 FC 172).

[48] The Applicant agrees that the ID and IAD decisions are not binding on the RPD but submits that the RPD provides no explanation for why it did not accept that there was not a momentary lapse of concentration. That is, the RPD did not explain its basis for reaching a different conclusion than the ID and IAD.

[49] I agree with the Applicant. The RPD simply repeated that the analysis required of the RPD is very different than that required of the ID and IAD because the RPD is not required to determine whether the Applicant's conviction in the UK is equivalent with an offence under Canadian legislation. The RPD stated that it must determine whether there are serious reasons for considering that the Applicant committed a serious crime.

[50] This, however, does not explain why the ID and IAD concluded that the Applicant suffered a momentary lapse of concentration but the RPD did not.

[51] On this point, the RPD acknowledged that most of the evidence regarding the collision is derived from the Investigation Diary. This is the same documentary evidence that was before the ID and IAD. As for the Applicant, the RPD stated that his testimony was that he did not know how or why he drove into oncoming traffic and that he did not recall falling asleep while driving. The IAD found that whether or not the Applicant fell asleep or was distracted by something else, the evidence before it served only to establish that was a lapse of attention. The RPD did not indicate that there was any new, different or additional evidence before it that was not before the IAD and, based on a reading of both decisions, I am unable to identity any different evidentiary basis upon which the RPD may have founded its different conclusion.

[52] To be clear, the RPD stated that the ID and IAD "accepted that the evidence did not establish that there was anything more than a momentary lapse of attention by the respondent" but that this finding was not binding on the RPD as it was not required to conduct an equivalency analysis and the RPD is "not limited to considering those facts that formed the factual foundation

of the respondent's conviction". While this may all be so, the RPD does not identify any new facts upon which it founded its differing conclusion.

[53] And, in the subsequent paragraph, the RPD stated:

> Based on the evidence before me, I find there are serious reasons for considering the respondent's conducting driving across three lanes and into oncoming traffic constitutes a marked departure from the standard of care expected of a prudent driver in the circumstances.

[54] The Applicant submits that the RPD's characterization of his vehicle as travelling over three lanes is factually incorrect and hyperbolizes the events of the day in question. I note that at paragraph 39 of its reasons, the RPD states that the parties agreed that the Applicant was involved in a motor vehicle accident on December 18, 2004 and that the parties "do not dispute that the respondent was driving a vehicle when it crossed three lanes and another vehicle head-on which resulted in the death of the driver of the other vehicle". At paragraph 49 of its reasons, the RPD states that the facts regarding the collision are not really in dispute "[t]he respondent was driving northbound when he crossed the centre lane, and two southbound lanes and collided into a vehicle that [sic] driving southbound". The RPD later concluded in paragraph 52 that the Applicant's act of driving "through the centre lane and into two oncoming lanes of traffic is dangerous to the public having regard to all of the circumstances". And, at paragraph 59 of its decision, the RPD again states that the Applicant "crossed three lanes of traffic into oncoming traffic".

[55] I agree that the RPD appears to have misapprehended the number of lanes that the Applicant's vehicle crossed. The Investigation Diary is clear that he left his lane, the sole

northbound lane, crossing over the double white lines into the immediately adjacent southbound lane then crossed into the far southbound lane (the third lane of three) and collided head on with the victim's vehicle.

[56] The RPD then went on to discuss some of the facts in *Beatty*, stating that in that case there was only one lane of traffic in each direction, there was limited visibility approaching a curve and the collision occurred within a split second of Mr. Beatty crossing the centre line. The RPD noted that the Supreme Court found that the trial judge appropriately considered the totality of the evidence in finding that the only reasonable inference was that Mr. Beatty experienced a loss of awareness that caused him to drive straight instead of following the curve in the road. The RPD distinguished the facts of *Beatty* from the situation before it on the basis that the collision involving the Applicant occurred on a straight road, the Applicant crossed three lanes of traffic into oncoming traffic and he had no explanation for what occurred or how a reasonable person would not have been aware of the risk and the danger involved. Based on this, the RPD stated that "there are serious reasons to consider that another inference about the Applicant's conduct could be drawn – that the collision was the result of a marked departure from the standard of care expected of a prudent driver in the circumstances".

[57] However, the totality of the evidence in *Beatty* was not dissimilar to the totality of the evidence that was before the RPD: Mr. Beatty's vehicle for no apparent reason crossed the centreline into the path of an oncoming vehicle with resultant fatalities; the weather was clear; the surface of the road was in good repair, bare and dry; witnesses driving behind him reported that the vehicle was being driven in a proper manner prior to the accident; there was no

mechanical failure; intoxicants were not a factor; Mr. Beatty could not explain what happened but thought that he must have lost consciousness or fallen asleep.

[58] The trial judge's reasons were set out in the Supreme Court's decision:

> [13] After reviewing the evidence, the trial judge instructed herself according to the test laid out in *Hundal*. I will review the analysis in *Hundal* in more detail later in these reasons. The trial judge noted that "[t]he application of this objective test has been challenging for trial courts", as "reflected in a number of decisions that at first blush would appear to be irreconcilable" (para. 28). After reviewing some of the appellate jurisprudence, including cases where the accused's driving had been held to constitute a "marked departure" from the applicable standard, she concluded as follows:
>
> > The circumstances in this case are different. Here there is no evidence of any improper driving by Mr. Beatty before his truck veered into the westbound lane and into the oncoming vehicle. While that act of driving was clearly negligent it occurred within a matter of seconds. Moreover, there was no evidence of any evasive measures or evidence of any obstruction in the eastbound lane that might have caused him to veer into the westbound lane. In my view, the only reasonable inference to be drawn in these circumstances, of Mr. Beatty's manner of driving, was that he experienced a loss of awareness, whether that was caused by him nodding off or for some other reason. That loss of awareness resulted in him continuing to drive straight instead of following the curve in the road and thereby cross the double solid line. These few seconds of clearly negligent driving, which had devastating consequences, are the only evidence of Mr. Beatty's manner of driving. In my view, *Hundal* requires something more than a few seconds of lapsed attention to establish objectively dangerous driving. Criminal culpability cannot be found, beyond a reasonable doubt, on such a paucity of evidence. [para. 36]
>
> [14] The trial judge then expounded on the distinction between criminal and civil negligence as follows:

> This tragic accident occurred from a momentary lapse of attention and snuffed out the lives of three individuals. There is nothing a court can do or say that will adequately redress the loss suffered by the victims' families in such circumstances. However, in assessing criminal culpability it is not the consequences of a negligent act of driving that determines whether an accused's manner of driving is objectively dangerous. It is the driving itself that must be examined. In my view, Mr. Beatty's few seconds of negligent driving, in the absence of something more, is insufficient evidence to support a finding of a *marked* departure from the standard of care of a prudent driver. As contemplated by *Hundal* Mr. Beatty's negligent driving undoubtedly falls within the continuum of negligence that is certain to attract considerable civil liability. It is in that forum that redress for his actions will be found. [Emphasis in original; para. 37.]

[59] In my view, the RPD erred by reaching an inference that was not based on the totality of the evidence before it.

[60] Like *Beatty*, there was no evidence before the RPD of any improper driving prior to the collision. In fact, the Investigation Diary records that witnesses reported that there was no erratic driving before this happened.

[61] Like *Beatty*, where Mr. Beatty could not explain why he left his own lane and could only attribute it to having fallen asleep or momentarily losing consciousness, the Applicant had no explanation for what occurred. The RPD stated that the Applicant's testimony was that he does not know how or why he drove into ongoing traffic and that he did not recall falling asleep while

he was driving. The evidence before the RPD also included the Investigation Diary report noting that two witnesses formed the impression that the Applicant had fallen asleep.

[62] The RPD distinguished *Beatty* on the basis that there Mr. Beatty crossed the centre line into the adjacent lane on ongoing traffic while the Applicant crossed three lanes of traffic into oncoming traffic. However, as discussed above, the Applicant left his lane, crossed one full southbound lane and then entered the second southbound lane where the head on collision occurred. Thus, after crossing over the centre line, the Applicant fully crossed over one southbound lane and then entered the second southbound lane. There is no evidence that he crossed three lanes of traffic prior to the collision. Assuming the RPD's point was that this would have taken longer than simply crossing the centre line, as was the case in *Beatty*, there is no evidence in the record as to how long, traveling at 50 mph, it took the Applicant's vehicle to cover this distance. There is, however, evidence in the Investigation Diary that a witness stated that the victim had no time to react – suggesting that the collision occurred very quickly. It is also of note that the IAD in its reasons stated that, to put the inherent risks of driving into perspective, that the expert evidence in *Beatty* was that it would have taken Mr. Beatty's vehicle only 0.00268 seconds to cross the centre line. The IAD stated "[e]ven assuming the respondent's lapse of attention was many multiples of that, tragedy struck in an instant".

[63] As to the fact that the road was curved in *Beatty* and straight in the matter before the RPD, I fail to see the relevance of this distinction. As stated by the trial judge in *Beatty*, it was the momentary loss of awareness that resulted in Mr. Beatty continuing to drive straight instead of following the curve in the road and thereby crossing the double solid line. Similarly, the

evidence before the RPD did not disclose any other reason for the Applicant leaving his lane and crossing into two lanes of ongoing traffic.

[64] In *Roy*, the circumstances were that Mr. Roy was driving in limited visibility due to fog when he pulled onto a highway into the path of an oncoming truck, causing a fatal accident. He could not explain his conduct, in large part because he could not remember the accident.

[65] In discussing the *mens rea* in *Roy* the Supreme Court stated:

> [37] Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in *Beatty*, put it this way: "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy" (para. 34). The Chief Justice expressed a similar view: "Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to a conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving" (para. 71).

[66] As to proof of the marked departure element, the Supreme Court stated:

> [39] Determining whether the required objective fault element has been proved will generally be a matter of drawing inferences from all of the circumstances. As Charron J. put it, the trier of fact must examine all of the evidence, including any evidence about the accused's actual state of mind (para. 43).
>
> [40] Generally, the existence of the required objective *mens rea* may be inferred from the fact that the accused drove in a manner that constituted a *marked departure* from the norm. However, even where the manner of driving is a marked departure from normal driving, the trier of fact must examine all of the circumstances to determine whether it is appropriate to draw the inference of fault from the manner of driving. The evidence

> may raise a doubt about whether, in the particular case, it is appropriate to draw the inference of a marked departure from the standard of care from the manner of driving. The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity: *Beatty*, at para. 37.
>
> [41] In other words, the question is whether the manner of driving which is a marked departure from the norm viewed in all of the circumstances, supports the inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited.
>
> [42] Driving which, objectively viewed, is simply dangerous, will not on its own support the inference that the accused departed markedly from the standard of care of a reasonable person in the circumstances (Charron J., at para. 49; see also McLachlin C.J., at para. 66, and Fish J., at para. 88). In other words, proof of the *actus reus* of the offence, without more, does not support a reasonable inference that the required fault element was present. Only driving that constitutes a marked departure from the norm may reasonably support that inference.

[67] The Supreme Court concluded:

> [54] In my view, the record does not provide evidence on which a properly instructed trier of fact, acting reasonably, could conclude that the appellant's standard of care was a marked departure from that expected of a reasonable person in the circumstances. I accept that the driving, objectively viewed, was dangerous. But it must be noted that there was no evidence that the driving leading up to pulling into the path of oncoming traffic was other than normal and prudent driving. The focus, therefore, is on the momentary decision to pull onto the highway when it was not safe to do so. I do not think that the manner of driving, on its own, supports a reasonable inference that the appellant's standard of care was a marked departure from that expected of a reasonable driver in the same circumstances.
>
> [55] Taking the Crown's case at its highest, the appellant pulled out from a stop sign at a difficult intersection and in poor visibility when it was not safe to do so. ….. However, on any realistic

> scenario consistent with the evidence, the time between visibility and impact would be only a few seconds. In my view, the appellant's decision to pull onto the highway is consistent with simple misjudgment of speed and distance in difficult conditions and poor visibility. The record here discloses a single and momentary error in judgment with tragic consequences. It does not support a reasonable inference that the appellant displayed a marked departure from the standard of care expected of a reasonable person in the same circumstances so as to justify conviction for the serious criminal offence of dangerous driving causing death.

[68] The ID and IAD both found that the evidence before them supported only one reasonable inference, being that the Applicant suffered a momentary lapse of attention and, therefore, he lacked the requisite *mens rea* of the offence. The RPD, on the basis that the collision occurred on a straight rather than a curved road, its mistaken understanding that the Applicant's vehicle crossed three lanes into oncoming traffic and, the Applicant's lack of an explanation for why this occurred, which the RPD seems to have interpreted as adverse evidence as to the Applicant's actual state of mind, found that this amounted to "serious reasons to consider that another inference about the respondent's conduct can be drawn. Namely that the collision was the result of a marked departure from the standard of care expected of a prudent driver in the circumstances".

[69] In my view, this reasoning is not in keeping with the analysis required by *Beatty*. There, the Supreme Court held that in the circumstances of that case Mr. Beatty's failure to confine his vehicle to his own lane of traffic was dangerous to other users of the highway and the *actus reus* of subsection 249(1) was therefore made out. However, the *mens rea* was not shown. There was no evidence of a deliberate intention to create danger suggestive of a marked departure from the norm. Rather, the limited evidence adduced at trial about the accused's actual state of mind

suggested that the dangerous conduct was due to a momentary lapse of attention. There was no evidence of improper driving before the accused's vehicle crossed the centre line. The Court concluded that, viewed on an objective basis, the momentary lapse of concentration was insufficient evidence to support a finding of a marked departure from the standard of care of a prudent driver, as found by the trial judge. Further, the Court of Appeal leaped too quickly to the conclusion that the requisite *mens rea* could be made out from the simple fact of the accident occurring, leaving no room for any assessment of Mr. Beatty's conduct along the continuum of negligence.

[70] Here, like in *Beatty*, the Applicant could not explain why he crossed the centre lane into oncoming traffic. Therefore, all that was left to determine if the requisite *mens rea* had been established was to assess his manner of driving in all of the circumstances. I agree with the Applicant that the RPD did exactly what the Supreme Court of Canada instructed against in *Beatty* and *Roy*, it jumped to the conclusion when it found – based on the evidence before it, which appears to have been the very same evidence that was before the ID and the IAD – that there are serious reasons for considering the Applicant's conduct in driving across three lanes and into oncoming traffic constituted a marked departure from the standard of care expected of a prudent driver in the circumstances by assuming the facts establishing the *actus reus* served to also establish the *mens rea.*

[71] The RPD erred by drawing an inference on limited facts, one of which was in error (that the Applicant crossed three lanes of traffic) and one of which was not relevant to assessing the manner of driving (the road was straight), rather than the totality of the evidence. Further, it erred

in its understanding and application of the modified objective test when the explanation offered as to state of mind was the Applicant's testimony that he did not know how or why he drove into oncoming traffic. Here, there was no evidence of deliberate behaviour or of prior erratic driving. The RPD's inference that the collision was the result of a marked departure from the standard of care expected of a prudent driver in the circumstances was not justified based on the legal and factual constraints and was, therefore, unreasonable.

[72] Accordingly, its resultant finding that "there are serious reasons to considering that the respondent operated a vehicle in a manner that was dangerous to the public and caused the death of another person" is also unreasonable.

[73] To be clear, while the standard of proof that the Respondent was required to meet under the Article 1F(b) analysis is at a lower threshold, in taking the analytical approach that it did, the RPD still required a sound evidentiary basis upon which to found its inference.

Did the RPD err in applying the *Jayasekara* factors to determine the seriousness of the offence?

[74] With respect to the elements of the crime factor, the RPD stated that the Applicant drove his vehicle "across three lanes" and into oncoming traffic resulting in the collision and fatality. The RPD found that the significant degree of negligence and disregard for public safety in the offence weighs in favour of finding that it is serious. For the reasons above, I found that the RPD's *mens rea* analysis was unreasonable as was its resultant finding that there are serious reasons to considering that the respondent operated a vehicle in a manner that was dangerous to

the public and caused the death of another person. It is also unclear to me whether the RPD is referring to the *actus reus* or the *mens rea* element of the offence when it is addressing this *Jayasekara* factor. Accordingly, the RPD's consideration of this factor is unjustified based on the law and the evidence that was before the RPD.

[75] The RPD states only that the mode of prosecution in the UK is unknown. It is unclear if the RPD is of the view that this renders this factor neutral or how this otherwise fits into its analysis. Similarly, as to sentencing range, the RPD states only that the parties had not provided any evidence with respect to the sentencing range for subsection "249(1) *Criminal Code* acts which cause death".

[76] As to the penalty prescribed, the Applicant received a sentence of three years of imprisonment and a two-year licence disqualification for the conviction for Dangerous Driving Causing Death in the UK. The RPD states that there was no evidence before it as to the applicable sentencing range. Regardless, it concludes that the Applicant received a custodial sentence "that appears to be moderate in length". I agree with the Applicant that there is no way of determining how the RPD reached this determination and, therefore, the finding is unintelligible.

[77] As to the aggravating and mitigating factors, the RPD found that the Applicant likely fled the UK to avoid prosecution. It was not disputed that the Applicant left the UK for Nigeria a few weeks before his criminal trial date. However, the RPD did not accept as credible the Applicant's explanations that he left the UK because of the death of a cousin in Nigeria, which was not

supported by any evidence. Similarly, it did not accept his explanation that his legal counsel had advised him that he need not appear for his trial as the matter was not a big deal because it was only an accident. Given that the UK court issued a warrant for the Applicant's arrest when he did not appear for trial, the RPD found that it was unlikely that his lawyer had told him that he need not attend at his trial. Based on his intentional omission of information concerning his commission of an offence, arrest and criminal charge in the UK from his PIF and related forms, the RPD found that the Applicant generally lacked credibility and placed little weight on his explanations about leaving the UK. I see no error in this analysis. The Applicant was required to disclose not just his conviction, but any arrest and charges. The Applicant could not have been unaware of those events.

[78] The RPD concluded that, given the Applicant's disregard for public safety and flight from prosecution and justice, his offence is serious for the purposes of the Article 1F(b) exclusion.

[79] In my view, while the RPD's assessment of the aggravating and mitigating factor was reasonable, given its assessment of the other three factors, this alone cannot render reasonable its required analysis of whether the Applicant's crime is presumptively serious.

Conclusion

[80] For the reasons above, the RPD's decision is unjustified and therefore unintelligible and unreasonable (*Vavilov* at paras 15, 86, and 95-98).

Remedy

[81] In the normal course, when an administrative decision is found to be unreasonable the remedy is to remit it back to a different decision maker for redetermination. When reconsidering the matter, the decision maker may reach the same or a different outcome (*Vavilov* at paras 140-141).

[82] However, in this matter the Applicant also submits that in *Freitas v Canada (Citizenship and Immigration)*, [1999] 2 FC 432 [*Freitas*] this Court confirmed that it has the authority to order the Respondent to return a wrongly removed applicant to Canada, and that this has been commented on favourably in *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750 [*Magyar*] and *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 345 [*Molnar*]. The Applicant requests that the Court order the Respondent return him to Canada at the Respondent's expense.

[83] I would first note that *Freitas* is a 1999 decision. There the Court stated that it was not prepared to arbitrarily order the respondent to return the applicant to Canada at the respondent's expense if the return of the applicant should prove to be unnecessary to an effective redetermination by the Convention Refugee Determination Division [CRDD] of the applicant's claim to Convention refugee protection. The Court allowed the application for judicial review, set aside the CRDD decision and remitted the matter back for redetermination. If the CRDD determined that it was necessary that the applicant again appear before the CRDD to allow it to

comply with the Court's order and so advised the respondent, then the respondent was ordered to forthwith make best efforts to return the applicant to Canada at the respondent's expense.

[84] Further, and contrary to the Applicant's submissions, neither *Magyar* nor *Molnar* support this outcome. They find only that *Freitas* remains good law with respect to the issue of mootness, which is not at issue in this matter. Further, this Court has held in *Kreishan v Canada (Citizenship and Immigration),* 2018 FC 481 at paras 80-83; aff'd in 2019 FCA 223, that the relief in *Freitas* was exceptional, discretionary relief granted due to procedural fairness concerns which was not the circumstance in *Kreishan,* where the applicant had a hearing before the RPD and the opportunity to present evidence to support his claim.

[85] The Court has also questioned whether it actually possesses the discretion to make the order granted in *Freitas.* In *Figurado v Canada (Solicitor General),* 2005 FC 347 [*Figurado*], Justice Martineau states: (at paras 26-27):

> Gibson J. did not state what authority specifically allowed him to make the above order. However, it is apparent from the reasons given in *Freitas*, that it was not disputed by the parties that the Court could order the Minister to return the applicant to Canada, at public expense, in order to render a new determination meaningful. Today, the respondent is not ready to make such a concession. There are a number of decisions of the Federal Court of Appeal that suggest that the Court's general power to make directions under subsection 18.1(3) of the *Federal Courts Act* is somewhat more limited. Particularly if the declaration or the remedy in question would indeed have the effect of conferring refugee status or protection, or of fettering the Minister's discretion in cases where an application to remain in Canada has been made on H & C grounds. (*Canada (Minister of Employment and Immigration) v. Sharbdeen* (1994), 23 Imm. L.R. (2d) 300 (F.C.A.), at paragraph 7; *Canada (Minister of Citizenship and Immigration) v. Forde* (1997), 210 N.R. 194 (F.C.A.), at paragraphs 9-10; *Turanskaya v. Canada (Minister of Citizenship and*

> *Immigration)* (1997), 145 D.L.R. (4th) 259 (F.C.A.), at paragraph 6; *Rafuse v. Canada (Pension Appeals Board)* (2002), 2002 FCA 31 (CanLII), 286 N.R. 385 (F.C.A.), at paragraphs 13-14; *Owusu v. Canada (Minister of Citizenship and Immigrat*ion), 2004 FCA 38 (CanLII), [2004] 2 F.C.R. 635 (C.A.), at paragraph 12; *Lazareva v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 39).
>
> *Freitas*, was decided under the former Act and before most of the decisions referred to above. It can be said today that the Court's power to order the return of an applicant to Canada is expressly limited by subsection 52(1) of the *IRPA*, which prescribes in such a case that "the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances." Therefore, while not expressing a definite opinion on this matter, I am inclined to accept the respondent's argument that the Court has no power to order the respondent to return an applicant to Canada. It is also clear that the Court does not have the power to direct the PRRA officer to accept the applicant's application for protection, unless, the negative PRRA decision was perhaps based on some determinative error of law.

[86] In my view, the Applicant’s bare reliance on *Freitas*, without more, is not a sufficient basis upon which I should grant the extraordinary remedy sought in this case.

[87] It must also be kept in mind that the Applicant has acknowledged that he misrepresented both his criminal history and his identity when seeking refugee protection. Thus, the fact of his misrepresentations is no longer at issue. Moreover, the RPD stated that its focus was on the omission of information as to his criminal history, as this was determinative in the test for a material misrepresentation under subsection 109(1) of the *IRPA*. On redetermination, the RPD will likely also need to determine if the Applicant’s misrepresentation as to his identity relates to a relevant matter, such as his immigration history, pursuant to s 109(1). That is, if it impacted the granting of his refugee status.

[88] And, regardless of the outcome of a redetermination, the Applicant remains a fugitive from justice in the UK. The Court has no way of knowing what, if any, impact this latter point might have on an attempt to return to Canada.

[89] Nor did the Applicant make any submissions as to why a redetermination could not be conducted while he is in Nigeria. He instructed his Canadian counsel with respect to his application for judicial review while he is outside Canada and offers no reasons why he could not do so with respect to a re-determination by the RPD. And, given the use of Zoom and other remote hearing platforms that have become common place in this COVID-19 era, and by which this application for judicial review was conducted and which permitted the Applicant to attend the hearing, he is at least potentially able to testify from Nigeria if that is necessary at a redetermination hearing.

[90] That said, there is no evidence or submissions before me on any of these points. This serves to emphasize the absence of any substantive submission or any evidence in support of the Applicant’s extraordinary relief request, which I am denying.

JUDGMENT IN IMM-7051-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7051-19
STYLE OF CAUSE:	ECHEZONACHIKA OKOLO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	SEPTEMBER 27, 2021
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	OCTOBER 19, 2021

APPEARANCES:

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