Federal Court  Cour fédérale

Date: 20210621

Docket: IMM-1168-20

Citation: 2021 FC 637

Ottawa, Ontario, June 21, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SARA MARSALA ALAZAR
SAMIEL ARAIA BEYENE
SELEMUN ARAIA BEYENE

Respondents

JUDGMENT AND REASONS

I. OVERVIEW

[1] The respondents – a mother and her two teenage sons – sought refugee protection in Canada on the basis of a fear of persecution in Eritrea due to the principal claimant's perceived anti-government political opinions. In a decision dated August 22, 2018, the Refugee Protection Division ("RPD") of the Immigration and Refugee Board ("IRB") rejected the claims because it

was not satisfied that the respondents had established their personal identities as citizens of Eritrea.

[2] The respondents appealed this decision to the Refugee Appeal Division ("RAD") of the IRB. In a decision dated January 21, 2020, the RAD concluded that the RPD had erred in its findings regarding identity. Being satisfied that the respondents had established their personal identities, the RAD then went on to find that they are Convention refugees. The RAD reached this latter conclusion because, "[a]ccording to objective country condition evidence contained in the National Documentation Package, returnees who have left illegally or have claimed asylum and are forced to return may face arbitrary arrest, detention, harsh punishments, torture, recruitment to indefinite military services or forced labour." Consequently, the RAD set aside the RPD's determination and substituted its own pursuant to paragraph 111(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[3] The Minister of Citizenship and Immigration had intervened before the RPD but did not intervene in the respondents' appeal to the RAD.

[4] The Minister now applies under subsection 72(1) of the *IRPA* for judicial review of the RAD's decision. The Minister challenges both the substance of the decision and the manner in which it was made. With respect to the substance of the decision, the Minister submits that the RAD's findings on identity and Convention refugee status are unreasonable. The Minister also submits that the RAD did not have jurisdiction to consider the *sur place* aspects of the respondents' claims. With respect to the manner in which the decision was made, the Minister

submits that, if the RAD did have jurisdiction to consider the *sur place* aspects of the claims, it breached the requirements of procedural fairness by making a positive determination on this basis without first giving the Minister notice that this issue was in play and an opportunity to be heard.

[5] As I will explain in the reasons that follow, the Minister has not persuaded me that the RAD's identity finding is unreasonable. Further, I do not agree with the Minister that the RAD lacked jurisdiction to consider the *sur place* aspects of the respondents' claims. However, I do agree that the RAD did not comply with the requirements of procedural fairness. Since this is a sufficient basis to set aside the decision and remit the matter to a new decision maker, it is neither necessary nor appropriate to consider whether the RAD's determination that the respondents are Convention refugees is unreasonable.

II. BACKGROUND

A. *The Respondents' Claims for Protection*

[6] The grounds for seeking protection are set out in Basis of Claim forms completed by Sara Marsala Alazar, the principal claimant, on her own behalf and on behalf of her sons shortly after they arrived in Canada. Ms. Alazar also described her experiences in Eritrea and her fear of returning there in her testimony before the RPD.

[7] Ms. Alazar states that she was born in December 1970 in the City of Asmara in Eritrea. At the time, Eritrea was a province of Ethiopia. It became an independent nation in 1993. Ms. Alazar belongs to the Tigrigna ethnic group.

[8] Ms. Alazar married Araia Beyene Nablush in January 2001. Mr. Nablush was born in Asmara in July 1965. Ms. Alazar and Mr. Nablush have two sons who were born in Asmara in June 2002 and January 2006, respectively.

[9] Ms. Alazar alleges that on February 3, 2016, she and Mr. Nablush were arrested at their home by armed security agents and taken by a police vehicle to a prison close to Asmara. Ms. Alazar was eventually released on February 26, 2016. Mr. Nablush was released on May 12, 2016. While they were detained, both were interrogated and subjected to physical and verbal abuse, including torture. Both were accused of being members of the Eritrean People's Democratic Party-Zete and of working against the Eritrean government. Ms. Alazar explained that the suspicions related mainly to her husband but she was arrested too to see if she knew anything. According to Ms. Alazar, neither she nor her husband had been politically active previously.

[10] When Ms. Alazar was released she was told to report to the police every month, to not leave Asmara without the consent of security officials, and to not be found at any public meeting. She was also told that if she failed to comply with these conditions, she would be executed. Ms. Alazar testified that she reported to police four times before leaving Eritrea.

[11] With the assistance of a smuggler, the family left Asmara by car on June 28, 2016, and crossed the border into Sudan illegally two days later. In Sudan, Mr. Nablush contacted an agent who arranged travel to Canada for Ms. Alazar and their two sons. The agent obtained false passports for them as well as airline tickets. (At the RPD hearing, Ms. Alazar testified that this had cost $35,000 USD. Family members had provided the necessary funds.) In the company of the agent, who was posing as her husband, Ms. Alazar and her sons left Khartoum on August 30, 2016, and arrived in Toronto the next day via Cairo. At the RPD hearing, Ms. Alazar testified that she never saw the passports they travelled on. The agent had held onto them throughout the trip and was the one who presented them in Toronto. Ms. Alazar testified that she was not questioned by border control officials because the agent said she did not speak English.

[12] Mr. Nablush had remained in Sudan but eventually left for Kampala, Uganda, after he was detained in Sudan. He could not accompany his family to Canada because of the ruse that the agent was Ms. Alazar's husband. He was not able to come afterwards because he could not afford to engage another agent. He decided to wait overseas to see what happened with the refugee claims in Canada.

[13] In her Basis of Claim form, Ms. Alazar stated that she believed if she returned to Eritrea she would be arrested, imprisoned and tortured by the government because she left the country illegally, because she had made a refugee claim against Eritrea, and because she was seen as disloyal to the government.

B. *The Minister's Intervention*

[14] By notice dated December 8, 2016, the Minister indicated his intent to intervene in the proceeding before the RPD in relation to Article 1F(b) of the United Nations Convention Relating to the Status of Refugees, *28 July 1951*, 189 UNTS 150 ("*Refugee Convention*"), identity and credibility. The notice stated that Article 1F(b) – which excludes from refugee protection anyone about whom there are serious reasons for considering that "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" – may be engaged because it appeared that Ms. Alazar may have abducted her minor children when she travelled to Canada with them and remained here without the permission of their father. The notice also stated that the Minister "has serious concerns regarding the principal claimant's credibility and all claimants' identities." As will be seen below, the Article 1F(b) concern was eventually withdrawn.

[15] A third-party Designated Representative was appointed for the minor claimants in April 2018. All three claimants were represented by a lawyer at the RPD.

[16] The hearing before the RPD took place on June 28, 2018. (A previous attendance on April 5, 2018, was adjourned on consent without the substance of the claims being addressed.) Counsel for the Minister took part in the hearing, questioning Ms. Alazar and filing documentary evidence. Counsel for the Minister also provided post-hearing written submissions, as did counsel for the respondents.

C. *Evidence Relating to Article 1F(b) Exclusion*

[17] Ms. Alazar testified that she left for Canada with her sons with their father's permission; indeed, he was the one who had made all the arrangements. She and her sons have kept in regular contact with Mr. Nablush since they have been in Canada.

[18] Ms. Alazar provided a letter from Mr. Nablush in which he confirmed that he did not object to her having taken their sons to Canada or to her seeking refugee protection in Canada on their behalf. As proof of his identity, Mr. Nablush provided his Eritrean driver's licence. (Mr. Nablush had sent his driver's licence to Ms. Alazar in Canada but it had not arrived at the time of the RPD hearing. It was filed post-hearing without objection.)

D. *Evidence of Identity*

[19] The respondents did not provide any primary forms of identification to establish their personal identities. Instead, to corroborate her testimony that she and her sons are who she said they are, Ms. Alazar provided the following documentary evidence:

- Copies of their respective birth certificates with translations. The birth certificates were issued by the Public Registration in the City of Asmara. All three were issued on November 25, 2009, and were numbered sequentially. Ms. Alazar testified that neither she nor her sons had had birth certificates previously. They only obtained these when her late father's estate was being settled. They did not leave Eritrea with the birth certificates; rather, Ms. Alazar's mother sent them to her later in Canada.

- Letters from two individuals in Toronto, Hailemariam Fsshaye Hagos and Simon Hagos Berhe. Both men attested to having known Ms. Alazar in Eritrea. On the basis of interviews with these two men, the Program Coordinator with the Eritrean Canadian Community Centre of Metropolitan Toronto in turn attested in a letter that Ms. Alazar and her sons are Eritrean. None of these statements were under oath or solemn affirmation and none of the authors of the letters attended the RPD hearing.

- A letter from the Chaplain of the Eritrean Catholic Ge'ez Rite Church in Toronto purporting to confirm Ms. Alazar's Eritrean nationality and confirming her and her sons' membership and attendance at the church.

- Two photographs of family members taken in Eritrea. One depicted Ms. Alazar's husband and their older son in 2004 or 2005. Ms. Alazar testified that she took the photograph. The other was a group photograph in which Ms. Alazar's father and a number of other members of her family were depicted. The occasion was the acceptance of one of Ms. Alazar's nieces into an order of nuns. Ms. Alazar was not present because she was at work that day. She did not know when the picture was taken but it was "a long time ago." (Ms. Alazar's father passed away in 2004.)

- Two photographs of Ms. Alazar with family members taken in Eritrea. One depicted her, her parents, and her younger brother. It was taken around 1994. The other was of Ms. Alazar and her father. Ms. Alazar thought this photograph had been taken before the other one but she did not give a date. Her mother had sent all of the photographs to her in Canada.

[20] The respondents also relied on the letter from Mr. Nablush described above as evidence of their personal identities.

[21] Ms. Alazar testified that she had had a national identity card but it was taken from her when she was detained in 2016 and never returned. She did not apply for a new one while she was still in Eritrea.

[22] Ms. Alazar testified that since she had been in Canada she had not attempted to obtain photo identification from Eritrea. She stated that this was not possible because she had left the country illegally. She also testified that she did not have any other documents that would assist in establishing her identity. The family had left behind most of their belongings in the house they had been renting in Asmara and Ms. Alazar did not know what had become of them. She did not contact her former employer in Eritrea for confirmation of her employment because she did not want to cause problems for them. (Ms. Alazar testified that she had worked for the same employer for 15 years.) She was also concerned about causing problems for family members in Eritrea if she asked them to help her obtain evidence from there to establish her identity.

[23] The Designated Representative for the minor claimants related their recollections of their lives in Eritrea to the RPD. The Designated Representative stated that she had "no doubt that the boys are from Eritrea and lived there for some time."

[24] Prior to the hearing, the Minister submitted the three birth certificates for analysis by a Canada Border Services Agency ("CBSA") document examiner. The reports of these analyses

(all dated April 12, 2018) were filed as exhibits. The reports stated that no evidence that the documents had been altered was found but all three reports were inconclusive with respect to the authenticity of the documents. The following comments were made with respect to each of the birth certificates:

> The questioned document does not appear to contain any security features that would assist in determining the authenticity of the document. In addition, we do not have a specimen and/or genuine sample of this document. This limits the conclusion of my analysis and as such, my results remain inconclusive.

Further:

> The physical examination of this document will not reveal whether it has been improperly issued, obtained by means of fraud or genuinely issued to a different person.
>
> This document does not contain any recognizable security features. The print methods employed to produce this document are commercially available and therefore highly subject to illegitimate production.
>
> This document contains no photograph, signature or biometric information to reliably link the document to the bearer and therefore does not provide reliable evidence of the bearer's identity.

E. *Post-Hearing Submissions*

[25] Both the Minister and the respondents provided post-hearing written submissions. The Minister's submissions were filed on July 13, 2018; the respondents' were filed on July 20, 2018.

[26] After formally withdrawing the concern with respect to Article 1F(b) of the *Refugee Convention*, counsel for the Minister focused on concerns with respect to the claimants' personal

identities and the credibility of the claims. With respect to identity, Minister's counsel raised a number of issues concerning the quality of the evidence of identity that was presented and concerning the absence of better evidence of identity. With respect to credibility, Minister's counsel raised a number of issues concerning Ms. Alazar's narrative of her experiences in Eritrea. In summary, Minister's counsel submitted that "due to the inconsistencies, contradictions, and omissions presented by the Claimants, there are serious concerns regarding their credibility, and the credibility of their refugee claim. Additionally, the Principal Claimant cannot be regarded as a credible witness."

[27] In written submissions on behalf of the respondents, counsel maintained that the evidence presented to the RPD was sufficient to establish their personal identities. With respect to the substance of the claims, counsel wrote the following: "It is respectfully submitted that the well-founded fear of the adult female claimant must not be forgotten in this case. Mrs. Sara Alazar provided moving and credible testimony in regard to the fact that she experienced rape and torture while in detention in Eritrea. There has been no evidence presented to contradict this oral evidence provided by Mrs. Alazar." After referring to IRB Chairperson's Guideline 4, counsel then continued as follows:

> Further, it is submitted that the Board Member must consider the subjective fear that Mrs. Alazar would have in returning to Eritrea, should her refugee claim be rejected, given the fact that she has already experienced rape and torture in her country. To return this woman to a country in which it is well-documented that rampant human rights occur [*sic*], and in which she has already suffered so much, would be a travesty of justice.

[28] Counsel for the respondents did not make specific submissions regarding a fear of persecution or ill-treatment based on the fact that Ms. Alazar and her children had left Eritrea illegally or that they had sought asylum in Canada.

F. *The RPD Decision*

[29] The RPD rejected the respondents' claims in a decision dated August 22, 2018. The dispositive issue was identity.

[30] The RPD concluded on a balance of probabilities that the respondents had failed to establish their identities. In summary, this conclusion was based on the following considerations:

- The respondents did not present any primary forms of identification. Given the objective evidence that it is difficult to obtain Eritrean passports, the RPD found that it was reasonable that they did not have passports. The RPD noted that Ms. Alazar had explained that her national identity card was seized when she was arrested and was not returned to her. The RPD stated: "Regardless of the alleged circumstances of why the national identity card was not presented, the panel notes that the principal claimant did not proffer it as establishing her personal identity or country of nationality."

- The only documentation tendered by the respondents to establish their identities was the birth certificates. The RPD concluded that the birth certificates were not authentic and, as such, carried no weight in establishing identity. Further, the tendering of inauthentic

documents undermined the respondents' credibility. The RPD concluded that the birth certificates were not authentic for the following reasons:

- As stated in the reports of the CBSA document examiner, the birth certificates do not contain any recognizable security features. Further, there was no photograph, signature or biometric information that would link the document to the bearer.

- The reports also stated that while there was no evidence that the documents had been altered, the print methods used to produce them "are commercially available and therefore highly subject to illegitimate production."

- An official stamp on each document that was partly in English misspelled the word "cemetery" as "cemetry".

- Reports in the National Documentation Package confirmed the availability and prevalence of fraudulent identity documents in Eritrea and in Eritrean communities abroad.

- The reasons given by Ms. Alazar for not trying to obtain other documentation to support her and her sons' identities – she did not want to endanger her mother, her brother or her former employer – are not borne out by the evidence. Specifically, there was no evidence that Ms. Alazar's mother or brother "were experiencing any problems at the hands of the Eritrean authorities." This, in turn, undermined the credibility of the respondents with respect to their identities.

- The letters from two community members attesting to their knowledge of Ms. Alazar were unsworn. Neither individual attended the hearing. As a result, neither the RPD nor Minister's counsel had an opportunity to question them. Ms. Alazar had made little, if any, effort to secure their attendance despite the importance of the issues the RPD was being asked to determine, including the threshold issue of identity. The failure "to make any attempts to have the witnesses testify at this hearing significantly undermines [the respondents'] credibility regarding their personal identities."

- The RPD accepted the letters from the Eritrean Canadian Community Centre of Metropolitan Toronto and from the Geez Rite Eritrean Catholic Chaplaincy as sufficient evidence of the respondents' Eritrean ethnicity but neither provided credible or trustworthy evidence to establish their personal identities. As a result, the RPD put very little weight on them.

- The photographs tendered by Ms. Alazar "do not provide any information which would establish the principal claimant's personal identity." As a result, the RPD put very little weight on them.

- Mr. Nablush's driver's licence was tendered to corroborate the identity of the author of the letter giving permission for the children to remain in Canada but no documentation had been tendered to establish that Ms. Alazar and Mr. Nablush are in fact married. Absent other evidence to establish the respondents' personal identities, Mr. Nablush's driver's licence "does not provide credible or trustworthy evidence to assist in that regard" and, accordingly, was given little weight by the RPD.

- In summary, the RPD had "concerns regarding the identity documentation provided by the claimants in support of their identities and there is reason to doubt the credibility and reliability of the other documentation provided by the claimants. Looking at the totality of the evidence, the panel finds that the claimants have not established their personal identities on a balance of probabilities."

[31] Since identity is a threshold issue, the failure to establish it meant that the claims must fail. As a result, the RPD did not address the substance of the claims in any way before rejecting them.

G. *The Appeal to the RAD*

[32] By Notice of Appeal dated September 7, 2018, the respondents commenced an appeal to the RAD. They were represented by counsel from the same law office as previously.

[33] In support of their appeal, the respondents tendered an affidavit from Ms. Alazar which reiterated her claim for protection based on her perceived political opinion, the fact that she had left Eritrea illegally and in violation of her conditions of release, and the fact that she had sought asylum in Canada. Attached as exhibits to the affidavit were statutory declarations from the two individuals in Toronto who had previously provided letters attesting to their knowledge of Ms. Alazar in Eritrea (see paragraph 30, above). Both declarants explained how they had known Ms. Alazar in Eritrea as well as why they had not attended the RPD hearing (one could not take time off work, the other had been difficult to reach because he had been very busy at work).

Also attached as exhibits were photographs which Ms. Alazar attested were of her wedding to Mr. Nablush as well as additional family photographs.

[34] In the statement required by subrule 3(3)(b) of the *Refugee Appeal Division Rules*, SOR/2012-257 ("*RAD Rules*"), the respondents indicated that they were seeking the admission of new evidence under subsection 110(4) of the *IRPA* (i.e. the evidence summarized in the previous paragraph) and that they were requesting a hearing if the RAD impugned the credibility of Ms. Alazar's declarations in her affidavit, if there are "concerns" about the new evidence, "and/or if contrary sworn testimony is admitted by the Division from another party which should be the subject of cross-examination by the Appellant's [*sic*] counsel."

[35] In their written submissions in support of the appeal, the respondents contended that the new evidence met the test for admission and that it "further establishes Ms. Alazar's identity on the balance of probabilities." The respondents also contended that, separate and apart from the new evidence, the RPD had erred in the analysis of the evidence leading to the conclusion that they had failed to establish their identities. Several alleged errors were identified. Finally, the respondents framed their request for relief as follows:

> The Appellant [*sic*] requests that, based on the arguments detailed above, the Refugee Appeal Division ("RAD") quash the decision of the RPD and return the matter for a new hearing or that the RAD substitute its own positive determination in the stead of the RPD's decision. The RPD decision in the present case made findings that are refuted by the new evidence. As well the RPD's findings about the Appellant's [*sic*] birth certificate are erroneous as outlined above.

[36] As required by subrule 3(2) of the *RAD Rules*, a copy of the Record was provided to the Minister.

[37] The Minister did not intervene in the appeal.

III. DECISION UNDER REVIEW

A. *The Admissibility of the New Evidence*

[38] The RAD found that the statutory declaration from Mr. Hagos met the test for admission under subsection 110(4) of the *IRPA* while the one from Mr. Berhe did not. The RAD noted that both statutory declarations repeated the details from the declarants' earlier letters. The RAD also found in respect of both statutory declarations that they were "provided in response to RPD findings, and therefore could not have reasonably been expected to have been presented at the time of the rejection of [the] claims." However, because Mr. Berhe had provided a different explanation for why he did not attend the RPD hearing than Ms. Alazar had offered (he said they had been unable to connect because he was too busy at work while she said she only saw him occasionally at church and never mentioned the hearing), the RAD found that his statutory declaration lacked credibility and, consequently, was inadmissible. (The RAD noted that it would still consider Mr. Berhe's unsworn letter, which was part of the record from the RPD.) On the other hand, Mr. Hagos's explanation for why he did not attend the RPD hearing was consistent with that offered by Ms. Alazar at the hearing and, therefore, was credible. Accordingly, his statutory declaration met the test for new evidence under subsection 110(4) of the *IRPA*.

[39] The RAD also admitted the additional photographs tendered by the respondents. The RAD agreed with the respondents that the photographs of Ms. Alazar with her husband were new because they were in response to the RPD's concerns during the hearing that Ms. Alazar did not provide any such photographs. The RAD accepted all the additional photographs because they "could not have reasonably been expected to have been presented at the time of the rejection of the claims."

[40] Despite admitting the new evidence, the RAD denied the respondents' request for a hearing. The RAD concluded under subsection 110(6) of the *IRPA* that a hearing was not warranted because, while the new evidence was relevant, it would not justify allowing or rejecting the claims if accepted.

B. *The RPD's Errors*

[41] The RAD agreed with the respondents that the RPD erred in its assessment of their birth certificates, in drawing a negative inference from their failure to obtain better identity documents from family members in Eritrea, and in its assessment of Mr. Nablush's driver's licence.

[42] With respect to the birth certificates, the RAD agreed with the respondents that it was an error for the RPD to make a finding of inauthenticity on the basis of the general prevalence of fraudulent documents. As well, there was no evidence that a genuine Eritrean birth certificate would have had security features that were missing from the ones that were tendered. Further, "the misspelling of a word on a document coming from a country where English is not a first

language should not be used to impugn its credibility." For its part, the RAD could see no basis for finding that the birth certificates are not authentic.

[43] With respect to the failure to seek the assistance of family members in Eritrea, the RAD found that Ms. Alazar's explanation for why she did not enlist her family to help her was credible in light of objective country condition evidence demonstrating the risks to family members of persons who have fled the country. The RAD found that the RPD had erred in drawing a negative inference on this basis.

[44] With respect to Mr. Nablush's driver's licence, the RAD found that Ms. Alazar had established on a balance of probabilities that she is married to Mr. Nablush. This finding was based on Ms. Alazar's testimony at the RPD, the letter from Mr. Nablush that was accepted by the RPD, and the new evidence in the form of photographs of their wedding. Mr. Nablush's driver's licence, in turn, "supports the [respondents'] overall identity and presence of the family in Eritrea" during the material time. The RAD found that the RPD erred in concluding otherwise.

C. *The RAD's Finding on Identity*

[45] On the basis of the evidence before it, the RAD found that the respondents had established their claimed identities as Eritrean citizens.

D. *The Refugee Determination*

[46] In their entirety, the RAD's reasons for finding the respondents to be Convention refugees are the following:

> As the Appellants have established their identities, I must now assess if they face a well-founded fear of persecution or a risk to life if they return to Eritrea. According to objective country condition evidence contained in the National Documentation Package, returnees who have left illegally or have claimed asylum and are forced to return may face arbitrary arrest, detention, harsh punishments, torture, recruitment to indefinite military services or forced labour [here the RAD cites a June 14, 2017, IRB Response to Information Request entitled "Eritrea: Situation of people returning to the country after they either spent time, claimed refugee status, or were seeking asylum abroad (July 2015-May 2017)]. As a result, I find that the Appellants do have a well-founded fear of persecution should they be forced to return to Eritrea. Because the state is the agent of persecution, they have no internal flight alternative available.

[47] Accordingly, the RAD allowed the appeal and, pursuant to paragraph 111(1)(b) of the *IRPA*, set aside the determination of the RPD and substituted its own determination that the respondents are Convention refugees.

IV. STANDARD OF REVIEW

[48] It is well-established that the substance of the RAD's decision is reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). This includes a finding with respect to identity, a fact-driven determination (*Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182 at para 5; see also pre-RAD jurisprudence concerning the review of identity findings such as *Rahal v Canada (Citizenship and*

Immigration), 2012 FC 319 at para 48, and *Su v Canada (Citizenship and Immigration)*, 2012 FC 743 at para 5).

[49] That this is the appropriate standard of review has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Reasonableness is now the presumptive standard of review for administrative decisions, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10). There is no basis for derogating from this presumption here.

[50] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*).

[51] As discussed in *Vavilov*, the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[52] As the applicant, the onus is on the Minister to demonstrate that the RAD's decision is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be

said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). Importantly, when applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125).

[53] As noted above, the Minister challenges the RAD's decision in part on the basis that it did not have jurisdiction to consider the *sur place* aspect of the claims. According to the Minister, having found material errors in the RPD's identity findings, the RAD was required to refer the matter to the RPD for re-determination. This issue was not raised before the RAD and, as a result, it is not addressed in the RAD's decision.

[54] The majority in *Vavilov* held that the rule of law requires courts to apply the standard of correctness to certain types of legal questions including "questions regarding the jurisdictional boundaries between two or more administrative bodies" (at para 53; see also paras 63 to 64). This strongly suggests that questions about the RAD's jurisdiction to determine certain issues itself as opposed to referring the matter to the RPD should be answered under a correctness standard. However, for present purposes, it is not necessary to come to a definitive conclusion about this. Even approaching the issue on the most favourable basis from the Minister's perspective and applying a correctness standard of review, as I explain below, the Minister has not persuaded me that the RAD did not have jurisdiction to consider the *sur place* aspects of the claims.

[55] Finally, with regard to the procedure followed by the RAD, there is no dispute here concerning how a reviewing court should determine whether the requirements of procedural fairness were met. The reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether the process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54, and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 at para 35. The burden is on the Minister to demonstrate that the requirements of procedural fairness were not met.

V. ISSUES

[56] I would frame the issues raised in this application for judicial review as follows:

a) Is the RAD's determination that the respondents had established their identities as citizens of Eritrea unreasonable?

b) Did the RAD have jurisdiction to consider the *sur place* claims?

c) Did the RAD breach the requirements of procedural fairness by determining that the respondents are Convention refugees *sur place* without first giving the Minister notice that this issue was in play and an opportunity to be heard?

d) Is the RAD's determination that the respondents are Convention refugees unreasonable?

VI. ANALYSIS

A. *Is the RAD's determination that the respondents had established their identities as citizens of Eritrea unreasonable?*

[57] The Minister submits that the RAD's identity findings are unreasonable because the RAD failed to address two arguments made by the Minister at the RPD – namely, that Ms. Alazar's explanation for why she did not have a national identity card was implausible and that her claim to know nothing about the passports she and her sons had travelled on was not credible.

[58] I do not agree. It is well-established that a decision maker is not required to address every argument that arises on the record (*Vavilov* at para 91, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16). This latitude is especially apt when, as is the case here, the arguments in question were not made on the appeal to the RAD but only earlier in the process, to the RPD. The RPD did not adopt those arguments in its reasons and, as a result, they were not addressed in the respondents' submissions to the RAD. As the Supreme Court observes in *Vavilov*, the review of an administrative decision "can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings" (at para 91).

[59] In any event, these arguments are peripheral to the core issues relating to the question of identity in this case. As it was required to do, the RAD made its own findings on identity because, on a correctness standard, it found that the RPD had erred in several material respects.

The Minister has not attempted to demonstrate that the RPD did not commit the errors identified by the RAD. The RAD also based its identity findings in part on the new evidence it admitted on appeal and the Minister has not challenged the RAD's new evidence rulings, either. Bearing in mind that it is not my role to reweigh evidence and that deference is owed to the decision maker on this issue, the Minister has not persuaded me that there is any basis to interfere with the RAD's findings on identity.

B. *Did the RAD have jurisdiction to consider the* sur place *claims?*

[60] The Minister submits that the RAD did not have jurisdiction to consider the respondents' *sur place* claims and, consequently, committed a reviewable error in determining the respondents to be Convention refugees on this basis. As I will explain, I do not agree. Before doing so, however, it may be helpful to begin by examining more closely the nature of the respondents' claims for protection.

[61] Typically, a refugee will leave their home country because of a fear of being persecuted there. Indeed, this is exactly what Ms. Alazar says she did. While this sequence of events may be typical, it is not required in order to be recognized as a Convention refugee. An individual who, when they are abroad, finds that they cannot safely return to their home country is referred to as a refugee *sur place*. For example, a fear of persecution can arise as a result of a regime change that occurred while the claimant was working or studying abroad. Similarly, political activities engaged in by a claimant while they were elsewhere may put them at risk should they return to their country of nationality. As Hathaway and Foster explain, the present tense of Article 1A(2) of the *Refugee Convention* – "is outside the country of his nationality" (which is

also found in paragraph 96(a) of the *IRPA*) – "ensures that all persons compelled to remain outside their own country – whether already present in, or forced to flee to, a foreign state – are equally entitled to benefit from the surrogate international protection of refugee law" (James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed) (Cambridge, UK: Cambridge University Press, 2014) at 75-76). See also UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Reissued February 2019) at paras 94 to 96.

[62] It is not always easy (or even necessary) to draw a bright line between *sur place* claims and others. In the present case, Ms. Alazar claimed that she was at risk because of her suspected political sympathies (for which she was arbitrarily detained and subjected to serious abuse while she was in Eritrea). This was the principal basis of her claim for protection. She also claimed that she was at risk because she left Eritrea illegally and contrary to an order to remain in Asmara. The latter ground is causally connected to the events that gave rise to the fear of persecution in the first place – she fled Eritrea because of those events – but it crystalized only after Ms. Alazar left Asmara and then, a short time later, Eritrea. It thus has elements of a *sur place* claim, even if it is not exclusively so. On the other hand, the risk Ms. Alazar could face as a failed asylum seeker is clearly a *sur place* claim: the basis for this aspect of her claim arose only after she had left Eritrea and had made a claim for refugee protection in Canada.

[63] As set out above, the RAD determined the respondents to be Convention refugees solely on the basis that, as "returnees who have left illegally or have claimed asylum" they had a well-founded fear of persecution should they be forced to return to Eritrea. While the RAD did not

use this terminology in its decision, there is no dispute that its determination can fairly be characterized as a finding that the respondents are Convention refugees *sur place*.

[64] The Minister submits that the RAD did not have jurisdiction to consider the *sur place* claims. According to the Minister, because this specific issue was not addressed by the RPD, the RAD could not "substitute" its determination concerning the *sur place* claims for that of the RPD under paragraph 111(1)(b) of the *IRPA*, as it purported to do.

[65] There is support for the Minister's position in this Court's jurisprudence. In *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551 at para 12, Justice Simpson held as follows with respect to a RAD decision dismissing an appeal and finding that the applicants did not have a *sur place* claim when the RPD had not made any findings in relation to the *sur place* claim (which was based on religious practice in Canada):

> In my view, the RAD lacked jurisdiction to independently decide the *Sur Place* Claim. The RAD did not cite any authority for taking this step, and section 111(1)(b) of [the *IRPA*] does not apply because there was no RPD decision to set aside. In these circumstances, since it felt that the issue ought to have been decided, the RAD should have referred the *Sur Place* Claim back to the RPD for a decision. Given that it did not take this approach, the RAD's decision was unreasonable.

[66] Similarly, in *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at para 20, Justice Annis held as follows with respect to a RAD decision dismissing an appeal on the basis of an Internal Flight Alternative when this issue was not addressed in the RPD's decision or raised by either party in the appeal to the RAD:

> The Court is in agreement with the Applicant's submissions that the RAD does not possess the jurisdiction to consider an issue that,

> although fully canvassed before the RPD, was not relied upon in its decision and therefore was not the subject matter of the Applicant's appeal.

[67] With all due respect to those who hold a different view, I am not persuaded that the RAD deciding an appeal on a basis not addressed by the RPD raises a jurisdictional issue (as opposed to an issue of procedural fairness, a topic I will address below).

[68] To begin with the statutory provisions, subsection 111(1) of the *IRPA* states the following:

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions: **(a)** confirm the determination of the Refugee Protection Division; **(b)** set aside the determination and substitute a determination that, in its opinion, should have been made; or **(c)** refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.	**111 (1)** La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.
(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that	**(2)** Elle ne peut procéder au renvoi que si elle estime, à la fois :

(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and	**a)** que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;
(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.	**b)** qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

[69] In my view, those who consider that paragraph 111(1)(b) of the *IRPA* imposes a jurisdictional limit on the issues the RAD may consider have interpreted the provision too broadly. Considering the text, context and purpose of the provision, the words "the determination" do not refer to any and all findings made by the RPD but, rather, only to that tribunal's finding on the ultimate issue of whether the claimant is a Convention refugee (or a person in need of protection). Notably, the mandate of the RPD under subsection 107(1) of the *IRPA* is to "determine" whether the claimant is a Convention refugee (or a person in need of protection). This narrower interpretation of paragraph 111(1)(b) is consistent with the wording of subsection 110(1) of the *IRPA*, which stipulates that an appeal to the RAD is an appeal "against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection." It is also consistent with the French version of subsection 111(1), which uses the phrase "*la décision attaquée*."

[70] Additionally, this interpretation is consistent with the now well-established view that paragraph 111(1)(a) of the *IRPA* permits the RAD to "confirm the determination of the Refugee Protection Division" (emphasis added) even if it finds that the RPD erred on a question of law, of fact or of mixed fact and law. As the Federal Court of Appeal explained in *Huruglica* at paragraph 78 (emphasis added):

> [T]he role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into the application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the *IRPA*.

Further, at paragraph 103 (emphasis added):

> I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[71] As reflected in the foregoing *dicta*, the only *jurisdictional* constraint on the RAD's power to dispose of an appeal is found in subsection 111(2) of the *IRPA*, which provides that two conditions must be satisfied before the RAD may refer a matter back to the RPD under paragraph 111(1)(c) instead of determining the claim itself. They are, first, that the RAD is of

the opinion that the decision of the RPD is wrong in law, in fact or in mixed fact and law and, second, that the RAD is of the opinion that it cannot determine whether to confirm the RPD's determination or to set it aside and substitute the determination that, in its opinion, should have been made, without hearing the evidence that was presented to the RPD. If these conditions are not satisfied, the RAD is required to determine the claim itself. There is no suggestion in *Huruglica* that the RAD cannot, as a matter of jurisdiction, substitute its own determination of the merits of the refugee claim on a basis that was not addressed by the RPD in its decision.

[72] It bears noting that both *Jianzhu* and *Ojarikre* were decided before *Huruglica*.

[73] In sum, contrary to the Minister's submission, paragraph 111(1)(b) of the *IRPA* refers to the determination of the ultimate issue of whether a person is a Convention refugee (or a person in need of protection) and not to the subsidiary findings on a question of law, fact or mixed fact and law on which the RPD's determination of this issue was based. As a result, it does not preclude the RAD from substituting its determination of a claim for that of the RPD on a ground that the RPD did not address. That being said, even if paragraph 111(1)(b) of the *IRPA* does not impose a jurisdictional constraint on the powers of the RAD to determine a claim for protection on a basis not addressed by the RPD, doing so can still raise procedural fairness concerns. I turn to this issue now.

C. *Did the RAD breach the requirements of procedural fairness by determining that the respondents are Convention refugees* sur place *without first giving the Minister notice that this issue was in play and an opportunity to be heard?*

[74] Subsection 110(3) of the *IRPA* provides that generally an appeal to the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division." Subsection 110(4), which governs the admission of new evidence from the person who is the subject of the appeal, creates an exception to this general rule. (The Minister is not subject to the same restrictions – see subsection 110(5).) So, too, does subsection 110(6), which permits the RAD to hold a hearing when certain preconditions are met.

[75] Rule 7 of the *RAD Rules* provides that, where a hearing is not warranted, the RAD may, "without further notice to the appellant and to the Minister, decide an appeal on the basis of the materials provided." This Court has recognized that, notwithstanding this rule, deciding an appeal on a new ground without first giving notice to the parties that the issue is in play can breach the requirements of procedural fairness. Justice Hughes expressed this exception to the general rule as follows in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10: "The point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions."

[76] Usually this principle is invoked where the RAD has confirmed the RPD's determination under paragraph 111(1)(a) of the *IRPA* that the appellant is not a Convention refugee but rests this conclusion on a different basis than the RPD. Typically in such cases, the RAD will have found an error in the RPD's analysis of the facts or the law but it is nevertheless satisfied that there is a factually and legally sound basis for coming to the same conclusion as it did. See *Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 33 and cases cited therein; see also

Aghedo v Canada (Citizenship and Immigration), 2021 FC 450 at paras 10 to 23. In my view, the procedural fairness constraint that has been recognized with respect to paragraph 111(1)(a) of the *IRPA* is equally applicable when the RAD allows an appeal and, under paragraph 111(1)(b), substitutes the determination which, in its opinion, should have been made by the RPD.

[77] The precise test for whether procedural fairness required notice to the parties and an opportunity to be heard is whether the ground on which the RAD decided the matter is a new issue in the sense that it is legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues on appeal as framed by the parties: see *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65 to 76, adopting the test in *R v Mian*, 2014 SCC 54 at para 30. The issue in *Mian* was what should happen as a matter of procedural fairness when an appeal court raises an issue that was not raised by the parties. As Justice Karakatsanis explained recently in *R v GF*, 2021 SCC 20 at para 93:

> *Mian* sought to strike a balance between the adversarial process and the appellate court's duty to ensure that justice is done. In pursuit of that duty, sometimes the appellate court will need to raise a new issue that suggests error in the decision below that goes beyond the arguments set forth by the parties. If the appellate court raises a new issue, fairness to the adversarial process requires the court to provide the parties with notice and an opportunity to respond to it: *Mian*, at para. 30. However, where the appellate court raises an issue that is not "new" but rather is rooted in or forms a component of the issues raised by the parties, *Mian* gives appellate courts a discretion to determine whether notice and submissions are warranted: para. 33.

[78] Even though both *Mian* and *GF* concerned criminal appeals, which involve interests and procedures quite distinct from those implicated in appeals to the RAD, there can be no question that in every case the RAD is required to strike the right balance between the adversarial process

and its duty to ensure that a claim for protection is determined correctly. The *Mian* test shows how this is done.

[79] When, as it did here, the RAD substitutes a determination that an appellant is a Convention refugee, whether on the basis of a new ground or otherwise, the appellant will have no cause for complaint. The key question raised by the present application is how, if at all, the principle of procedural fairness reflected in the *Mian* test extends to the Minister in such circumstances. Thus, before even considering how this test applies to the *sur place* claims, it is necessary to address the respondents' principal submission that the Minister cannot claim the benefit of the test now because he did not intervene in the appeal to the RAD. According to the respondents, it is only the parties to an appeal who would be entitled to notice in any event and, because he did not intervene, the Minister was not a party to the appeal.

[80] I do not agree that the notion of who is a party to an appeal to the RAD for purposes of the kind of notice at issue here should be construed so narrowly. In my view, applying the *Baker* factors (*Baker* at paras 21 to 28), the Minister has a right to procedural fairness even in appeals in which he has not intervened. This includes the right to notice that a new issue is being considered by the RAD and the opportunity to make submissions in relation to it. (The Minister may well also have the right to present evidence on the new issue; however, since the Minister's complaint here is limited to the denial of the right to make submissions on the basis of the record before the RPD, I leave this question open.) It goes without saying that the appellant would have the right to reply to any submissions made by the Minister.

[81] Subject to certain exceptions that are irrelevant here, both the person concerned and the Minister have the right to appeal a decision of the RPD on a question of law, of fact or of mixed fact and law (*IRPA*, subsection 110(1)). I acknowledge that, in the case of an appeal by the person concerned, Rule 1 of the *RAD Rules* defines "party" as "the person and, if the Minister intervenes in the appeal, the Minister." However, I do not agree that, for procedural fairness purposes, this is exhaustive of the Minister's interest in appeals to the RAD by persons concerned.

[82] The Minister's broad and continuing interest in such appeals is confirmed elsewhere in the *RAD Rules*. Most importantly, the Minister may intervene in an appeal as of right "at any time before the Division makes a decision" (*RAD Rules*, subrule 4(1)). The *RAD Rules* also recognize the Minister's interest in appeals separate and apart from any intervention. Among other things, they provide that:

- When an appeal is filed by the person concerned, the RAD must provide a copy of the notice of appeal to the Minister without delay (*RAD Rules*, subrule 2(2)).

- When an appeal by the person concerned is perfected, the RAD must provide a copy of the Appellant's Record to the Minister without delay (*RAD Rules*, subrule 3(2)).

- When a party wants to challenge the constitutional validity, applicability or operability of a legislative provision, that party must, among other things, provide a copy of the notice to this effect to the Minister, "even if the Minister has not yet intervened in the appeal" (*RAD Rules*, subrule 25(3)(b)).

- For the purpose of a request to conduct an appeal proceeding in public, the Minister is considered a party "even if the Minister has not yet intervened in the appeal" (*RAD Rules*, subrule 42(1)).

- If the Chairperson of the IRB orders that an appeal be heard by a three-member panel, the RAD must notify the parties of this without delay, including the Minister "even if the Minister has not yet intervened in the appeal" (*RAD Rules*, subrule 43(1)).

- If the person concerned applies to reinstate an appeal that was withdrawn, the RAD must, without delay, provide a copy of the application to the Minister (*RAD Rules*, subrule 48(3)).

- If the person concerned applies to reopen an appeal that has been decided or declared abandoned, the RAD must, without delay, provide a copy of the application to the Minister (*RAD Rules*, subrule 49(3)).

- When the RAD makes a final decision on an appeal, it must provide notice in writing of the decision to the Minister (among others) (*RAD Rules*, subrule 50(1).

[83] These provisions leave no room for doubt that the Minister has procedural fairness rights before the RAD even in cases where he has not (or has not yet) intervened. Central to these rights is the right to notice of material developments as they occur, from the commencement of an appeal through to its conclusion. Crucially, such notice allows the Minister to make informed and timely decisions about whether to intervene in a pending appeal and whether to pursue an application for leave and judicial review of a decision once it is made. Thus, I cannot agree with

the respondents that, having opted not to intervene after receiving their Record, the Minister had no right to notice of a subsequent development affecting the determination of the appeal and the respondents' claims for protection.

[84] This brings me, then, to the application of the *Mian* test. To reiterate, the question is whether the ground on which the RAD decided the appeal is a new issue in the sense that it is legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues as framed by the respondents (the respondents being the only party to the appeal for the purpose of this part of the analysis). Only if this question is answered affirmatively will it have been a breach of the requirements of procedural fairness for the RAD to decide the appeal on the basis that it did without first providing the Minister an opportunity to be heard in relation to it.

[85] Applying this test, I have concluded that the *sur place* claim is a new issue and, as a result, the RAD was required to give notice to the Minister (and, of course, to the respondents) that it could be considered in deciding the appeal and, further, that all parties should have had an opportunity to address this issue before the appeal was decided. The RPD determined the claims on the threshold issue of personal identity; the merits of the claims were not addressed in any way by the RPD. As a result, the respondents' appeal to the RAD was limited to this threshold issue. The *sur place* claims are legally and factually distinct from the grounds of appeal related to the threshold issue of identity and also from the new evidence tendered by the respondents. Moreover, they cannot reasonably be said to stem from the issues as framed by the respondents

in their appeal. In these circumstances, the Minister can fairly be said to have been taken by surprise that the appeal was decided on the ground that it was.

[86] It is true that the *sur place* claims were part of the claims as presented to the RPD. It is also true that, in their alternative request for relief, the respondents asked the RAD to determine the claims for protection in their favour and this presumably included the *sur place* claims. The important point is that these claims were not – indeed, could not be – part of the grounds of appeal as they were framed by the respondents.

[87] As I have explained above, in deciding an appeal the RAD has jurisdiction to consider issues the RPD did not address in its decision and, further, the RAD is not limited to considering the issues raised on appeal. However, when, as happened here, the case has materially shifted away from the RPD's decision and the appeal as it was framed by the respondents, the RAD breached the requirements of procedural fairness by deciding the appeal on the basis on which it did without first giving the Minister notice that a new issue was in play and an opportunity to be heard. (How such notice should be given is, in the first instance, for the RAD to determine but it may find the suggestions in *Mian* at paragraphs 53 to 60 of assistance.)

[88] Finally, I am satisfied that this breach of the requirements of procedural fairness warrants setting aside the RAD's decision. As the Supreme Court of Canada held in *Baker* (at para 22), "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for

those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker." Regrettably, because of how the RAD proceeded, this did not happen.

D. *Is the RAD's determination that the respondents are Convention refugees unreasonable?*

[89] As I have already stated, it is not necessary to address this issue.

VII. CONCLUSION

[90] For these reasons, the Minister's application for judicial review is allowed. The decision of the Refugee Appeal Division dated January 21, 2020, is set aside and the matter is remitted for redetermination by a different decision maker. For greater certainty, unless the Minister presents new evidence calling into question the personal identities of the respondents, the RAD shall proceed on the basis that the personal identities of the respondents are established.

[91] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA.* I agree that none arise.

JUDGMENT IN IMM-1168-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated January 21, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.
3. For greater certainty, unless the Minister presents new evidence calling into question the personal identities of the respondents, the RAD shall proceed on the basis that the personal identities of the respondents are established.
4. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1168-20
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v SARA MARSALA ALAZAR ET AL

HEARING HELD BY VIDEOCONFERENCE ON MAY 5, 2021 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	NORRIS J.
DATED:	JUNE 21, 2021

APPEARANCES:

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Vakkas Bilsin	FOR THE RESPONDENTS

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