Federal Court  Cour fédérale

Date: 20230621

Docket: IMM-6257-22

Citation: 2023 FC 875

Ottawa, Ontario, June 21, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BALWINDER SINGH
DIPEN CHAUDHARY
RUBY CHAUDHARY
KANISHKA CHAUDHARY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are the father and mother of the children referenced in the style of cause. This is a judicial review application authorized pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or the IRPA]. They are all citizens of India. The only issue before the Court is whether the finding made by the Refugee Appeal Division [RAD] that

the Applicants have an internal flight alternative [IFA] in India is reasonable. The RAD confirmed the decision made by the Refugee Protection Division [RPD].

[2] In my view, the Applicants have not discharged their burden of showing that the RAD made a decision that qualifies as being unreasonable. My reasons for reaching that conclusion follow. It could not constitute an unreasonable decision as the new issue raised on judicial review was not before the RAD for its determination. Indeed, the Court finds that the matter presented by the Applicants for the first time on judicial review ought not to be entertained by the Court in view of the case law.

I. The facts

[3] The facts are simple. It is the principal Applicant, Mr. Balwinder Singh, who claims to be the victim of actions which would justify for the family the protection conferred by sections 96 and 97 of the IRPA.

[4] Mr. Singh worked for a chemical company in India as a “managing director” upon his return to India from Kenya in August 2018. The company is located in Haryana State. As a promotional scheme, the company gave out for free some of their products to poor people living in slums. In May 2019, the Principal Applicant and his team visited a poor area and distributed cleaning products.

[5] On June 15, 2019, the principal Applicant said that the police came to the chemical company and stated that some poor people died from using the cleaning products. They spoke

with the company's owner for about an hour and left. When questioned about the discussion with the police, the owner said that things had been sorted out and that the principal Applicant "should forget everything" (Basis of Claim, p 1).

[6] The principal Applicant said in the Basis of Claim [BOC] that a journalist came to the company and asked questions. The principal Applicant alleged that he was supposed to publish something the following day; but he went missing. He accuses the company's owner of bribing the police and to have "got him (the journalist) killed" (BOC, p 2). No evidence was offered in support of the contention.

[7] On June 21, 2019, Mr. Singh went to the tv station where the journalist was employed and accused the company's owner of being behind the journalist's death.

[8] The following day, the company's owner is alleged to have threatened the principal Applicant that he would "pay a huge price" for "spoiling the name of the company" (BOC, p 2). He states in his BOC that the company's owner knew about the visit to the tv station.

[9] On June 26, 2019, the police came to the Applicant's home, started interrogating him and then took him to the police station. The principal Applicant states that they wanted him to take responsibility for compromising the quality of the products resulting in the deaths of people. Faced with the principal Applicant's refusal to sign documents to that effect, the police started beating him and torturing him for four days. On June 29, a bribe was paid for the principal Applicant's release.

[10] There was another encounter with the police on July 2, 2019. The principal Applicant claims to have been beaten again by the police; even Mrs. Chaudhary was slapped when she tried to intervene. The police departed after receiving another bribe.

[11] With the help of a smuggler, the Applicants went to Delhi on July 7, 2019, until funds were assembled to pay to leave for Canada; once the money was gathered, the Applicants came to Canada on October 31, 2019.

II. The decision under review

[12] It is of course the RAD decision which is the subject of the judicial review. Be that as it may, both the RAD and the RPD were on the same wavelength: the refugee claim could be dealt with through the existence of internal flight alternatives in two large Indian cities.

[13] First, the RAD declined to hold an oral hearing: there was no new evidence and the conditions for such a hearing, in accordance with s 110(6) of the IRPA, were not present.

[14] Second, the RAD went on to identify the two-part test that governs the examination of an IFA. As is well known, before someone can seek refuge outside the country of nationality, the availability of an internal flight alternative must be considered. That is inherent in the nature of the refugee protection such that the burden of negating the existence of an IFA resides on the shoulders of those who seek refugee protection (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589). As the RAD rightly put it, the IFA "is safe if there is no serious

possibility of persecution … or of cruel and unusual treatment or punishment, or torture. It is reasonable if conditions in the IFA are not unduly harsh and do not jeopardize the life or safety of the appellants" (RAD decision, para 17). If an applicant can satisfy a decision maker on a balance of probabilities that the IFA is not safe, or that it is not reasonable, the proper decision is to conclude that the IFA is not available.

[15] On the safety prong of the test, the RAD noted that the motivation of the agents of persecution and their ability to locate the Applicants are to be considered. On the reasonableness of the IFA, the Federal Court of Appeal in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 [*Ranganathan*], stressed that to be unreasonable, there must be the existence of conditions in the IFA which would jeopardize the life or safety. It will be for one who disputes an IFA to establish that the location is not safe or reasonable to avoid having the decision maker conclude that sections 96 and 97 of the IRPA are not engaged in view of the existence of an IFA.

[16] The RAD then proceeded to address a number of issues in connection with the two-prong test.

[17] The first such issue was whether the agents of persecution had the motivation and the means to reach the Applicants in the proposed IFA. The agents of persecution were said to be the former employer and the local corrupt police officers. Although no detail was provided about the former employer, the Applicants still believe that there is motivation to find them to prevent the principal Applicant from disclosing any information about the alleged deaths. However, the

principal Applicant testified that he knew nothing about the alleged deaths. He does not know how many people died as a result of using the cleaning products, nor how they died or how the deaths are linked to the products. His belief that the journalist was killed before he was able to publish some articles is speculation; as a matter of fact, he does not know what happened to the journalist. The belief that the principal Applicant may have does not carry much weight. If his truthfulness is to be presumed, that is not so of the trustworthiness of the facts reported where they are based on some belief. There must be facts in support of the belief.

[18] As for the ability of the local police to locate the Applicants in a very populous Indian city, the RAD, based on the National Documentation Package [NDP], observes that there is a national registration system in India: however, there is not one at the state level, let alone one to track people from state to state. It follows that the police in the state of Haryana would not likely be able to track the Applicants in other states. The Applicants' argument that the Crime and Criminal Tracking Network and Systems, or a tenant verification system, would allow the local police to track them down was not accepted. The Applicants had to establish their allegation on a balance of probabilities. If one accepts that the principal Applicant was arrested and detained by the police, it would appear that the agents of persecution were corrupt police officers motivated by the collection of bribes. To put it simply, the decision maker was not satisfied that the corrupt police officers had an interest in the principal Applicant other than extorting money from him. There is no evidence that the principal Applicant was charged with any crime, or that there may have been an arrest warrant issued at any time. Thus, the balance of probabilities did not favour the Applicants.

[19] Similarly, with a population of 1.3 billion inhabitants in India and proposed IFAs in cities with many millions of residents, there is insufficient evidence that a tenant verification system can be used to alert the police about the location of the Applicants hundreds of kilometres away from the local corrupt police officers said to be the agents of persecution.

[20] The next issue is whether the proposed IFAs are reasonable. It seems that the Applicants raised the Covid-19 pandemic, with its multiple lockdowns, as making the relocation in India next to impossible. But it was only a general statement that was made, without evidence in support of the argument. The RAD notes that it is not its role to find the evidence: “The Appellants cannot simply raise an issue or concern and then expect the RAD to find the evidence to support it” (RAD decision, para 48). Hence the Covid-19 situation, which was said to be quickly evolving at the time of the RAD decision (June 2022), was not established as making it unreasonable to relocate in any of the two identified IFAs.

[21] The RAD found that there was no evidence of hardship that could be due to the inability to travel, as the two IFAs are major urban centres easily accessible. Moreover, language and religions would not be barriers to the relocation. The same can be said of education, housing and employment considerations: other than general statements, there was no evidence provided to support what amounts to a belief.

[22] Finally, the Applicants argued that they are doing well in Canada and they would not want their relocation to jeopardize the well-being of their children and disrupt their education. The RAD simply commented that hardship associated with relocating does not suffice, as

preferences as to where to live are not relevant. Citing *Ranganathan*, *supra*, the RAD notes that the inconvenience or reduction in status or quality of life are not considerations. The threshold for the determination of an unreasonable IFA is much higher and it was not met in the circumstances.

III. Arguments and Analysis

[23] On judicial review, the Applicants put their focus on the safety of the proposed IFAs. They claim to find support in the case of *Ali v Canada (Minister of Citizenship and Immigration)*, 2020 FC 93 [*Ali*], where it was stated that "it would not be reasonable to expect family members to place their own lives in danger by either denying knowledge of the Applicants' whereabouts or deliberately misleading the TTP" (*Ali*, para 49). The Court in *Ali* adds at paragraph 50 that "(g)iven the dangers posed by knowledge of their whereabouts, or even their return to Pakistan, the Applicants would be forced to hide from family members and friends and cut off communications. This is not a reasonable requirement and so cannot be used to obviate risk under the first prong."

[24] The Applicants argue that other cases have followed the lead of *Ali* and they refer to one: *A.B. v Canada (Minister of Citizenship and Immigration)*, 2020 FC 915. Given that the Applicants would have to hide from their family at their new location, as the principal Applicant's father's affidavit reports that he has been visited by the police since the Applicants' departure for Canada, the IFA determination is said to be incorrect as the first prong of the test cannot be satisfied.

[25] There is no dispute that the standard of review applicable in cases involving an IFA is that of reasonableness. Accordingly, the RAD decision is measured against that standard of review. The reviewing court is instructed to address whether the decision is reasonable and not to consider the merits of the decision. Basically, a court of review is not a court of first view. That is a matter left by Parliament to the administrative decision maker. However, there is a fundamental problem with the Applicants' proposition that the IFAs are not safe: there does not appear to be a decision from the RAD that addresses the issue raised on judicial review.

[26] I have therefore sought to consider the reasons given by the RAD for declining to deny the proposed IFA on the basis that it would not be reasonable for the Applicants to hide their whereabouts from their family. I could not find a discussion of such basis in the reasons given by the RAD.

[27] I have read the Applicants' factum before the RAD and the issue is nowhere to be found. The Applicants raise this issue for the first time; it was not raised before the RPD, nor before the RAD. As is well known, the appeal before the RAD is heard without a hearing (s 110(3) of the IRPA), with the exception of the circumstance found at s 110(6)): it was confirmed by counsel for the Applicants before this Court that not only was there no hearing before the RAD, but the matter raised before this Court was never alleged or argued before the RPD or the RAD.

[28] The Court raised *proprio motu* at the hearing of the application the question of whether the Court ought to entertain what is arguably a new issue, given that the RAD was never given an opportunity to address an issue that was not brought before it.

[29] The reason why the matter had to be raised is because of the role played by a reviewing court with respect to decisions made by administrative tribunals. As explained in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], the democratic principle is at the heart of the requirement for the courts to defer, to some extent, to the decision made by the administrative tribunals. At paragraph 30 of *Vavilov*, the majority states that "it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. [Emphasis in original]"

[30] Because of the choice made by Parliament to delegate decision making to a tribunal, rather than to the courts, a reviewing court sees its role as controlling the legality of decisions made elsewhere. The judicial review is conducted on the basis that the decision under review is reasonable or not: "reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers" (*Vavilov*, para 75). In the case at bar, the Applicants come to this Court and raise for the first time an issue. It is difficult to see how a reviewing court can control the legality of a decision, which requires that it be justified, transparent and intelligible taking into account the relevant factual and legal constraints that bear on the decision (*Vavilov*, para 99), if the administrative tribunal did not rule on an issue because it was not before it. The reviewing court is instructed to develop an understanding of the decision maker's reasoning process to determine whether it is reasonable or not. The shortcomings identified by the party challenging the decision must be sufficiently serious to satisfy the reviewing court that it lacks the requisite degree of justification, transparency or intelligibility. Without a decision, there is no review possible. If the matter was before the administrative tribunal, there would be an expectation that adequate reasons are given. In *Vavilov*, the Supreme

Court noted "that the provision of reasons for an administrative decision may have implication for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable" (para 81).

[31] The Supreme Court in *Vavilov* observes that there are two types of fundamental flaws. A failure of rationality in the reasoning process is one. The other is where the decision is untenable somehow in light of the factual or legal constraints. The reviewing court is invited to consider the evidence before the decision maker, but it will not interfere with the decision maker's findings. Similarly, the submissions of the parties before the administrative decision maker will also be relevant on judicial review.

[32] That suggests of course that the role of the reviewing court is solely to consider the decision made, that is the outcome as well as the decision making process (*Vavilov*, para 82). The reviewing court is tasked with reviewing the decision made, not substitute its own view of the matter, and certainly not to decide the issue in replacement of the decision maker who is designated by Parliament as the entity to dispose of the merits. Paragraph 83 of *Vavilov* appears to me as usefully encapsulating the notion:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472

> N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
>
> [Emphasis in original]

[33] The Supreme Court of Canada crystallized in its decision in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers' Association*], the ability of a reviewing court to decline to undertake judicial review where an issue is raised for the first time on judicial review "where it would be inappropriate to do so" (para 22). That stems from the very nature of the remedy sought through the discretionary prerogative writs; it is said to be extraordinary and discretionary.

[34] The discretion to hear a matter will generally not be exercised where the issue could have been but was not raised before the administrative decision maker. The Court, in *Alberta Teachers' Association*, identifies the rationales for the general rule:

> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.

The Court goes on to state that when an issue is brought for the first time on judicial review, there is the loss of the benefit of the view of the tribunal who has specialized function and expertise.

[35] The Court also notes the prejudicial effect of hearing an issue on judicial review for the first time, without the appropriate decision maker having examined the issue:

> [26] Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).

[36] With the *Vavilov* Court's renewed insistence on the proper role to be played by reviewing courts, there have been a number of pronouncements by the Federal Court of Appeal in the last few years on the discretionary decision to hear a new argument not raised before. At the hearing of this judicial review application, I advised counsel for the parties of the case law which may be relevant to the matter raised *proprio motu*. That was with a view to allowing counsel to make submissions on the issue (*Bell Canada et al v Adwokat et al*, 2023 FCA 106 at para 31), which they did in writing in the days following the hearing.

[37] In *Gordillo v Canada (Attorney General)*, 2022 FCA 23 [*Gordillo*], it is paragraphs 99 and 100 which were referred to:

> [99] The reasonableness of an administrative decision cannot normally be impugned on the basis of an issue not put to the decision maker: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 22-29; *Canada (Citizenship and Immigration) v. R. K.*, 2016 FCA 272 at para. 6, leave to appeal refused, [2017] 1 S.C.R. xvi; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156 at paras. 73-74, leave to appeal to S.C.C. sought, 39855 (25 October 2021). Rather, to respect legislative choice as to where primary decision-making authority lies, issues like those raised before us by the interveners should be decided at first instance by those in whom Parliament has vested responsibility to decide the merits – in this case, the Commissioner – not by a reviewing court or a court sitting on appeal from a reviewing court, whose roles are more limited. If the decision is then judicially reviewed, the reviewing court will have the benefit, in assessing reasonableness, of the decision maker's reasons, experience and expertise. And if the matter then goes to appeal, the appellate court will have the further benefit (even if it is to decide on reasonableness *de novo*) of the reasons of the reviewing court: *Oleynik v. Canada (Attorney General)*, 2020 FCA 5 at paras. 71-73, leave to appeal to S.C.C. refused, 39118 (15 October 2020); *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189 at para. 4, leave to appeal to S.C.C. sought, 39899 (December 8 2021).
>
> [100] For these reasons, this Court should not consider the merits of the interveners' international law and Charter arguments. I appreciate that the interveners were granted that status to address those very issues, and that our declining to decide them will cause disappointment. But it is for the panel hearing the appeal to decide, aided by its knowledge of the entire matter, what submissions it should entertain: *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 at para. 27.
>
> [Emphasis added]

[38] In *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at paragraphs 70 to 74 [*Oleynik*], the Court of Appeal also declined to consider a ground of appeal as that ground had not been raised before: "There is, accordingly, no decision on the issue for this Court to review on appeal" (para 70).

[39] Similarly, the Court of Appeal refused in *Canada (Minister of Citizenship and Immigration) v Mason*, 2021 FCA 156 [*Mason*], to entertain a new issue, that is to invoke a new argument based on the Refugee Convention.

[40] As alluded before, given that the matter was raised *proprio motu* by the Court, the parties were given the opportunity to address in further written submissions whether or not the reviewing Court should exercise its discretion to hear arguments on an issue that was not presented or argued before the RPD and the RAD. The parties made their written submissions.

[41] The Applicants argued that what was raised for the first time before this reviewing Court does not constitute a new issue. It is rather "an alternative legal argument with respect to the determinative issue enumerated by the Tribunal; that is, internal flight alternative."

[42] The short submissions from counsel boil down to arguing that raising, for the first time on judicial review, that the RAD was somehow wrong in not concluding that the proposed IFA was flawed, because the family members would not be able to share their new location somewhere in India, is not a new issue.

[43] However, there is no doubt that this completely new argument was not raised before the RPD, nor before the RAD. It is as if the Applicants contend now that the RPD ought to have considered the issue because it should have been part of the consideration of the IFA, without even raising the issue. The RAD is said to be equally guilty, in spite of the fact that the argument was never raised.

[44] The Respondent submitted that recent case law in this Court confirms that the Court ought not to entertain new arguments presented for the first time to someone other than the appropriate decision maker. The Respondent refers to *Ibrahim v Canada (Citizenship and Immigration)*, 2022 FC 1194:

> [35] I note in passing, however, that the Applicant also argues that the Officer ignored the profound difficulties that the Applicant would experience in Canada by virtue of being from a country with a TSR as he will be left in a position with unknown and precarious status for an indeterminate period of time and that his life will effectively be in limbo. In his written submissions, the Applicant states that "[w]ithout status, he may face loss of medical care coverage, difficulties obtaining identity documents, severe psychological stress and severe hardship if the TSR is lifted. He may experience limited employment opportunities or limited professional advancement opportunities, as employers know he lacks status and therefore lacks the ability to remain in Canada long-term". However, as the Respondent points out, this argument was not made before the Officer. The Officer cannot be faulted for not addressing a submission that was not before them and this new argument cannot be made at the judicial review stage as it was not made before the administrative decision-maker who was given the task of considering the arguments on the merits. It is for the administrative tribunal to consider arguments on the merits, not the reviewing court (*Leteyi* at para 27; *Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22 at paras 18-19; *Paramasivam v Canada (Citizenship and Immigration)*, 2022 FC 1084 at para 21 and; *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 193 at para 25).
>
> [Emphasis added]

Similarly, one can read in *Zingoula v Canada (Citizenship and Immigration)*, 2019 FC 201:

> [13] Judicial review is an examination of the legality of the decision under review based on the record and the arguments presented to the decision-maker. A decision is not unreasonable because the decision-maker has not considered an argument that was not been presented to him or her. In other words, it is not possible to present a new argument at the judicial review stage.

To the same effect, *Owolabi v Canada (Citizenship and Immigration)*, 2021 FC 2, found:

> [52] The Respondent submits, and I agree, it is not appropriate for the Applicants to impugn the Decision based on an issue they had not previously raised. In this case they now raise a new argument. With respect, I decline to consider this new argument because of jurisprudence to the effect that new argument not argued below should not be advanced for the first time in the Federal Court on judicial review, see: *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 [LeBlanc J, as he then was]:
>
> > 23 Finally, the Applicants' position is at odds with the principle often acknowledged by this Court, to the effect that an issue not raised before an administrative tribunal cannot be examined in judicial review proceedings before the Court (*Mohajery c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2007 FC 185 (F.C.), at para 28). The Federal Court of Appeal, in *Guajardo-Espinoza v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 797 (Fed. C.A.), at para 5, stressed the importance of that principle in the following terms:
> >
> > > As this Court recently said in *Pierre-Louis [sic] v. M.E.I.*, [F.C.A., No. A-1264-91, April 29, 1993.] the Refugee Division cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole. [*Ibid*., at 3.] Saying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow.
> >
> > 24 This principle applies equally to the RAD which, like the RPD, is an administrative tribunal subject to the supervisory power of this Court pursuant to section 18 of the *Federal Courts Act*.
>
> [Emphasis added]

[45] The Respondent also refers to case law which finds that the RAD cannot be faulted for not considering errors allegedly made by the RPD if these were not raised before (*Krasilov v Canada (Citizenship and Immigration)*, 2023 FC 635, at para 23; *Bhavnani v Canada (Citizenship and Immigration)*, 2023 FC 300, at para 23; *Salaudeen v Canada (Citizenship and Immigration)*, 2022 FC 39, at para 20).

[46] The point made vividly in these cases is that new arguments equate with new issues. The distinction the Applicants sought to make that theirs constitutes a new argument on the general issue that the IFA is not appropriate is a distinction without a difference. The new argument not made before is the new issue.

[47] I have reviewed carefully the submissions of counsel. The sole argument offered on behalf of the Applicants is that the new argument, based on a letter which reports that the local police continue to show an interest in the principal Applicant's whereabouts, is not a new issue as it relates to the availability of an IFA. This is obviously not consonant with the case law which is binding on this Court. The new issue in this Court is the argument that was not presented before the decision maker. In *Mason*, the very same situation presented itself. An attempt was made to introduce a new argument later in the process. The Court of Appeal found:

> [73] Mr. Mason attempted to invoke the *Refugee Convention* in argument before us. But in this Court that is a new issue and we should not entertain it: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 23-26. It goes to the merits of the interpretation of paragraph 34(1)(e). That issue should be made to the merits-deciders under this legislative regime, in particular the Immigration Appeal Division, not a reviewing court or a court sitting in appeal from a reviewing court: '*Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149; *Forest Ethics*

> *Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75.

In effect, a new argument not raised in due course, that is before the merits-deciders, is not entertained normally because it constitutes a new issue. The Applicants did not argue how their situation could be considered to be an exception to the general principle.

[48] Similarly, in *Oleynik, supra*, the new issue was a new ground of appeal, which had not been raised before the administrative tribunal or before this Court. A new ground of appeal constitutes a new issue. As the Court of Appeal puts it, "(t)here is, accordingly, no decision on the issue for this Court to review on appeal" (para 70). Referring to *Alberta Teachers' Association*, the Court of Appeal states that "(a)s a general rule, a court will not consider an issue on judicial review where the issue could have been but was not raised before the administrative decision-maker" (Para 71). That is the situation in the case at bar. In *Canada (Citizenship and Immigration) v R.K.*, 2016 FCA 272, the Court of Appeal stated, in the context of an issue not raised before the administrative tribunal, that the applicants were precluded from raising the issue in the Federal Court. The Court of Appeal explained why in these terms at para 6:

> This is because the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue not put to it particularly where, as in the present case, the new issue raised for the first time on judicial review relates to the Appeal Division's specialized functions or expertise.

[49] The Applicants insisted that the evidence was before the administrative tribunal in the sense that there was a letter from the principal Applicant's father reporting that the police had visited him asking about the whereabouts and said that, as a murderer and terrorist, he cannot hide forever.

[50] However, no argument was ever attempted, giving the decision maker the opportunity to consider the matter. It is for the administrative tribunal to have the opportunity to deal with the issue (*Alberta Teachers' Association*, para 24).

[51] As the Court of Appeal said in *Gordillo* (para 99), the role of a reviewing court is more limited in that it does not decide the merits: "If the decision is then judicially reviewed, the reviewing court will have the benefit, in assessing reasonableness, of the decision maker's reasons, experience and expertise." I repeat: a court of review is not a court of first view.

[52] The case law from this Court is essentially to the same effect.

[53] If a court is to review a decision for reasonableness, it seems to me to be quite obvious that there has to be a decision to review. The *Vavilov* framework is predicated on a decision having been made: the reviewing court is thereafter concerned with the outcome and the decision making process followed to reach the outcome. But there must be a decision to review, and there will not be a decision if an issue is not raised.

[54] It was striking that the memorandum of fact and law of the Applicants was conspicuously silent on how the decision under review was unreasonable, in that it was not justified, transparent and intelligible (*Vavilov*, para 99). Where are the "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, para 100)? None could be identified because the issue was never presented to the RPD or the RAD.

[55] In the supplementary submissions, the Applicants sought to find support in a decision from this Court in *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637 [*Alazar*]. That was misguided.

[56] In *Alazar*, the issue was whether the RAD was in violation of a principle of procedural fairness for having disposed of an appeal on a ground that had not been raised on appeal before it. The question was not so much if it could, but rather whether the parties must be given the opportunity to offer submissions (*R. v G.F.*, 2021 SCC 20, para 93).

[57] The *Alazar* judgment stands for the proposition that a new ground of appeal raised by the RAD (and not decided by the RPD) requires that notice be given to the parties to invite submissions. The new ground constitutes the new issue: "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" (para 84).

[58] It follows that different grounds of appeal constitute new issues. Nevertheless, it might be possible to consider the ground of appeal if it can be said that it stems from the issues as framed by the appellant before the RAD. That was not argued by the Applicants before this Court. I have nonetheless considered the possibility and I have been unable to find how the new ground on judicial review could be said to stem from the issues as framed before the administrative tribunals. The suggestion made that "the new "argument" is not factually distinct from the grounds of appeal" is of no assistance to the Applicants. It is not clear how a new argument is not

factually distinct from a ground of appeal. More fundamentally, there is a new ground of appeal from the RPD decision simply because the ground of appeal was not raised. What we have is a new ground on judicial review as the new argument was not even broached before the administrative decision maker. At any rate, the Applicants have not attempted on judicial review to make that case. If anything, the *Alazar* judgment is in line with the Court of Appeal jurisprudence and that of the Court.

[59] In *R. v Mian*, 2014 SCC 54, [2014] 2 SCR 689, the Supreme Court was concerned with a court of appeal, in a criminal case, raising new issues on appeal. The Court asked "What constitutes a "New Issue"?" Clear guidance, in my view, is provided at paragraph 30:

> [30] An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.
>
> [Emphasis added]

That is what is before the Court in this case. The Applicants seek to find error before the RAD beyond the grounds actually raised on appeal from the RPD decision. The Applicants attempt to raise an issue on judicial review which could, and should, have been raised before the administrative tribunals. Only where there has been a decision by the appropriate decision maker can there generally be a review of that decision for reasonableness by a reviewing court. As stated by the Court of Appeal, the role of a reviewing court is limited. What is asked of a

reviewing court where a new issue is raised on judicial review is to delve into the merits of the case. Such is not its role.

[60] Here, the Applicants seek from this Court that it considers an argument that was not raised before the appropriate decision makers. The Court must respectfully decline to entertain a new issue presented for the first time on judicial review as the integrity of the judicial review process requires that issues of that nature be decided by the tribunal designated by Parliament as the decision maker.

[61] Other than the attempt to introduce before this Court an issue not presented to the RPD and the RAD, the Applicants stated generally that they cannot relocate elsewhere in India. There was no attempt at demonstrating, on a balance of probabilities, how it can be said that the decision is unreasonable in its conclusion that the Applicants have not shown that the IFA was not safe or reasonable as required by the two-prong test. A disagreement with a decision does not make it unreasonable. Indeed, it has not been shown to this Court that it is unreasonable. In effect, the sole argument on judicial review was the new issue raised by the Applicants for the first time before this Court.

IV. Conclusion

[62] As a result, the judicial review application must be dismissed. The Applicants have asked that a question be certified. It reads:

> "When the evidentiary record and legal issue in front of the Court is identical to that which was in front of the Tribunal, can the Court consider a "new" argument on judicial review?"

That question cannot be certified.

[63] The Applicants did not try to justify why a question ought to be certified and, more particularly, why their proposed question would satisfy the requirements of s 74 of the IRPA. They simply submitted a question.

[64] The criteria needed to certify a question which gives jurisdiction to the Federal Court of Appeal have been reiterated often over time. In *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229, at para 36, the Federal Court of Appeal stated that not only must there be a serious question that is dispositive of the appeal, but it must transcend the interests of the parties and raise an issue of broad significance of general importance. Indeed the question to be certified must arise from the facts of the case: otherwise the question becomes something in the nature of a reference to the Court of Appeal. In my view, the proposed question fails that test.

[65] For starters, the proposed question does accept that a new argument (or ground of appeal) is a new issue. Nevertheless, the case law is unequivocal. It is simply inaccurate to say that the "legal issue in front of the Court is identical to that which was before the tribunal." Whether the IFAs are either safe or reasonable, because the Applicants would have to remain silent concerning their whereabouts, was never before the RPD and the RAD. That argument not raised before is the new issue. The point of the matter is that the legal issue was not before the RAD: it

was never raised. Contrary to the Applicants' submission, the new argument is the issue. It follows that the issue, that is the new argument, could not have been identical to that which was brought for the first time before this Court.

[66] In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 FCR 674, the Court of Appeal declined to accept a question which had been certified. The Court found that the question, as formulated, did not arise from the facts of the case. In effect, the proposed question was in the nature of a reference to the Court of Appeal. The same is true here. The proposed question posits a situation which was not present on the facts before the Court: the legal issue was never before the RAD. The legal issue was rather, since the RAD was not seized of the issue, that this Court should not entertain it for the first time, thus substituting itself for the appropriate decision maker. Judicial review is the review of a decision made by a tribunal under the supervision of a superior court.

[67] Finally, it is also less than clear how the question transcends the interests of the parties. In fact, I have not been convinced that it is not merely a function of the situation that has developed in this case: it is of less than broad significance and, as framed, it is not, in my view, of general importance. Accordingly, the Court is not able to certify the question proposed by the Applicants.

JUDGMENT in IMM-6257-22

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no question that is certified pursuant to section 74 of the *Immigration and Refugee Protection Act*.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6257-22
STYLE OF CAUSE:	BALWINDER SINGH, DIPEN CHAUDHARY, RUBY CHAUDHARY, KANISHKA CHAUDHARY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 1, 2023
JUDGMENT AND REASONS:	ROY J.
DATED:	JUNE 21, 2023

APPEARANCES:

Mark Gruszczynski	FOR THE APPLICANTS
Mario Blanchard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canada Immigration Team Barristers and Solicitors Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT