Federal Court  Cour fédérale

Date: 20230509

Docket: IMM-7473-21

Citation: 2023 FC 663

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 9, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

M.N. et al

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

S.V.

Intervener

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], confirming a decision by the Refugee Protection Division [RPD]. Leave to bring an application for judicial review was granted under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act or IRPA]. I note that the Court made an order protecting the applicants' anonymity on October 28, 2022.

[2] The applicants effectively alleged two grounds for their application for judicial review. They argue that the impugned decision is not reasonable, and that they did not receive adequate representation before the RAD.

[3] Neither of the grounds raised can be accepted. It follows that the application for judicial review must be dismissed.

I. Facts

[4] The applicants are a family. They are Algerian citizens. The family's refugee protection claim is based on the allegations of the principal applicant, who is the father of the two children and the husband of the female applicant.

[5] It appears from the Basis of Claim Form (August 29, 2019) [BOC Form] that the applicants left Algeria on July 3, 2019, with visitor visas to enter Canada. The two children are twins and are now 25 years old.

[6] The principal applicant worked in the import-export field in Algeria. He complained of unfair competition and corruption in his field, where he became the manager of a corporation.

[7] He complained about the competition he faced, which made his business difficult for those who wanted to maintain their integrity: according to him, people had to bribe politicians, which he refused to do. In 2015, he filed a complaint against another corporation for importing a counterfeit of his trademarked and registered product. No action was apparently taken.

[8] He said that in 2016, he reported thefts totalling more than 20 million dinars. Complaints against five people were then filed before Algerian courts. In his BOC Form, he states the following:

> [TRANSLATION]
> 14. Since 2018, I have not stopped receiving threats, anonymous phone calls asking me to watch out for myself and my family, but I was still beaten. I had found out that it was either employees who had stolen from me and who had made threats for me to withdraw my complaint, or competitors who did not want to share the market and wanted to eliminate the competition.

This meant that the applicants had to be cautious about their movements.

[9] Two specific incidents were noted. On April 19, 2019, the principal applicant found at the main door of his residence [TRANSLATION] “a bag that contained sheets . . . and things for washing and burying the dead” (BOC Form at para 16). This was interpreted as a death threat. The police were contacted. Then, on May 28, 2019, the tires of the applicant’s car were slashed.

[10] The principal applicant seems to summarize his situation in this way at paragraph 22 of the BOC Form:

> [TRANSLATION]
> 22. I contacted the police to investigate the people who threatened me in order to find out if it was former employees who had stolen from me or if it was the importer who imported counterfeit goods whom I had previously taken to court or even competitors who did not want to see my tuna canning project come into being, but the police did not lift so much as a finger; my country did not want to protect my family.

The principal applicant said that the threats were ruining his life and that he had left everything behind to come to Canada.

II. Refugee Protection Division

[11] Neither the RPD or the RAD accepted the applicants' allegations as supporting a claim under sections 96 and 97 of the Act. The applicants were represented by different people. It is clear that the RAD decision is the subject of the application for judicial review, but because the applicants now allege the incompetency of counsel who represented them before the RAD, replacing their representative before the RPD, it is necessary to review the RPD decision that was appealed to the RAD.

[12] As has been seen, the BOC Form did not reveal a complex factual background. The RPD initially noted that the allegations dealt with fears of former employees and former competitors. Since no nexus with section 96 was present, the claim for refugee protection could only be considered on the basis of on section 97: was it likely, on a balance of probabilities, that the

applicants [TRANSLATION] “would be personally subjected to a risk to their lives or a risk of cruel and unusual treatment or punishment if they returned to Algeria” (RPD decision at para 7).

[13] The RPD found the applicants to be generally credible with respect to their allegations. The difficulties with the employees and competitors were harsh. The RPD accepted that telephone threats were made, that sheets used for interring deceased people were left at the applicants’ residence and that car tires were slashed. However, the RPD had no choice but to find that the applicants had an internal flight alternative in Algeria.

[14] This alternative relies partly on the lack of motivation by the agents of persecution to find and threaten the applicants if they return to Algeria. In fact, when questioned at the hearing, the principal applicant testified that revenge would be the motivation. He tried to argue this, claiming that the person occupying his apartment in Algiers continued to receive calls; in addition, his brother-in-law reportedly received a visit from [TRANSLATION] “friends” who were seeking the applicants’ address. However, this motivation was not accepted by the RPD because it was presented very late. In fact, an amended written account had been submitted the day prior to the hearing before the RPD, with no motivation for revenge being explained, even though this information was said to be of [TRANSLATION] “central” importance. The RPD stated that it did not believe the principal applicant with respect to the people looking for them, as the principal applicant claimed.

[15] The RPD found that there was an internal flight alternative in Algeria based on the analysis framework that has been in place for more than three decades:

1) Is there a serious possibility of persecution elsewhere in Algeria?

2) Would it be objectively unreasonable to seek refuge in this other place?

[16] The RPD was unable to see sufficient responses in the testimonies to substantiate that the agents of persecution would have the means and motivation to find them if they moved somewhere other than Algiers. Not only were the provided responses vague, but the principal applicant also alleged that his role as a merchant made him vulnerable to being identified (business register, bank card, record). In addition, the RPD noted that the principal applicant said that he did not know who had made the threats. Therefore, the applicants could not, on a balance of probabilities, satisfy the first prong of the test.

[17] The second prong was also not satisfied. Three Algerian cities were identified. With respect to the ability to live in these places, the RPD was of the view that the four applicants are resourceful and educated, which will foster their resettlement in their country of citizenship. Freedom of movement in Algeria (except in the south of the country) favours this resettlement. The mother and daughter cited the difficulty of wearing the veil in the proposed places, but they could not be specific about this, since they did not know how it would be in those places. Addressing this concern, the [TRANSLATION] “panel notes that there is no objective documentary evidence to confirm that there is a serious possibility of persecution or that they would be personally subjected to a risk to their lives or a risk of cruel and unusual treatment or punishment if they did not wear the veil in one of the proposed cities” (Decision at para 35).

[18] Having found that there was an internal flight alternative, the RPD rejected the claim that they were refugees or persons in need of protection under sections 96 and 97 of the Act.

III. Refugee Appeal Division

[19] The applicants did two things following the RPD's decision. First, they retained the services of a lawyer who is an immigration specialist. They then filed an appeal before the RAD.

[20] It seems essential to me to highlight some minimal rules that govern any possible appeal before the RAD. Thus, the appeal may deal with a question of law, of fact or of mixed law and fact, but the appeal must be on the basis of the record (subsection 110(3) of the Act). Specific instances where the RAD can receive new evidence are provided for in the Act. They are:

- evidence that arose after the rejection of the claim; or
- that was not reasonably available; or
- that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[21] Holding a hearing is exceptional and is only possible if the three conditions in subsection 110(6) are met:

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility	a) soulèvent une question importante en ce qui concerne

of the person who is the subject of the appeal;	la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

In simple terms, appeals are held using relatively restrictive rules. Moreover, the RAD does not have to show the same deference as the reviewing court does.

[22] As in the case before the RPD, the determinative issue was the internal flight alternative in Algeria, and the appeal was dismissed, since the RAD accepted one of the three cities identified by the RPD as being an appropriate refuge.

[23] The question does not relate to the events that occurred in Algeria before the applicants departed. This is a given. Instead, it is that they did not establish that the agents of harm were still looking for them. The RAD shared the RPD's opinion that the principal applicant's testimony regarding the attempts by unknown individuals to find them lacked credibility. While the applicants amended their written account barely a few days prior to the hearing before the RPD, the principal applicant for the first time testified at the hearing that individuals were seeking them. That was new. These attempts to find them would be determinative for the applicants, and the principal applicant could not be unaware of their importance. Furthermore, no evidence to corroborate such information, such as affidavits from people who have been in contact with the unknown individuals, was provided:

> [19] The appellants could have amended their BOC Form by adding a single paragraph, which would not have unduly extended their written account. This failure to amend their story is even more important since they amended two other pieces of information in their BOC Form a few days before the hearing. They also did not inform the RPD of these new events at the start of the hearing; they even affirmed that the information in their BOC Form was true, complete, correct and up to date. When the RPD asks this question, it is not simply a formality. If new material facts have occurred, they must report it before the hearing. It is important for refugee protection claimants to present all the material information of their story.
>
> (RAD decision).

A negative inference was therefore made, ensuring that the veracity of these allegations was cast into doubt.

[24] The RAD then reviewed the applicants' relocation to a major city in Algeria other than Algiers. It largely agreed with the RPD. The applicant did not demonstrate that the agents of persecution had the motivation to pursue the applicants in Algeria. The applicants also did not establish that they would have the means to find them.

[25] The evidence considered by the RAD was to the effect that the agents of harm had not reappeared in more than two years (in September 2021) and that it was unlikely that they would come after the applicants when the complaints about a competitor had been filed in 2013 and those about the employees, in 2016.

[26] The RAD found that, even if there was interest or motivation, the applicants had not established that the agents of harm even had the ability to relocate them. No evidence of this was

provided, and the National Documentation Package on Algeria was of no help to the applicants. In fact, a report by the United Kingdom's Home Office found that relocation was reasonable if the agents of harm are not government agents. No indication was found that it would be easy to find someone using his or her personal information in a country that has 40 million inhabitants and is the largest in Africa by surface area. Lastly, no allegations, let alone evidence, suggested that the agents of harm were part of powerful or significant organizations.

[27] The RAD also dedicated a portion of its analysis to the risk of persecution of Algerian women. As indicated above, the RAD accepted one of the three cities considered by the RPD, which was the most populous of the three. The RAD conducted its own research on the issue of wearing the veil. The National Documentation Package does deal with the situation of Algerian women. However, it is legal discrimination, the absence of parity in families, at work or in divorces, or domestic abuse that is at issue. The RAD stated that it did not "find any information on discrimination against women who do not wear the veil, . . . also did not find any information on this issue in the other tabs of the NDP, and nor does the cumulative discrimination that women face in general amount to persecution" (RAD decision at para 45).

[28] We then move to the second prong, that of the reasonableness of resettling in his or her own country of citizenship. The RAD did not accept an argument that the principal applicant cannot perform physical work and his skills are in the field of business. This is not the question being asked. Instead, it is knowing whether the principal applicant can find a job that will allow him to support himself and his family financially. His burden was to demonstrate that he had no reasonable prospects if he could not be employed as a merchant. He did not discharge it.

[29] The spouse of the principal applicant and his children, both of whom are adults, also did not discharge their burdens. The spouse worked in a daycare, and there was no evidence that she would be unable to do that if she returned to a large Algerian city. As for the children, they have reached adulthood. There was no evidence to establish that they could not support themselves financially in Algeria, since both of them had jobs in Canada. In any case, the applicants should have provided real and concrete evidence of conditions in a major and well-populated Algerian city that would endanger their life and safety. They did not do so.

[30] The RAD found that the RPD decision was correct. The appeal was therefore dismissed.

IV. Application for judicial review

[31] New counsel replaced the counsel who was acting for the applicants during their appeal before the RAD. Counsel before the RAD replaced another representative who had acted during the initial claim before the RPD.

[32] The applicants claim that the RAD decision is unreasonable, but they also allege that counsel who represented them before the RAD was incompetent. This incompetence allegedly arose at the start by not challenging the competency of the representation provided by another person before the RPD. In other words, the applicants now argue that their representation before the RAD and RPD was incompetent. Aside from counsel before the RAD not being able to recognize the incompetency of counsel before the RPD, this incompetency before the RAD took the form of:

- not justifying why the situation in Algeria had not been updated;

- failing to specify before the RAD that one of the applicants (one of the twins) suffered from schizophrenia; and

- failing to add to the evidence regarding the situation of women in Algeria.

[33] Very surprisingly, the applicants launched attacks in every direction, often in a chaotic manner. In fact, their claims were that their counsel before the RAD was incompetent and that the RAD had made an unreasonable decision that they had an internal flight alternative in Algeria. However, both were mixed into the memorandum of fact and law and at the hearing. These two types of claims are not particularly complex, as they are subject to specific rules. It is only once these rules have been determined that we can then assess the claims by gauging their quality.

[34] In place of that, the memorandum of fact and law (which itself goes far beyond the limits allowed without leave being obtained) presented the Court with a hodgepodge of assertions for which it is not easy to see how they are relevant or how they meet the standards required by law. Arguments are assessed on the basis of what is required to establish that a decision does not meet the standard of correctness or reasonableness, depending on the case. It is up to the applicants to demonstrate this.

[35] The applicants claim that the RAD did not consider the objective situation of women in Algeria. This could be viewed as an argument about the reasonableness of the internal flight alternative. However, it sought to criticize counsel before the RAD for not having gone further with the research in order to possibly present new evidence. Their claim is that the mother and

her daughter [TRANSLATION] “do not look like proper Algerian women” (memorandum of facts and law at para 14). While the RAD found from the evidence that the applicants would not face a serious possibility of persecution in a major city other than Algiers, the applicants seem to place their criticism elsewhere. It was the situation of women that they wanted to complain about, since, despite noticeable progress, there continue to be situations of concern, including violence against women in their families, sexual harassment, stigmatization and hostility towards single mothers and women living alone. They emphasized the discrimination faced by Algerian women, whereby their freedom is curtailed by social pressure.

[36] Two remarks are in order. First, without ever attempting to demonstrate it, the applicants state that they could be victims of persecution in a major, populous city, rather than in more conservative places. Then, no attempt was made to demonstrate a nexus with either prong of the analysis of internal flight alternatives under our law. This persecution, if it existed, should satisfy the second prong of the test. Thus, we are not dealing with any sort of deficiency in the reasonableness of the RAD’s finding in this regard. As we know, the burden is on the applicant to demonstrate that a conclusion is unreasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at para 100).

[37] In another hodgepodge of assertions, the applicants also criticize their counsel before the RAD for not adding to the evidence before the RAD on the general situation of women in Algeria.

[38] Some remarks are in order here as well. The applicants do not explain how such new evidence, if it is relevant, could be submitted. The hearing before the RAD is held using the record created before the RPD. Adding evidence is an exception and must meet specific constraints. There is no dispute that the applicants' case as detailed in their BOC Form was based on the difficulties experienced by the principal applicant in his commercial dealings (with competitors and employees). Both the RAD and the applicants' counsel before the RAD were unable to find specific documentation on the problematic situation in the populous city selected by the RAD as a possible internal flight alternative. In fact, before the RPD, the applicants referred to difficulties encountered in a small town while they were in hiding. Lastly, I note that in its review of the second prong of the internal flight alternative analysis, the applicants' memorandum before the RAD, which was expressly approved by them, discussed problems encountered by the mother and her daughter because of their lifestyle and the fact that they were not veiled (memorandum before the RAD at pp 7–9). The applicants' complaints in this regard were specifically raised by their counsel:

> [TRANSLATION]
> The situation for women in Algeria is a consideration that had to be considered because of problems they have experienced in employment, home ownership and inequalities of every kind, to say nothing of the unpunished sexual violence.

[39] The applicants also complained that the RAD had no valid reason to doubt the principal applicant's credibility regarding his fear that strangers were looking for him in Algeria. Recall that both the RPD and the RAD had seen the principal applicant's testimony presented for the first time at the RPD hearing, without even amending his BOC Form, although he had amended it the day before that hearing to add this information, as not being credible. The administrative tribunals did not believe these last-minute changes.

[40] In that regard, the applicants seem to base their argument on the claim that an omission is not a contradiction. Thus, the principal applicant's testimony was rejected because his testimony that strangers were supposedly searching for him, which he had not even spoken of before, was unsubstantiated. The applicants see a difference between failing to say something that is central to their claims, thus leaving an opening to a conclusion that this is a recent invention, and a contradiction in a testimony.

[41] I will start with the alleged incompetence of counsel retained for the appeal before the RAD. The applicants dedicate most of their memorandum to it. In fact, this is also a hodgepodge of arguments, this time with the alleged incompetence of their counsel before the RPD mixed in. We can see a somewhat awkward attempt to draw the RPD decision, which is not and cannot be before the Court, into the judicial review of the RAD decision.

[42] At paragraph 32, I have already reproduced the accusations made against counsel before the RAD. The objective situation of liberal women in Algeria has already been dealt with.

[43] The applicants are seeking to claim incompetence due to the fact that the explanation for the alleged searches for the applicants in Algeria, which we will deal with in another section, was late in arriving, which raised doubt as to the veracity of these allegations. The principal applicant testified in this regard after declaring that his BOC Form was complete, when it did not deal in any way with this important aspect of a refugee protection claim.

[44] We do not know too much about what BOC Form update could validly have been made before the RAD. The principal applicant's testimony before the RAD was unequivocal. We can only repeat that the appeal was based on the record. In addition, counsel raised the issue before the RAD, recalling that there was no obligation to update the written account. But in that case, what could the applicants be complaining about? What should have been done exactly? What would have been the remedy that was so grossly neglected? No indication or allegation is given.

[45] At best, the applicants now claim that counsel should have questioned them more about this aspect of the matter to possibly explain why the BOC Form had not been amended prior to the hearing before the RPD. However, the memorandum before the RAD, which was approved by the applicants, includes five paragraphs on this single issue. Essentially, the applicants say that their counsel should have questioned them more, despite the paragraphs that are explicit and that could have been subject to questioning if there had been any. But in that case, what else should have been done? Even if it were possible to have 20/20 hindsight, which is highly doubtful, the applicants do not present anything that could have, or should have, validly taken place.

[46] Counsel is also criticized for not raising an allegation of incompetence on the part of the representative before the RPD. The failure to recognize this person's incompetence is apparently proof of the incompetence of counsel before the RAD.

[47] This somewhat unusual proposal is based in part on the allegation that, in another completely different immigration matter, counsel cited errors that had been committed by the

same representative who had acted on behalf of the applicants in this case. Before the Court, the applicants referred to passages from a memorandum of facts and law before this Court in this other case.

[48] When asked about this allegation, counsel for the applicants in this Court acknowledged that the case had not been concluded, since it was never argued: there was a settlement of some kind, the substance of which remains unknown.

[49] Thus, although the applicants say that they reported the incompetence of their representative before the RPD, which their counsel before the RAD should have highlighted, they do not provide any details. At best, they report the incompetence of the representative and attack the explanations provided by counsel, who states that disagreement on preparing a case should not amount to incompetence or even negligence. Furthermore, as we will see, this representative had provided the RPD with corrections to the BOC Form and numerous documents. The criteria for alleging incompetence should still be met, even when a person is governed by a recognized regulatory body. This is a serious and consequence-filled issue to which we will need to return.

[50] The applicants also allege that their counsel showed incompetence by not stating that the son was diagnosed in Canada as suffering from schizophrenia. The twin sister claims that counsel knew about her brother’s condition, which counsel vehemently denies. In any event, the record does not reveal the severity of the illness. At best, the record includes an affidavit regarding the illness, which states that he receives a medication that allows him to hold a stable

job and lead a balanced and stable life. As was the case everywhere else, the applicants merely state that counsel should have mentioned their son's illness. They do not mention the seriousness of the illness or how it could be relevant to the case before the RAD, such that it could have made any difference. In other words, this allegation arrives *ex post facto* without the applicants showing any connection, supposing that counsel had known about the son's medical condition in a timely manner. The allegation is a declaration in nature and not a demonstration. In addition, the applicants' claims are cobbled together with submissions that are more arguments in the nature of a claim based on humanitarian and compassionate considerations, in which shortcomings in the medical system in Algeria are alleged, yet it does not demonstrate what those are specifically. Additionally, we must recall subparagraph 97(1)(b)(iv) of the Act:

97(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
. . .	. . .
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
. . .	. . .
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

V. Arguments of respondent and counsel accused of incompetence

[51] This dispute was littered with incidents regarding the involvement of counsel who was accused of incompetence [intervener]. There were complaints from the intervener about serious breaches by the applicants of the Protocol Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court (dated March 17, 2014). The applicants objected to counsel's affidavit; they also claimed that counsel had not followed the Rules. Ultimately, the Court allowed counsel to intervene with the possibility of arguing before the Court, in addition to submitting a memorandum on the allegation of incompetence made against him.

[52] I chose to deal with the allegations of incompetence, despite the argument by counsel for the intervener that the Court must refuse to hear the allegation of incompetence because the many breaches of the Protocol by the applicants did not allow for the thoroughness required for serious personal and professional accusations.

[53] There is some merit to the argument that [TRANSLATION] "the applicants' conduct in a case alleging incompetence must be beyond reproach and worthy of preserving the integrity of the legal system and of the claims made in it" (memorandum in this Court of counsel before the RAD at para 9). However, it is preferable to deal with the incompetence argument on the merits since, in my view, the allegation has no basis at all.

[54] The respondent and the intervener both argue that anyone who raises incompetence has a heavy burden to meet. Extraordinary circumstances are required. The accepted articulation of

this test is presented in *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at paragraph 21:

> [21] In *Badihi v Canada (Citizenship and Immigration)*, 2017 FC 64 I discuss the test to be applied where incompetent assistance of counsel is alleged:
>
> > [17] Justice James Russell set out the test for addressing allegations of ineffective or incompetent assistance of counsel in Galyas, where he stated at paragraph 84:
> >
> > > [84] It is generally recognized that if an applicant wishes to establish a breach of fairness on this ground, he or she must:
> > >
> > > a. Provide corroboration by giving notice to former counsel and providing them with an opportunity to respond;
> > >
> > > b. Establish that former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and
> > >
> > > c. Establish that the outcome would have been different but for the incompetence. [Sources omitted]
> >
> > [18] The burden is on the applicants to establish the performance and the prejudice components of the test to demonstrate a breach of procedural fairness. The parties agree that the threshold is very high. As noted by Justice Richard Mosley in *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paragraph 9:
> >
> > > [9] […] The party making the allegation of incompetence must show substantial prejudice to the individual and that prejudice must flow from the actions or inaction of the incompetent counsel. It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different."

> [19] The Supreme Court of Canada has stated the following in *R. v G.D.B.*, 2000 SCC 22 at paragraph 29:
>
> > [29] In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow ([*Strickland v Washington*, 466 U.S. 668 (1984)] at p. 697).

An applicant must therefore establish that there is incompetence and prejudice, and that the result would be different were it not for the incompetence.

[55] While the respondent argues that the applicants did not satisfy any of the three components of the test, the intervener simply argues that no incompetence was demonstrated, which is sufficient to reject the argument, since the three components of the test must be satisfied.

[56] Thus, for the intervener, the son's health status was not known at the time of writing the memorandum for the RAD. If the applicants wanted to challenge counsel's sworn statement, they had to challenge it by cross-examining counsel, since the evidentiary burden for this rests on their shoulders. In fact, the only medical evidence on record is a note that came after the RAD decision. No clear and convincing evidence was submitted about the knowledge of the son's health status (supposing that it could have been relevant).

[57] The same absence of evidence was raised regarding the situation in the city selected by the RAD as an internal flight alternative. The available evidence was submitted to the RAD.

[58] The intervener notes that at no time during the weeks that preceded the filing of the memorandum before the RAD did the applicants submit any evidence whatsoever that was neglected. On the contrary, after reviewing the memorandum to be filed with the RAD, they stated that they were [TRANSLATION] "content" with the work that was done.

[59] With respect to the allegation that there was incompetence regarding the BOC Form in not explaining why he ignored the searches by strangers in Algeria, the intervener recalls that the principal applicant had attempted to provide an explanation at the hearing before the RPD, but the explanation was far from being accepted.

[60] Lastly, it is argued that the allegation that the intervener should have recognized the incompetence of the applicants' representative before the RPD, which apparently demonstrated the intervener's own incompetence, is without merit. The intervener made a judgment that he could not prove incompetence. It is one thing to see a file from a given perspective; it is another to demonstrate incompetence. In any case, at no time did the applicants suggest arguing the incompetence of representation before the RPD, less still did they give instructions of any kind about this.

[61] The intervener requests costs at the Court's discretion for what he believes to be oppressive or inappropriate conduct. This includes offensive characteristics that are in no way

justified by the record as it exists. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, gives rise to costs in circumstances that would constitute the "special reasons" mentioned in rule 22.

[62] The respondent did not stop at the first prong of the three-prong test to justify an allegation of incompetence. He argued that none of these were satisfied by the applicants.

[63] It is submitted that there is no clear and accurate evidence of incompetence, as is required. We can see that the intervener listened to the recording of the hearing before the RPD and found that it was not possible to allege incompetence by the representative before the RPD who had chosen to amend the BOC Form and had added documentary evidence, yet had not amended the subject's written account regarding the alleged searches by unknown people in Algeria. This was a professional judgment that does not involve incompetence. As for the situation of women in Algeria, the respondent highlights the intervener's affidavit, according to which the applicants did not even suggest what new evidence could have inspired them; furthermore, there was never any issue of what sort of difficulties were encountered in Algeria, only certain situations in a small town where the applicants had taken refuge. No specific evidence had been found regarding the major city selected as an internal flight alternative. Additionally, nothing has since emerged regarding this city. In fact, this confirms the absence of evidence about this city.

[64] The respondent relies on the intervener's affidavit, where it is said that the illness from which the son suffered had not been disclosed. Disagreeing *ex post facto* with counsel is not

proof of incompetence that will lead to finding a breach of procedural fairness. The applicants therefore have neither proven the prejudice required, nor that the result would have been different.

[65] The respondent goes on to argue that the RAD decision is reasonable. It was appropriate for the RAD to see that the assertions made before the RPD (according to which strangers were suddenly looking for the principal applicant, 19 months after leaving Algeria) lacked credibility. The failure to cite this new factor was analyzed by the RAD, which rightly noted that the people who were supposedly contacted in Algeria regarding the applicants did not even corroborate the principal applicant's statements. For the respondent, not only could the contradictions be a basis for gauging the credibility of a witness, but the omissions are also relevant (*Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at para 20; *Talanov v Canada (Citizenship and Immigration)*, 2020 FC 484 at para 61).

[66] What then of an internal flight alternative elsewhere in Algeria? It is up to the applicants to demonstrate that this alternative, which both the RPD and RAD accepted, does not meet the standard of reasonableness. We must examine whether there was no serious risk of persecution at the selected place and if it would be objectively unreasonable to seek refuge there.

[67] As for the first prong, the applicants did not demonstrate that their agents of harm would have the interest and desire to come after them. They also do not have a demonstrated ability to cause harm. The RAD examined the documentary evidence in the National Documentation Package to satisfy itself that internal relocation is particularly appropriate when the agents of

harm are not governmental, as in this case. The applicants' suppositions are not valid as evidence.

[68] The second prong is no more successful for the applicants. No evidence has been presented that would justify a conclusion where it would be unreasonable to seek refuge in the city designated by the administrative tribunals.

VI. Analysis

[69] The existence of an internal flight alternative negates the refugee protection claim because, before seeking international protection, a person must first seek refuge in his or her own country of nationality. This rule, which is inherent in the very definition of "refugee", is well known and was affirmed by the Federal Court of Appeal more than thirty years ago (*Rasaratnam v Canada (Minister of Citizenship and Immigration) (CA)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706).

[70] The jurisprudence of the Court of Appeal has established a two-prong test. It must be satisfied, on a balance of probabilities, that the person does not seriously risk being persecuted at the internal flight alternative's location and that it would not be unreasonable to seek refuge there.

[71] In *Thirunavukkarasu v Canada (Minister of Employment and Immigration) (CA)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 [*Thirunavukkarasu*], the Court of Appeal continued to articulate the required test, repeating that the internal flight alternative is not a legal defence or a

legal theory but the consequence of the definition of “refugee”. The onus is therefore on the claimant to establish that he or she meets all aspects of the definition of “refugee”: this includes demonstrating that the claimant has no internal flight alternative. As the Court states, “I do not think it possible to conclude that, in so far as the IFA issue is concerned, the original onus carried by the refugee claimant, should, somehow, be shifted to the Minister” (pp 594–95). The individual claiming refugee status must therefore prove, on a balance of probabilities, once an internal flight alternative has been raised, that there is a serious risk of persecution in this other part of the country.

[72] With respect to the second prong, the Court of Appeal dealt with it by establishing the following parameters:

> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.
>
> In conclusion, it is not a matter of a claimant’s convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travelling half-way around the world to seek a safe haven, in another country. Thus, the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of Convention refugee. That definition requires claimants to be unable or unwilling by

> reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country.

[73] If this gives the impression that the bar is high for claiming refugee status, this impression is confirmed by the third decision in the trilogy, *Ranganathan v Canada (Minister of Citizenship and Immigration) (CA)*, 2000 CanLII 16789 (FCA), [2001] 2 FC 164 [*Ranganathan*], where the Court of Appeal refused to lower the bar (para 16). Paragraph 15 reads as follows:

> [15] We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.
>
> [Emphasis added.]

Not only is the bar high with regard to the type of challenges that may make the place of refuge unreasonable, but there also must be actual and concrete evidence of it. I also note that the Court of Appeal warns against any confusion that would blur the lines between a claim for refugee status and a claim based on humanitarian and compassionate considerations.

[74] On judicial review, applicants must persuade the reviewing court that the RAD decision does not bear the hallmarks of reasonableness—justification, transparency and intelligibility—and that it is not justified in relation to the relevant factual and legal constraints (*Vavilov* at

para 99). As everyone now knows, the reviewing court must show judicial deference and adopt a respectful attitude towards the decision of the administrative tribunal to which Parliament deferred the task of deciding these issues on the merits.

[75] In fact, the applicants spent the bulk of their time claiming that their representation by counsel before the RAD was deficient to the point of incompetence.

[76] The applicants' argument regarding the allegation of incompetence suffers from a radical defect: it involves 20/20 hindsight. Justice Russell wrote in *I.P.P. v Canada (Citizenship and Immigration)*, 2018 FC 123, at paragraph 153, that "[a]pplicants who are dissatisfied with a negative decision often blame those who represented them. Such accusations are easily made. The Court has made it clear that there is a significant burden upon those who wish to assert this ground . . .". Accordingly, the evidence submitted by the party alleging professional incompetence "must be so clear and unequivocal and the circumstances so deplorable that the resulting injustice caused to the claimant is blatantly obvious . . ." (*Parast v Canada (Minister of Citizenship and Immigration)*, 2006 FC 660 at para 11). This statement has become part of our Court's jurisprudence (*Arana Del Angel v Canada (Citizenship and Immigration)*, 2020 FC 253 [*Arana Del Angel*] at para 22). As Justice LeBlanc said in *Arana Del Angel*, only the most exceptional of circumstances are required.

[77] In my view, my colleague Justice Strickland very helpfully encapsulated the rules that govern this matter in *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850:

> [17] The test for addressing allegations of ineffective or incompetent assistance of counsel has been well defined by the

> jurisprudence (*Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at paras 39–43). First, the applicant must establish that the impugned counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*R v GDB*, 2000 SCC 22 at para 26 ("*GDB*")). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a breach of procedural fairness (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 at para 12 (FCA) ("*Shirwa*"); *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 ("*Memari*")). There is also a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at paras 16, 18). Incompetence will only result in procedural unfairness in "extraordinary circumstances" (*Shirwa* at para 13; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 24). Further, a procedural protocol of this Court, *Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* ("Procedural Protocol"), sets out the procedure applicants must follow when alleging counsel incompetence, which includes giving notice to former counsel.

Incompetence must therefore be established in a clear and specific manner since counsel is presumed to have acted within his or her professional discretion. In addition, it is not enough to invoke professional incompetence. The wisdom of 20/20 hindsight will not be viewed favourably. It must also be established that the prejudice is such that there is a reasonable probability that the outcome of the proceeding would have been different.

[78] In this case, the applicants have not met any of the conditions. Ultimately, they did not even attempt to establish prejudice that would have led to a different outcome in the proceeding. It is because the prevailing legal framework regarding internal flight alternatives sets the bar high

for refugee status claims, while the allegations of incompetence as formulated would not have resulted in a different outcome.

[79] As was noted during the review of the applicants' arguments, they did not prove incompetence that was clear and unequivocal to the point of being blatantly obvious. I would go further. There is no indication of where the incompetence would lie. Stating that the representative before the RPD was incompetent, and that counsel should have detected this, does not establish the incompetence of either one. There needs to be more than a statement. Thus, the principal applicant had testified before the RPD regarding allegations that strangers were supposedly searching for him in Algeria barely a few days before the hearing; his explanation was very shaky, especially since he had not adjusted his written account beforehand as he should have done, and actually did in some respects, but not for this fundamental issue. To put it bluntly, that could resemble a recent invention. Having 20/20 hindsight does not establish incompetence of any kind. Just because the RPD and then the RAD found that the failure to adjust the written account beforehand was a problem does not mean that this indicated a lack of competency leading to the conclusion that there is a reasonable probability that the result before the administrative tribunals would have been different. All things considered, the evidence was remarkably weak.

[80] In addition, the claims that the incompetence comes from the lack of documentation regarding the [TRANSLATION] "objective situation of liberal women in Algeria" has no weight. No such evidence regarding the city where there was an internal flight alternative existed at that time or even when the case came before this Court. More important still, this evidence would not

have established the persecution that the applicants had to demonstrate in order to win on the internal flight alternative issue, at either the first or second prong. It is sufficient to recall that there must then be persecution or a risk to life or safety. Apart from general remarks that are not supported by evidence, nothing was presented to support such an allegation. In addition, this allegation seems to confuse refugee status with a claim based humanitarian and compassionate considerations.

[81] The son's state of health falls into the same category. We can certainly not speak of persecution; it was very likely intended that the claim should have been presented under the second prong, the reasonableness of the internal flight alternative. The jurisprudence of the Federal Court of Appeal is unambiguous: life should be at risk or safety should be at stake. Not only was there no evidence of this kind, but there was not even an allegation in this regard. It is very clear that the grievance alleging incompetence because there was no evidence regarding the objective situation of patients like their son in Algeria is without merit; the applicants have conflated the issues, unfortunately. I would add that the evidence tends to show that counsel before the RAD testified that he had not been informed of this situation, while the claimants had the burden of proving it. As indicated above, it was not reasonable in any way to believe that this assertion could have changed the outcome, since the burden for both prongs is relatively heavy. In fact, the applicant did not even attempt to demonstrate that the outcome would have been different.

[82] Therefore, there is no acceptable argument that counsel before the RAD was incompetent. The evidence for this is not merely scant: in my view, it is non-existent.

[83] With respect to the reasonableness of the RAD's decision concluding that there was a reasonable internal flight alternative, the applicants cited two [TRANSLATION] "errors": the RAD supposedly had not considered the objective situation of women in Algeria, and there were no valid grounds to challenge the credibility of the principal applicant's testimony about strangers whose identity he did not know, but were apparently looking for him in Algeria. Both of them have little merit.

[84] The applicants cannot simply raise alleged errors: they must instead show that the decision was unreasonable. To do this, it must clearly be based on the question to be decided, that being that the applicants are not refugees because they have an internal flight alternative. Thus, there was no evidence of persecution in the city selected as an internal flight alternative. It must be remembered that there has to be persecution, which was never established by any evidence at all.

[85] I have already dealt with the objective situation of women in Algeria in connection with the alleged incompetence of counsel before the RAD. In the context of the internal flight alternative, not only was it not demonstrated that the agents of harm could and wanted to find the applicants to cause them harm wherever they sought refuge, but it was in no way established how refuge in the proposed city could have the type of environment regarding the objective situation of women dealt with in *Thirunavukkarasu* and *Ranganathan*. The conditions at this place must jeopardize life or safety, and real and concrete evidence that these conditions exist is needed. That was not proven. The RAD's decision as to the principal applicant's credibility about strangers searching for him is justified, transparent and intelligible. Not only was it less

than plausible that strangers would appear 19 months after the applicants departed, but the principal applicant had failed to mention all this in his BOC Form and had neglected to provide any corroboration that could have improved their position. The applicants' burden was not discharged in any way. The reasonableness of the decision was not undermined.

[86] This Court noted the following in *Sani v Canada (Citizenship and Immigration)*, 2021 FC 1337:

> [20] I think Mr. Sani is looking to reverse the burden of proof as regards the establishment, or negation, of a viable IFA. It is not up to the RAD to set out why a particular IFA would be safe; the burden is upon Mr. Sani to show that it is not (*Photskhverashvili v Canada (Citizenship and Immigration)*, 2019 FC 415 at para 32).
>
> [21] As stated by Madam Justice Roussel in *Singh v Canada (Citizenship and Immigration)*, 2021 FC 459 at paragraph 23:
>
> > [23] The RAD's IFA findings are essentially factual and are based on its assessment of all the evidence, including the documentary evidence, which includes more than the passages on which the applicants rely. The findings are within the RAD's area of expertise and require a high degree of deference from this Court. Based on all the evidence, the RAD could reasonably conclude that the applicant had failed to demonstrate, on a balance of probabilities, that he would be at risk in the cities proposed as IFAs. It is not the role of this Court to reassess and reweigh the evidence to reach a conclusion favourable to the applicants. The role of this Court is to assess whether the decision bears the hallmarks of reasonableness (*Vavilov* at paras 99, 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). This Court finds that it does.
>
> [22] Mr. Sani is, in essence, also asking me to reweigh the evidence before the RAD and to come to a different conclusion. I will not do so, and I too find that in this case, the decision of the RAD bears the hallmarks of reasonableness. I would, therefore, dismiss the present application for judicial review.

I find myself in the same situation here.

VII. Costs

[87] The intervener requested that the Court award costs against the applicants or their counsel. I admit that I seriously considered the question and tried to award them to punish what some would have seen as carelessness.

[88] After careful reflection, I have found that it would be preferable not to award costs. On the one hand, counsel must be able to vigorously represent the immigration interests of a client, yet not have a sword of Damocles over his or her head and have to pay costs that would penalize his or her actions. Given the exceptional nature of costs in immigration matters, the conduct must be just as exceptional, requiring special reasons. On the other hand, it is true that some of the comments made in defence of his clients' interests were inappropriate. Counsel's rhetoric cannot be a substitute for the quality of the arguments, which are assessed in light of the legal system in place and the issues at hand. Circumspection continues to be a virtue. Some comments should have been avoided. Ultimately, I am not satisfied that there was bad faith. In this case, it was misplaced enthusiasm that caused unfortunate misbehaviour. As for the applicants themselves, they tried to use all available means. This was ill advised. The quality of their case was lacking. The Court finds that awarding costs was not required to punish the behaviour of the applicants and their counsel.

VIII. Conclusion

[89] The applicants presented two arguments in the hope of seeing the RAD decision overturned. Their argument regarding the alleged incompetence of their counsel before the RAD was lacking, as the evidence was neither specific nor unequivocal. The presentation was more in the nature of insinuation and 20/20 hindsight.

[90] With respect to the RAD decision, the applicants had to demonstrate, on a balance of probabilities, that it was unreasonable. This was not done. The "errors" that were raised were not so, especially since the alleged "errors" had to be assessed against the only question before the Court in order to demonstrate the serious shortcomings: was there an internal flight alternative where the applicants, in order to win their case, had the burden of demonstrating that they would suffer persecution there and that the selected refuge would not be reasonable because the conditions would jeopardize their lives or safety. As the Supreme Court wrote at paragraph 100 of *Vavilov*, the reviewing court must "be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable". The RAD decision was not demonstrated as not meeting the standard of reasonableness.

[91] The parties agreed that there was no question to be certified pursuant to section 74 of the Act. The Court agrees.

JUDGMENT in IMM-7473-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

3. No costs are awarded.

"Yvan Roy"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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