Federal Court  Cour fédérale

Date: 20210223

Docket: IMM-7880-19

Citation: 2021 FC 165

Ottawa, Ontario, February 23, 2021

PRESENT: Mr. Justice Annis

BETWEEN:

ALABI ADAM SABITU
MARIAM AROMOKE SALIU-ADAM
SUMAYYAH TIWATOPE ADAM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of the decision from the Refugee Appeal Division (RAD) dated December 13, 2019, which confirmed the Refugee Protection Division's (RPD) refusal of the Applicants' refugee claim as there was a viable internal flight alternative (IFA) in Port Harcourt and in Ibadan, Nigeria.

[2] For the following reasons, this Court allows this application for judicial review.

II. **Background**

[3] The male Applicant, his wife and their minor daughter are citizens of Nigeria and are claiming refugee protection for fear of female genital mutilation (FGM), harmful tribal rituals and/or other serious harm at the hands of the male Applicant's grandfather and extended family. The adult Applicants also have a daughter born in Canada that is not part of the claim.

[4] The adult Applicants are university educated. The male Applicant is a civil engineer, and the female Applicant is a microbiologist. They speak Yoruba and English. The couple was engaged in June 2012. In October 2012, the male Applicant left Nigeria for Qatar where he worked in a construction company as a quality control engineer; a position which became permanent in August 2014. They married in June 2013.

[5] As the male Applicant was unable to take his wife with him to Qatar, she stayed with his family in Nigeria. During this time, it appears that she worked in a medical clinic in Ilorin.

[6] The male Applicant's grandfather was a traditional doctor in his hometown, and as such, the controlling head of the family. When the minor Applicant was born in 2015, he informed the Applicants that she would be subjected to FGM and given a tribal cut mark on the face.

[7] The adult Applicants disagreed with FGM and tribal cutting, but did not express this publicly because it would be contrary to their tradition and customs to argue with elderly

members of the family. However, pressure mounted to set a date for the procedures and they received threats to take the minor Applicant from them if a date was not chosen for the circumcision. The Applicants decided to leave Nigeria in 2017.

[8] As the female and minor Applicants did not have a visa for Qatar, the family flew to the United States, and then crossed the border at Lacolle, Quebec a few days later to seek refuge in Canada in September, making a refugee claim in Montréal in 2017.

[9] While the RPD had some credibility concerns, these were not determinative. The claims were ultimately rejected based on the availability of viable IFAs in Ibadan or Port Harcourt. The RPD found that there was insufficient probative evidence that the extended family or tribal community—non-state actors—would be able to find and harm the Applicants in the IFA locations. Further, in all the circumstances of this case, it was judged not objectively unreasonable for the Applicants to seek refuge in the IFA locations of Ibadan and Port Harcourt; considering their profile, education, employment, accommodation, language, indigeneship and alleged ethnic violence. The RPD rejected the asylum claim as the Applicants had a viable IFA. The RAD confirmed the decision.

[10] On appeal, the RAD found that the RPD had misconstrued the male Applicant's testimony regarding why he had gone to work in Qatar several years ago. However, this was not considered determinative of the appeal because it was not probative of whether he could find work outside of his profession in the IFA locations. Having examined and assessed the record

independently, the RAD otherwise concurred in the IFA assessment, and dismissed the Applicants' appeal.

[11] On December 30, 2019, the Applicants filed the subject application for leave and judicial review. On February 6, 2020, the Applicants filed their application record. The memorandum of argument contained submissions claiming their counsel before the RPD and RAD was incompetent including advising them against including evidence of the fact that the female Applicant has suffered from sickle cell disease since birth.

[12] On March 9, 2020, the Respondent filed its memorandum which contained submissions that the Applicants are statutorily barred from seeking judicial review on allegations of breaches of procedural fairness where they have not exhausted their right to reopen their RAD appeal pursuant to rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 (*Rules*).

[13] On April 8, 2020, subsequent to the completion of pleadings at the leave stage, the Immigration and Refugee Board of Canada revoked the Jurisprudential Guide (JG) TB7-19851 for Nigeria.

[14] On June 29, 2020, the Applicants filed an application to reopen their RAD appeal pursuant to rule 49 of the *Rules*. They advance the same ground of inadequate representation as in their Federal Court leave application, in addition to claiming that the RAD decision should be set aside because of the revocation of the Nigeria JG.

[15] On September 22, 2020, Mr. Justice Bell issued a production Order in the present litigation, followed by an Order granting leave for judicial review of the RAD's decision, on October 21, 2020.

[16] On October 2, 2020, a different RAD member dismissed with reasons the Applicants' application to reopen their appeal regarding the alleged inadequate representation of former counsel and for the RAD's reliance on the Nigeria JG. The Applicants have not challenged the reopening decision before the Federal Court. However, the Applicants argue these issues of unfairness referred in this application, which the Respondent claims is a collateral attack on the RAD's reopening decision.

III. **Issues**

[17] The issues are as follows:

1) Is the Federal Court barred by section 72(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) from hearing this judicial review regarding the Applicants' alleged failures of natural justice claims, without their first exhausting a right to request the reopening of the RAD appeal pursuant to rule 49(1) of the *Rules*?
2) Are the Applicants' submissions in this application, claiming failures of natural justice, an impermissible breach of the collateral attack doctrine, given that the RAD dismissed the same submissions in the Applicants' reopening request, which decision the Applicants did not seek to judicially review?

3) Is a determination of the effect of a lawyer's incompetence on the outcome of the impugned decision assessed against a standard of a "reasonable probability" or "serious possibility"? Was former counsel incompetent and to a degree that would have affected the decision?
4) Was there a failure of natural justice by the RAD's reliance on the revoked JG? Is the requirement to prove that the revocation would affect the outcome of the impugned decision assessed against a standard of a "reasonable probability" or "serious possibility"?

IV. **Standard of Review**

[18] In accordance with the decision of the Supreme Court on Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*], the merits of administrative decisions are to be presumptively reviewed on the standard of reasonableness, unless either a clear indication of legislative intent or the rule of law requires otherwise.

[19] The framework to determine the standard of review is based on the presumption that an impugned decision is reasonable. A reasonable decision requires internally coherent reasoning and should be justified in light of the legal and factual constraints that bear on the decision such that the decision as a whole is transparent, intelligible and justified (*Ibid* at paras 15, 75, 83, 85–86, 99). Further, a reviewing court must not require exactitude such that an administrative tribunal must include all arguments or other preferred details; this is not a reason to set aside a decision (*Ibid* at paras 91–92). The onus is on the party who contests the decision to demonstrate that it is not reasonable (*Ibid* at para 100).

[20] Issues one and two, interpreting section 72(2)(a) of the *IRPA* regarding exhausting appeals and waiving the collateral attack rule, are novel questions of law that arise in the determination of this decision, not subject to any standard of review, but are required to be correct statements of legal principles.

[21] Whereas issues three and four described are governed by the standard of correctness. The presumption of reasonableness does not apply to a procedural breach of natural justice. These are reviewable on the standard of correctness (*Vavilov* at para 23). This standard is governed by common law principles and requires a demonstration of a miscarriage of justice.

[22] In particular, the Court has applied a correctness standard of review to allegations of counsel incompetence, as this issue "goes to the Applicant's right to fully present his case, which is an issue of procedural fairness" (*Galyas v. Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27; *Stephen v Canada (Citizenship and Immigration)*, 2019 FC 1331 at para 10; *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 at para 22; *McIntyre v Canada (Citizenship and Immigration)*, 2016 FC 1351 at para 16). Similarly, the effect of the revocation of the JG as an issue of procedural natural justice is reviewed on a standard of correctness, and not that of reasonableness.

[23] However, it is to be noted that when the issues of solicitor incompetence and revocation of the JG are considered in an application to reopen an appeal by the RAD pursuant to rule 49(1) of the *Rules*, the RAD's decision regarding these issues are reviewed on a reasonableness

standard, as stipulated in *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at para 13, stating as follows:

> Recent case law has established that RPD decisions considering applications to re-open are to be reviewed on a reasonableness standard, because the RPD's assessment is a question of mixed fact and law (*Gurgus v Canada (Citizenship and Immigration)*, 2014 FC 9, at para 19 [*Gurgus*]; *Yan v Canada (Citizenship and Immigration)*, 2010 FC 1270, at para 21).

V. **Analysis**

A. *Is the Federal Court barred by section 72(2)(a) of the* IRPA *from hearing this judicial review regarding the Applicants' alleged failures of natural justice claims, without their first exhausting a right to request the reopening of the RAD appeal pursuant to rule 49(1) of the* Rules*?*

[24] The Applicants find themselves in the predicament of facing a collateral attack submission because they understood from the Respondent's leave submissions that they were required to request the reopening of the RAD appeal decision pursuant to rule 49(1). The Respondent contends that section 72(2)(a) of the *IRPA* bars them from seeking this judicial review regarding their unfairness claims, without first exhausting their appeal rights pursuant to rule 49(1) of the *Rules*, to reopen the RAD appeal to entertain their natural justice submissions.

[25] The Applicants therefore, requested a reopening of the RAD appeal pursuant to rule 49(1), which was unsuccessful. Thereafter, having acquiesced to the Respondent's submissions to reopen the RAD appeal, they did not apply for leave to judicially review the RAD's reopening decision. Instead, they moved to address their natural justice claims in the principal judicial review application, obtaining leave to add documents to the record relevant to those issues. The

Respondent now claims that the continued prosecution of the unfairness claims in this application should be dismissed as a collateral attack on the RAD's rejected reopening decision.

[26] Because the collateral attack submission is determinative of the Court's decision, it stands in the way of allowing the application, which is premised on natural justice issues. The collateral attack issue only arises because of the Respondent's contention that the Applicants were required to exhaust their appeal rights pursuant to section 72(2)(a) and rule 49(1) before seeking to review the RAD decision based on natural justice issues. The interpretation of these provisions is therefore an issue requiring the Court's consideration, with which it will commence its analysis.

(1) The requirement to request a reopening of the RAD

(a) *Two procedures to review failures of natural justice in RAD appeals*

[27] To say the least, the Court finds highly surprising the Respondent's submission that the Applicants' recently discovered natural justice claims are not reviewable in this application until they have exhausted the RAD appeal process by requesting that it be reopened pursuant to rule 49(1) of the *Rules*. The consequences of the Respondent's submission is to force an applicant to engage in a secondary appeal reopening procedure, and if unsuccessful as is most often the case, thereafter to bring a second judicial review application. This would necessitate a motion by an applicant to have both applications heard together, assuming that the applicant would wish to advance the same natural justice issues in the principal application.

[28] If this novel proposition is upheld, it brings to an end the daily practice of this Court in considering failure of natural justice claims in the principal judicial review application. The Court has always proceeded directly, without impediments of other proceedings, to hear natural justice allegations together with other issues raised on the RPD or RAD decisions in a single judicial review application, with the record expanded as necessary to do so. Such a protracted mandatory supplementary procedure will likely be to the disadvantage of an applicant whose reopening request is refused. It will also lead to a multiplicity of proceedings, delay and increased costs, which would have mostly been avoided by the usual procedure of having all of the issues related to the RAD's decision considered together in one judicial review proceeding before the Federal Court.

[29] The relevant statutory provisions of the *IRPA* and the *Rules* necessary to engage these issues are as follows:

IRPA	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27
71 The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.	71 L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.
Application for judicial review	Demande d'autorisation
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is,	72 (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous

subject to section 86.1, commenced by making an application for leave to the Court.	réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.
Application	Application
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées ;
[Emphasis added.]	[Je souligne.]

Rules	*Règles de la Section d'appel des réfugiés*, DORS/2012-257
Application to reopen appeal	Demande de réouverture d'un appel
49 (1) At any time before the Federal Court has made a final determination in respect of an appeal that has been decided or declared abandoned, the appellant may make an application to the Division to reopen the appeal.	49 (1) À tout moment avant que la Cour fédérale rende une décision en dernier ressort à l'égard de l'appel qui a fait l'objet d'une décision ou dont le désistement a été prononcé, l'appelant peut demander à la Section de rouvrir cet appel.
…	[…]
Factor	Élément à considérer
(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.
Factors	Éléments à considérer
(7) In deciding the application, the Division must consider any relevant factors, including	(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :
…	[…]

(b) if the appellant did not make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made.	b) si l'appelant n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire, les raisons pour lesquelles il ne l'a pas fait.
…	[…]
Other remedies	Autres recours
(9) If there is a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of appeals, or dismiss the application.	(9) Si une demande d'autorisation de présenter une demande de contrôle judiciaire en instance ou une demande de contrôle judiciaire en instance est fondée sur des motifs identiques ou similaires, la Section, dès que possible, soit accueille la demande de réouverture si cela est nécessaire pour traiter avec célérité et efficacité les appels, soit rejette la demande.
[Emphasis added.]	[Je souligne.]

[30] In advancing the exhaustion of appeal submission, the Respondent first cited the recent decision of *Slatineanu v Canada (Citizenship and Immigration)*, 2017 FC 1129 [*Slatineanu*]. The case involved an inadmissibility appeal before the Immigration Appeal Division (IAD). Section 71 of the *IRPA* permitted an unsuccessful appellant to request a reopening of the appeal. Particularly relevant to this discussion are paragraphs 17 to 19 of *Slatineanu,* as follows:

> [17] I find that the Applicant had a right of appeal as described in section 72(2)(a) of the IRPA that he is required to exhaust before he applies for judicial review. I do not agree that because the re-opened appeal (section 71 of the IRPA) is narrower, and only exercised if there is a failure to observe a principle of natural justice, that it is still not a right of appeal as per section 72(2)(a) of the IRPA.

> [18] There is no doubt in my mind that section 72(2)(a) does apply in this case because the argument on the merits in this judicial review are in fact based on procedural unfairness grounds. So the re-opening application is not prejudiced as it is also on the same procedural unfairness grounds and this right must be exhausted before it can be judicially reviewed.
>
> [19] Because the Applicant did not exhaust his right of appeal, I am dismissing this application as being pre-mature.
>
> [Emphasis added.]

[31] In interpreting section 72(2)(a) of the *IRPA*, the Court in *Slatineanu* relied on previous decisions of the Federal Court of Appeal that required the exhaustion of appeal rights as a precondition to a judicial review (see *Somodi v Canada (Citizenship and Immigration)*, 2009 FCA 288; and *Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180).

[32] However, it should be noted that the Court of Appeal decisions referred to involved independent statutory appeal routes that initiated an appeal. While the rights of appeal were available, they were not exercised before seeking to judicially review the tribunal decisions. These cases would be procedurally similar to a refugee claimant attempting to judicially review a decision of the RPD, without first exhausting an originating appeal right to the RAD. The rights of appeal in those cases did not involve supplementary procedures following upon the originating right of appeal, such as a reopening or a redetermination of the appeal decision.

[33] In reply to the Respondent's submissions, the Applicants argue that reopening issues before the RAD are not encompassed by section 72(2)(a) of the *IRPA*. They argue that the IAD cases reflect a statutory scheme that demonstrates Parliament's intent to expressly prescribe

"right[s] of appeal" that must be exhausted before bringing judicial review application. This encompasses section 71, as a component of the statutory scheme allowing the applicant to reopen the appeal. The second component then constitutes section 72(2)(a), which imposes the precondition for bringing a judicial review application as "any right of appeal that may be provided by this Act is exhausted" [emphasis added].

[34] As the Court understands the Applicants' submission, there is a distinction between a statutory reopening of an appeal pursuant to section 71 of the Act in an inadmissibility proceeding, and a similar right in refugee matters to reopen an appeal pursuant to a rule, such as that provided by rule 49(1) of the *Rules*. In other words, the Applicants would distinguish the rule 49(1) appeal reopening provision from that provided by section 71 as not being "a right of appeal" within the statutory scheme, as that phrase is found in section 72(2)(a) of the Act.

[35] There is some contextual support for the Applicants' contention that the statutory scheme demonstrates Parliament's intent to prescribe a path by which "right[s] of appeal" are expressly provided for in admissibility proceedings and which requires its exhaustion as a precondition to bringing a judicial review application. Section 71 is entitled "Reopening appeal" and is found in Division 7 of the Act under the major heading "Right of Appeal". Section 72(2), contains the phrase "right of appeal" in the body of the provision, and is contained in Division 8, entitled "Judicial Review". The phrase "right of appeal" in the heading of Division 7 covering the reopening provision, and also found in section 72(2)(a), would contextually support Parliament's intention that "right of appeal" is a term linked to both provisions.

[36] The Court does not reject the Applicants' submission. It simply seems irreconcilable with the historical treatment of these provisions. The *Slatineanu* decision in 2017 similarly appears to be the first case applying section 72(2)(a) to conclude that section 71 provided a "right of appeal" that barred judicial review applications until a non-originating appeal procedure was exhausted.

[37] Treating section 71 or rule 49 in this mandatory fashion raises procedural and practical disadvantages. This is in comparison with the direct procedure of the Court considering natural justice issues together with other issues arising from tribunal appeals, as is more thoroughly discussed below. The consequences of the mandatory application of section 71 and rule 49(1) resulting in a two-track judicial review proceeding with all the unnecessary trappings that this entails, supports a conclusion that the Respondent's interpretation of section 72(2)(a) is erroneous.

(b) *Textual constraint*

[38] The Court considers the issue to be one turning on the interpretation of the words in section 72(2)(a) requiring that "any right of appeal that may be provided by this Act is exhausted" [emphasis added]. For the reasons that follow, the Court is of the view that term "right of appeal" in section 72(2)(a) of the Act does not include what can be described as a right to reopen an appeal under rule 49(1) of the *Rules*.

[39] The Court's interpretation of section 72(2)(a) would constrain the meaning of "right of appeal" to originating appeals, and exclude procedures that supplement or are derived from an

ongoing appeal. Accordingly, the phrase “right of appeal” in section 72(2)(a) would exclude any right allowing appeals to be reopened or reconsidered both by section 71 of the Act in inadmissibility matters, and by rule 49(1) in refugee cases.

[40] Without the mandatory requirement of exhausting a right would mean that reopening requests would be optional. This would be consistent with the purpose of appeal reopening provisions. They provide an unsuccessful applicant with an alternative means to raise natural justice issues before undertaking a comprehensive judicial review of all issues together, which would include those concerning unfairness. As will be described below, this interpretation provides the greatest benefit if combined with a dispensation from the collateral attack rule by not requiring natural justice arguments rejected by the RAD reopening decision to be reviewed by a separate judicial review application. In the Court’s view, waiving the collateral attack rule in these circumstances would best serve Parliament’s intention of promoting both the administration and interests of justice.

(c) *Contextual constraint*

[41] A reopening right, by its very definition, is a right that arises after the originating right of appeal to the RAD is decided pursuant to section 111 of the *IRPA*. The reopening decision constitutes a distinct decision that may be subject to an application for judicial review, one that is almost always exercised by the applicant to review a negative RAD reopening request. The judicial review of the negative RAD reopening decision does not encompass the original RAD decision. It is a new process related to the narrow context of a failure of natural justice. Its advantage over the judicial review is that the RAD may proceed to decide the matter, if it

concludes that the appeal should be reopened. Thus, the very concept that a post-RAD decision right exists to request a reopening of the appeal without subsuming or terminating the principal RAD decision lends credence to an interpretation that distinguishes between the two forms of appeal for the purpose of section 72(2)(a) of the Act.

[42] A further contextual consideration recognizes the similarity of purpose of a request to reopen an appeal with a right to seek a redetermination of the original decision. Both are supplementary to the initial decision-making process, and both achieve a similar purpose of providing facultative alternative routes for an applicant to raise natural justice issues, without the necessity of proceeding directly to a judicial review application. There is no logical substantive reason to distinguish therefore between redetermination of rights, and reopening of appeal rights, in terms of the purpose that each is intended to serve.

[43] Additionally and contextually in refugee matters, rules 49(7)(b) and 49(9) of the *Rules* would appear to support a conclusion that exercising a right to reopen the RAD appeal pursuant to rule 49(1) does not create an obstacle to proceeding to consider the natural justice issues with the other issues described in the judicial review application of the RAD decision. Rule 49(5) requires the requesting party to provide a copy of any pending application for leave to apply for judicial review or any pending application for judicial review. Rule 49(7)(b) requires the RAD to consider as a factor in deciding the reopening application whether the appellant failed to make an application for leave to apply for judicial review and the reasons why an application was not made. Further, rule 49(9) references a pending application for leave to apply for judicial review "on the same or similar grounds", appearing to exhort the RAD to coordinate its decision in a

manner that facilitates the judicial review application. The Court considers these Rules as indicative of a judicial review proceeding on the same or similar grounds regardless of any request to reopen the appeal.

(d) *Constraint of the purpose of the rule 49(1) RAD appeal reopening request*

[44] When speaking of the purpose of legislation, one enters the realm of policies, and often the benefits and costs of differing interpretations. It is particularly the costs, broadly defined, associated with an interpretation of rule 49(1) of the *Rules*, which would mandatorily route unsuccessful claims of failures of natural justice through an appeal reopening pathway to a second judicial review, that weighs against the Respondent's submission.

[45] That is not to deny that there is some benefit to be achieved by applying section 72(2)(a) of the *IRPA* to section 71 or rule 49(1) when successful reopenings of appeals bring the litigation to an early end. If the reopening appeal is successful, the rule 49(1) procedure should provide a speedier and less costly outcome to the applicant's benefit by avoiding a judicial review proceeding in the Federal Court. These benefits are reduced marginally by the offsetting resources and costs involved with the RAD procedure, although not approaching those if the judicial review application proceeds.

[46] However, any benefits of the mandatory RAD reopening procedure are appreciably outweighed by the significant downside when the reopening request is rejected, as anecdotally appears to be very much most often the case (statistics were not readily available).

[47] First, this follows from the fact that unsuccessful rule 49(1) decisions will likely engender a second judicial review application, particularly when the principal judicial review application is already proceeding on other issues where natural justice issues will be reviewed against a standard of correctness. The rejected reopening decisions will therefore most often generate a second judicial review application. The result is a multiplicity of procedures, including those necessary to have the two applications heard together. This wastes the time and resources of the parties and the Court, along with the additional costs this entails. All this is associated with an unwanted detour simply to reach the original goal of having the Federal Court review the natural justice failures, along with the applicant's other issues, as the most appropriate forum to do so. These procedures do not advance the administration or the integrity of justice.

[48] Second, hearing the two judicial reviews at the same time on related issues raises concerns of confusion as to how best to proceed. There is notably the problem, as previously indicated, of having two differing standards of review being generally applied to the same unfairness issues. The Supreme Court of Canada has indicated a preference for courts to review issues of natural justice rather than administrative tribunals (*CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100 ("[i]t is for the courts, not the Minister, to provide the legal answer to procedural fairness questions")). See also *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 37–56; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53; *Satkunanathan v. Canada (Citizenship and Immigration)*, 2020 FC 470 at para 31; *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27).

[49] There also appears to be unforeseen procedural and substantive concerns as to how best to conduct the combined hearings. Can either the originating or reopening appeal decision be set aside and the matter be sent back for a redetermination by another panel, terminating both judicial review proceedings? Should the Court ponder the issue of diverging standards of review in considering which judicial review to dispose of first? If commencing with the principal judicial review, is there any necessity to review the reopening decision?

(e) *Brown v Canada* (Citizenship and Immigration) *upholding rule 49(1)*

[50] As a final point, the Court is aware that its restricted interpretation of section 72(2)(a) of the Act was not adopted in the recent decision of *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 at para 33 [*Brown*]. It was the only case the Respondent could provide to support the concept that a rule 49 reopening of the appeal must be exhausted before the judicial review application can be commenced regarding the failure of natural justice.

[51] The reasoning in *Brown* on these issues is as follows:

> [33] Third, the member also faults the applicants for not following Rule 49(7)(b). This rule requires the RAD to consider, if an applicant did not make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made. It is true that the applicants did not say anything in their application to re-open about why they had not applied for leave for judicial review. <u>However, any reasonable person would recognize that such an application would have little chance of success unless and until the alternative remedy available under Rule 49 had been exhausted. The approach taken by the applicants promotes the efficient and effective use of judicial resources</u>. While it would have been preferable if the applicants had addressed Rule 49(7)(b) in their submissions, the member's reliance on this factor is unreasonable.
>
> [Emphasis added.]

[52] It is noteworthy that the reopening appeal in *Brown* was not substantive in character, but was rather a procedural issue. The appeal was dismissed by the RAD for lack of its perfection. The Court understands that prior to this matter, corrective reopening requests were the only form of RAD reopenings normally sought by an applicant pursuant to rule 49(1) of the *Rules*. The distinction between corrective and what are substantive allegations of procedural failures of natural justice is significant. Substantive claims result in considerably more complex decisions and thereby more challenging judicial reviews, and do not necessarily terminate the appeal or the judicial review application without consideration of the merits of the matter in either the appeal or the judicial review of the appeal.

[53] With respect to comments made in *Brown*, it is contended that rules 49(5), 49(7)(b) and 49(9) of the *Rules* recognize that judicial review applications, including those "on the same or similar grounds" relating to allegations of natural justice unfairness, will proceed simultaneously with any application to reopen the RAD appeal. As indicated, rule 49(5) requires notice of any pending application for leave to apply for judicial review, or where leave has been granted. Rule 49(7)(b) requires, as a factor in the decision, an explanation of why there has been a failure to apply for judicial review. The RAD would likely wish to know why the appellant did not make an application for judicial review as a factor either supporting or weighing against the reopening request. Rule 49(9) appears to exhort the RAD to coordinate completion of the reopening decision with the judicial review application underway in the Federal Court, obviously not stalled pending the reopening request.

[54] For all of the foregoing reasons, the Court respectfully disagrees with the interpretation of the phrase "any right of appeal" in section 72(2)(a) of the Act as bearing any pertinence to the RAD reopening of appeal procedure under rule 49(1) of the *Rules*. In the Court's view, the term "right of appeal" in section 72(2)(a) applies only to an originating appeal. It does not extend to supplementary procedures relating to the originating right of appeal. In *obiter*, the same conclusion would appear to apply to section 71 of the *IRPA*. An applicant is not required to exhaust a reopening request as a condition precedent to judicially reviewing natural justice issues together with other issues relating to the RAD decision.

[55] Alternatively, the Court adopts the Applicants' submission that section 72(2)(a) applies to statutory appeal rights only, broadly defined to include reopening appeal requests, that are provided for in the statutory scheme of the Act, but not extending to any similar procedure established by the *Rules*.

B. *Are the Applicants' submissions in this application, claiming failures of natural justice, an impermissible breach of the collateral attack doctrine, given that the RAD dismissed the same submissions in the Applicants' reopening request, which decision the Applicants did not seek to judicially review?*

[56] The Applicants failed to apply to judicially review the unsuccessful RAD reopening decision. As a result, they face the Respondent's submission that the doctrine of collateral attack applies, preventing them from advancing the same arguments in this application. The Respondent cites the unreported decision of *Olah v Canada (Citizenship and Immigration)* (4 November 2016), Ottawa IMM-8406-14 at paras 6–12 (FC) [*Olah*] in support of this submission. The applicants in that case advanced identical submissions in their judicial review application as

had been unsuccessfully argued before the RPD in a redetermination procedure. The redetermination decision was not judicially reviewed. In the judicial review hearing, the Federal Court refused to hear the same submissions concluding they were an impermissible collateral attack on the RPD's redetermination decision.

[57] In support of its decision, the Federal Court cited the Federal Court of Appeal decision in *Vidéotron Télécom Ltée v Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90 [*Vidéotron*]. In that matter, the impugned decision was the initial decision. It had been followed by a reconsideration decision wherein the applicant argued that there were errors regarding the decision maker's interpretation of the applicable legislation. There was no attempt to judicially review the reconsideration decision. The Court concluded that the applicant's position was limited to challenging findings in the initial decision—akin to the Respondent's submission in the present matter.

[58] The Federal Court of Appeal outlined the appropriate procedure to follow when a related decision has been refused as follows at paragraph 14:

> [14] This finding is consistent with the practice generally followed in this Court. A party asking the Board to reconsider an initial decision files a concurrent application for judicial review of the initial decision, or at least files a motion for an extension of time while awaiting the reconsideration decision. Once the reconsideration decision is rendered, the party chooses whether to challenge one or the other or both, depending on the circumstances. If both decisions are challenged, the parties may ask the Court to join the applications for judicial review for the purposes of preparing the records and the hearing.

[59] In most circumstances, such as are described in *Olah* and *Vidéotron*, courts apply the doctrine of collateral attack without question. Nevertheless, the doctrine is a judge-made creation. It therefore allows for flexibility in its application to suit situations that are inconsistent with its purpose. The teachings of the Supreme Court of Canada in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*] are helpful in delineating these relevant policy considerations. The relevant policies are succinctly stated at paragraphs 18 and 61 as follows:

> [18] This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.
>
> …
>
> [61] The [collateral attack] rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 72:
>
> > The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" [this Court's emphasis] (*R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it. [Emphasis added.]
>
> [Emphasis added.]

[60] The Court is satisfied that in the peculiar, and indeed exceptional circumstances of the Applicants, their decision to bypass a judicial review of the RAD's reopening decision could not

be said to undermine the administration of justice or the integrity of the justice system. In arriving at this conclusion, the Court considers the following:

1. The Applicants at all times attempted to follow the traditional procedure to review newly discovered natural justice issues when initiating their judicial review application with the intention of having these claims reviewed by the Court. In adopting this approach, they initially followed the most prevalent, practical, efficacious and least costly procedures available, which simply entailed adding their natural justice claims to their judicial review application of the RAD's first decision already underway. They had no intention of seeking a request to reopen the RAD appeal.
2. The failure of the Applicants to pursue their original procedural path was not due to any misapprehension or failure on their part to abide by the correct and preferred legal procedure that met their needs as originally planned.
3. Rather, it is the Court's conclusion that there was an unfortunate misapprehension of legal principles, or at least confusion regarding the application of section 72(2)(a) of the Act, which induced the Applicants to request the reopening of their RAD appeal decision. They undertook this procedure pursuant to section 72(2)(a) in order to exhaust any supposed right of appeal before they could bring their application for judicial review. In the Court's opinion, the allegedly obligatory diversion of the prosecution of the judicial review application to request a reopening of the RAD appeal was not a legal requirement.
4. Due to this unfortunate series of events, the failure to judicially review the unsuccessful reopening decision cannot be attributed to any attempt on the

Applicants' part to circumvent the RAD decision, or undermine the integrity of the administration of justice. The Applicants were simply pursuing an unnecessary procedure in order to carry on with their original judicial review application to have their complaints of failures of natural justice heard in the appropriate forum.

5. In the Applicants' specific circumstances, the application of the collateral attack rule would be incompatible with the underlying policy considerations intended to "minimize unnecessary cost and complexity" and seek "practical and pragmatic" solutions (*TeleZone* at para 18).

[61] The Applicants' unique circumstances aside, the Court concludes that waiving the collateral attack rule for other unsuccessful rule 49(1) RAD reopening applicants would provide only benefits, without costs, to the administration of justice. Waiving the doctrine should be considered as a general exception to the doctrine in similar circumstances, including adopting similar procedures followed by the Applicants in this matter. This practice would extend to allowing additional information from the reopening RAD request to be added to the record in the principal application, as was done in this matter. The Court notes that the CTR in this application included the record before the RAD in the reopening appeal. The Court did not order its inclusion. This would appear to reflect the recognition implicit in rule 49(9) of the *Rules* that documents from the reopening matter should be before the Court when the same issue arises in the principal application.

[62] The Court benefits from including the RAD reopening documentation before it on an informational basis. This allows the Court to consider the decision, which it can adopt, reject or gain insight from, as it benefited from in this matter, as shall be seen below. No other collateral procedure appears necessary, such as the requirement to give notice to the allegedly incompetent lawyer, which is a condition required in both forums.

[63] Waiving the collateral attack doctrine following an unsuccessful reopening decision pursuant to rule 49(1) does not violate any statute or legal principle. It is simply a principled demurral of the strict application of the collateral attack rule, consistent with the doctrine's underlying policies and with the interests of justice. Waiving the doctrine could be said to be sanctioned by the Supreme Court of Canada's teachings in *TeleZone* to achieve the purpose of providing an applicant of a failed RAD appeal with a practical and efficacious procedure that minimizes unnecessary cost and complexity, while benefiting the Court in avoiding a multiplicity of proceedings and upholding the interests of justice.

[64] There are only positives from this approach. In the first instance, there are obvious benefits from the possible disposing of the matter at a preliminary stage, if the applicant succeeded in reopening the matter before the RAD and the appeal therefore granted. Even if unsuccessful before the RAD, it would encourage a screening of the natural justice arguments of an applicant, while providing the Court with the RAD's views, including disposing of the preliminary procedural requirements, for example notice requirements in lawyer incompetence claims, that apply in both forums.

[65] Of considerable importance also is that waiving the collateral attack rule would avoid the unnecessary possibility of two judicial review applications being brought before the Court on the same issue, but assessed against different standards of review. This alone serves the interests of justice, not to mention the reputation of the Court.

[66] The Court concludes that the waiver of the collateral attack rule in the unique circumstances of this case is appropriate. Doing so enhances the interests of justice that promote a practical and principled dispensation from the rule, when no ill repute or undermining of the integrity of the justice system can be said to result from the Applicants' actions.

[67] Accordingly, the Court rejects the Respondent's submission that it should refuse to entertain the Applicants' natural justice submissions on the basis that they represent an impermissible collateral attack on the RAD's reopening decision.

C. *Were the principles of natural justice breached as a result of the incompetence of the Applicants' former counsel, or by the RAD's reliance on the revoked Nigeria JG?*

(1) Lawyer incompetence

[68] The issue at hand concerns the second prong of the IFA test, whether it is a suitable location for the Applicants' relocation in Nigeria. The onus, which is substantial and rests with the applicant, is encapsulated in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 at para 15 (FCA) 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.
>
> [Emphasis added]

(a) *The legal test to establish a lawyer's incompetence*

[69] An applicant must meet a high standard in order to establish a breach of natural justice on the ground of incompetent lawyer representation. The applicant must first provide notice to the former counsel so as to allow the lawyer to respond to the allegations of incompetence. Then the former counsel's acts or omissions must be demonstrated to amount to incompetence. Finally, the applicant must prove that such incompetence resulted in a miscarriage of justice (*R v GDB*, 2000 SCC 22 at paras 5, 12 [*GDB*]).

(b) *The threshold to that prove the lawyer's incompetence would affect the outcome of the decision*

[70] Before considering the substance of this matter, the Court finds that there is a serious issue in the jurisprudence regarding the threshold of the evidence to prove that counsel's incompetence would affect the outcome of the impugned decision.

[71] Most cases describe the threshold as a "reasonable probability" that the outcome "would be different", whereas others require that the outcome "would have been different." See examples of these different statements of standards in the following: *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at para 9; *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at para. 36: *Galyas v Canada (Citizenship and Immigration*), 2013 FC 250 at para 84; *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at para 23, citing

the summary of law in *Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626.

[72] The unqualified term “would” in the phrase “would have been different”, could be either a “probability” that the outcome would be different; or a more certain prediction that the final outcome would be found to be different. It does not describe a “possibility”, as its degree of predictability is greater than that of the terms “may” or “might”, when speaking of future circumstances. It is assumed therefore, that the standard of “would have been different” was meant to describe an outcome that would probably be different. In either case, the Court respectfully rejects a standard of proof as a probability to prove that the outcome would be different.

[73] It is the Court’s view that an applicant must meet only the less onerous standard of demonstrating a serious possibility, not a probability or likelihood—its perfect synonym—, that the lawyer’s incompetence would have affected the outcome. This conclusion is based on three factors.

[74] First, setting a standard of incompetence as probably or likely affecting the impugned decision would fetter the RAD’s jurisdiction to decide that issue anew. While the Court can fully assess and determine the competence of the lawyer’s conduct based on the record before it, it cannot determine the effect of incompetence on the outcome as a probability, i.e. deciding the issue, because it does not have the full record before it that may be presented to the RAD.

[75] Second, a careful reading of the Supreme Court of Canada's decision in *GDB* leads to the conclusion that the effect of a lawyer's incompetence must only prove a "serious possibility" that the decision will be affected. At paragraph 15 of the *GDB* reasons, the Supreme Court cited the test of the dissenting Judge of the Alberta Court of Appeal for consideration. The Judge concluded that the appellant had met his burden by providing evidence that "was sufficiently compelling that it might have affected the outcome of the appellant's trial" [emphasis added]. The Supreme Court examined this issue, and at paragraph 35 concluded, as a finding of fact, that the alleged incompetence "did not affect the outcome of the trial."

[76] Thus, in *GDB* there was no apparent question of probabilities versus possibilities as a threshold of prejudicial outcome from the lawyer's incompetence. Nevertheless in dismissing the appeal, the Court concluded at paragraph 41 as follows:

> Given these findings, I am satisfied that the appellant has failed to establish that the results of his trial might have been different had he been expressly informed of his counsel's decision not to use the tape.
>
> [Emphasis added.]

[77] The Supreme Court adopted the same term "might" as was employed by the Alberta Court of Appeal to describe the threshold of the required prejudicial outcome of a lawyer's incompetence. The term "might" describes a possibility, not a probability. Thus, the burden to prove a different outcome from a lawyer's incompetence cannot be at a threshold of a probability.

[78] Third, the Supreme Court's reference to a threshold of "might", i.e. a possibility, is insufficiently specific to be of particular use in the circumstances. The range of proving a possibility is simply too broad and ambiguous, extending from 1 to 50 chances out of a 100, after which the threshold becomes a probability. Returning to the logic of the Supreme Court's analysis in *GBD*, it is apparent that the Court was responding to the dissenting Judge of the Alberta Court of Appeal. The Judge described the test as being "sufficiently compelling that it might have affected the outcome of the appellant's trial" (*GDB* at para 15 [emphasis added]). The phrase "sufficiently compelling" describes a standard of proof that would describe a "serious possibility."

[79] In addition, the burden of proof of a "well-founded fear" of persecution in the *IRPA* is also described in the jurisprudence as a "serious possibility" (see *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at paras 7–9). Courts should attempt to apply consistent statements of thresholds or burdens of proof using the same terms to describe similar circumstances whenever possible. A "possibility" described by the Supreme Court in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 in refugee law has been more narrowly defined by the Federal Court of Appeal to be a "serious possibility". It is reasonable that the Court should follow the Court of Appeal's lead to ascribe a possibility described in *GDB*—stated as "might"—to be restated as a "serious possibility" as the burden of proof that an applicant must prove that a lawyer's incompetence would have affected the outcome of the impugned decision.

[80] Accordingly, the Court concludes that the Applicants must demonstrate that there is a serious possibility, not a probability, that their former lawyer's incompetence would have affected the outcome of the impugned decision.

(c) *Was there a miscarriage of justice due to lawyer incompetence*

[81] In this matter, the issue of counsel's competence initially derives from the admittedly short but unambiguous medical note on the female Applicant dating back to 2012. Its total content is as follows:

> The above named patient is a known patient with Sickle Cell Disease with recurrent vaso occlusive crisis. The crisis is always triggered off by stress.
>
> She should therefore be exempted from strenuous exercises. She is however fit to continue her studies.
>
> [Emphasis added]

[82] The 2012 note was supplemented, after the fact, by a letter dated January 17, 2020 from Doctor Jarrer of the Windsor Regional Hospital, Cancer Program. He provided medical opinions regarding the risks associated with the female Applicant's sickle cell disease stating as follows:

> Mariam is a 29-year-old lady who is a known case of sickle cell anemia. I understand that she has submitted a refugee claim to stay here in Canada. She asked me today for a letter of support for her application.
>
> I have been seeing Mariam now for about 10 months. She, as mentioned above, suffers from sickle cell anemia, which is a chronic hematological condition that can result in life threatening complications, including strokes as well as acute chest syndrome and infectious complications. She is currently receiving treatment here in Canada and she will need close monitoring for her condition. Her health care might be adversely affected if she travels back to a place where health care services are not readily

> available, especially for someone who has a chronic condition, like hers.
>
> [Emphasis added.]

[83] The evidence of counsel's consideration of the 2012 medical note in the course of the refugee proceedings is as follows:

1. On two separate occasions, when the Applicants raised the medical letter, counsel advised that it was not needed at that time. He advised that if the female Applicant was questioned at the hearing, not to mention her health condition;
2. Counsel confirmed that he advised the Applicants that in his "considered opinion", a medical report of this nature would be relevant and best serve in an application based on humanitarian and compassionate (H&C) grounds;
3. The counsel also advised against including the document in relation to their refugee claim at that time because "the IRB will believe that the reason for the Applicants seeking refugee protection is to receive medical treatment"; and
4. Counsel pointed out, in responding to the complaint, that the medical note was six years old at the time it was presented to him, and that no other evidence was presented which would indicate that the female Applicant's condition had worsened, or that this would somehow affect her ability to travel or relocate to any IFA locations that had been identified in her case.

[84] The Court agrees that evidence about sickle cell disease is relevant to an H&C application, but disagrees that this would justify the decision not to present evidence of the female Applicant's condition in the refugee hearing. There is no reason that the same evidence

cannot serve two purposes, given the different tests for refugee claims of risk to life and safety in refugee matters, versus hardship claims for H&C cases.

[85] Concerning refugee matters, sickle cell disease is not a danger to public health and safety; nor do the inadmissibility provisions in the *IRPA* apply to refugees regarding possible excessive demands on health or social services. The Court also very much disagrees that revealing the female Applicant's evidence would have any bearing on the RPD's decision-making process by arousing an unspoken suspicion that the true motivation for the refugee claim was to seek medical treatment.

[86] The Court's view is that competent counsel would not be sidetracked by concerns about the evidence's usefulness in an H&C application or hidden motivations of RPD panel members in regard to the Applicants' case. First and foremost, counsel should be seeking persuasive evidence to meet the obviously high threshold to demonstrate that relocation would jeopardize the life and safety of the Applicants. The female Applicant's susceptibility to onsets of sickle cell disease, a debilitating and even dangerous disease, could raise a spectre of removal affecting her safety and indirectly adversely impact the family members in the relocation. Counsel should also be looking forward to the nature of issues usually raised in IFA-related procedures and the possible impact of the sickle cell disease evidence on the female Applicant's profile as a mother with young children facing the innumerable challenges of being relocated to a Nigerian IFA.

[87] The potential risk to her safety on relocation is plain to see in such a short medical note in its one-line diagnosis and prognosis: "[t]he crisis is always triggered off by stress" [emphasis

added]. The note also indicates that exhausting physical activity could also bring on the condition. Significant stress, mental anxiety, depression and exhaustion both physical and mental are reasonably foreseeable occurrences that would accompany the female Applicant's removal to one of the Nigerian IFAs. Although Dr. Jarrer's letter was not before counsel, it is indicative of the nature of the highly objective medical evidence that could have been obtained related to the risk associated with the female Applicant's sickle cell anemia. He describes the nature and implications of the disease as "a chronic hematological condition that can result in life threatening complications, including strokes as well as acute chest syndrome and infectious complications."

[88] Counsel's statement that the Applicants presented him with no other evidence cannot be used to justify his consideration of how the female Applicant's condition could factor into the case, particularly given his immediate rejection of the evidence. The Applicants' evidence was that counsel made quick decisions on two occasions to reject the relevance of the female Applicant's sickle cell disease. Had her disease been recognized as being relevant to her safety, it was his obligation to ask the clients if they could procure additional evidence.

[89] The Respondent argues that the female Applicant has been living with sickle cell anemia since the age of one, without any reported difficulty accessing treatment. This ignores the fact that she lived with families and under their care to ensure that triggering circumstances were avoided. The female Applicant's affidavit reports steps taken to avoid its onset. Such pre-emptive measures are consistent with the 2012 physician's note proactively seeking to excuse the female Applicant from physical exercise when attending school to avoid inflaming the disease.

The female Applicant will not have the support of her family on her return to Nigeria. She is already anxious about exposing her two daughters to FGM risks. Instead, she will be encountering predictably stressful, enervating, exhausting and likely depressing circumstances when for the most part starting her life all over again.

[90] The Court concludes that the initial failure of counsel to pursue the female Applicant's medical condition constitutes incompetence. Her susceptibility to an onset of sickle cell disease presented what should have been recognized as the most persuasive opportunity to prove some degree of risk to her life and safety, with indirect consequences on her family. The failure to present evidence with respect to the female Applicant's serious and objective medical condition would meet the requirements described in Justice Near's statement that "[a] breach of procedural fairness inevitably occurs where the incompetence of counsel prevents a refugee claimant from presenting critical evidence to satisfy the [RAD]" (*El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at para 21 [*El Kaissi*]).

[91] With respect to demonstrating that there is a serious possibility that the incompetence of the lawyer would affect the outcome of the decision, this issue will be considered together with the effect of the revocation of the JG, as there is some degree of symbiotic relationship between them and other issues considered by the RAD.

(2) Jurisprudential guidelines and the female Applicant's profile as a single woman with children

(a) *Revocation of jurisprudential guidelines*

(i) The applicability of the JG

[92] An initial issue for consideration is that of the RAD's reasons to reject the Applicants' reopening application regarding the revocation of the JG. They are short, consisting of the following:

> The applicants' second argument is that the result of their refugee claim would have been different if the Jurisprudential Guide (decision TB7-19851) had been revoked prior to their RPD and RAD decision cannot succeed. The Jurisprudential Guide was revoked because of changing country conditions. The RAD must adjudicate claims as quickly as the circumstances and the considerations of fairness and natural justice permit. The RAD cannot reopen appeals because ever-changing country conditions lead to changes in the jurisprudence. If this was the case, there could not be finality in the RAD[']s decisions.
>
> [Footnotes omitted.]

[93] The Court respectfully disagrees with this reasoning. The issue is one of the interpretation of the purpose of rule 49(1) of the *Rules*. The need for finality in the RAD's decisions is contradicted by the very fact that rule 49(1) has been enacted to allow for a reopening in situations where there is an apparent failure of natural justice. The purpose of instituting a reopening procedure contemplates information coming to light after the RAD's decision, but usually before the completion of the judicial review application, although sometimes even after. The more reasonable interpretation of rule 49(1) allows the reopening application to occur at any time before the final judicial review ruling on the case, i.e. *res judicata*, including perhaps at later instances depending upon the timing and nature of new additional evidence.

[94] Consideration of a post-decision revocation of a JG has been the subject of other Federal Court decisions (see particularly *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 89 [*CARL* 2020]; and *Liang v Canada (Citizenship and Immigration)*, 2019 FC 918 [*Liang*] and the cases citing the latter).

[95] The *Policy on the Use of Jurisprudential Guides* provides authority for the Chairperson to identify a decision as a jurisprudential guide for consideration in refugee and immigration cases. In July 2018, the Immigration and Refugee Board of Canada's Chairperson identified the RAD decision TB7-19851, dated May 17, 2018, as a JG relating to the second prong of an IFA, grounded on the facts relevant to a single woman without children relocating to major cities in south and central Nigeria, when fleeing non-state actors. The Chairperson identified the decision as one that offered sound analysis of the legal issues raised in such matters, and would assist other panels dealing with similar cases.

[96] On April 6, 2020, the Chairperson partially revoked the decision TB7-19851 as a jurisprudential guide. The Chairperson justified its revocation indicating, "[d]evelopments in the country of origin … have diminished the value of the decision as a jurisprudential guide" [emphasis added]. It noted that the diminishment of the decision's value included "those in relation to the ability of single women to relocate to various internal flight alternatives". The Chairperson stipulated that the JG could continue to be useful in identifying the legal test and maintaining the seven factors applicable to an analytical framework to assess the facts of each case in applying the most current country of origin information.

[97] In perusing the decision TB7-19851, the Court expresses its concern that the factors considered in the decision did not expressly include gender-related violence such as rape and serious harassment of women and children, extending also to include general serious crime issues, if statistical or anecdotal evidence demonstrates a higher safety risk for females and children as victims of such crimes. The inclusion of violence would appear to follow from the factor's inclusion in the *Responses to Information Requests*, NGA103907.E referred to on several occasions in TB7-19851:

> 6. Violence
>
> The University of Kansas assistant professor indicated that violent crimes are "highly prevalent" across Nigeria, and that "women who lack the economic resources to access safe housing are disproportionately exposed to this risk" (18 Oct. 2012). When asked if women who head their own households without male or family support are exposed to a risk of violence, the Women's Rights Watch Nigeria project coordinator said that "[w]omen in both [the] north and south risk armed robbery attacks and there are increasing incidents of rape" (18 Oct. 2012). Further, according to the British Council in Nigeria's *Gender in Nigeria Report 2012*, "women who have never been married are more likely to have been attacked than married women" (UK 2012, vii).
>
> Okeke indicated that, mainly in the south, women are <u>more likely</u> to be abused when they are no longer with a male partner (26 Oct. 2012). Okeke added that women who head their own households in the south are "stigmatized" and exposed to "psychological violence" (26 Oct. 2012). The British Council in Nigeria report says that almost "half of unmarried women in parts of southern Nigeria have experienced physical violence" (UK 2012, 2).
>
> [Emphasis added]

(ii) Jurisprudence on the revocation of the Nigeria JG TB7-19851

[98] In *CARL* 2020 at para 88, rev'g in part 2019 FC 1126 [*CARL* 2019], the Federal Court of Appeal effectively upheld JGs stating as follows:

> [88] For all of the above reasons, I am of the view that the impugned JGs do not unlawfully fetter the Board members' independence. They simply put claimants on notice that the current existing conditions seem to suggest certain conditions in a given country, without providing a definitive assessment of the facts and without preventing claimants and their counsel from distinguishing their particular circumstances.

[99] Of more significance to this matter, however, is the expression of concern by the Court about "potentially dramatic consequences" arising from decisions decided on repealed JGs, as described at paragraph 89 of the decision:

> [89] That being said, I am sensitive to the fact that JGs on findings of fact are fraught with risks and difficulties, as the repeal of three of them abundantly shows. Country conditions, by their very nature, are bound to change, and in some critical circumstances at an accelerated pace, with potentially dramatic consequences for refugee claimants. Even if JGs are closely monitored, as suggested by Mr. Kipling in his affidavit (Appeal Book, p. 1673), the prejudice suffered by refugee claimants whose claims were decided on the basis of a JG that was eventually repealed cannot be minimized. In cases where a deportation order is issued and carried out, in particular, the prejudice may prove to be irreparable.
>
> [Emphasis added]

[100] The question remains as to how best to consider and apply the effect of a revoked JG. The principal case law to date on this issue did not have the benefit of the expression of concern of the Federal Court of Appeal caused by the revocation of JGs.

[101] With respect to the effect of the JG, in *Liang* at para 10, the Court concluded that "the revocation of the document on which the RPD expressly adopted must be taken to weaken its finding in this respect."

[102] The decision of *Cao v Canada (Citizenship and Immigration)*, 2020 FC 337 at para 35 [*Cao*] referred to the Federal Court decision in *CARL* 2019 on the concept that "some board members may feel pressured to adopt the factual determinations in the Jurisdictional Guide." This reasoning was not accepted by the Federal Court of Appeal. On another point, the Court in *Cao* at para 37 noted that "the RAD effectively made the same error that ultimately led to the revocation of the Jurisprudential Guide" [emphasis added] in regard to the use of a covert facial recognition system in airports. Implicitly, this amounts to a statement that the effect of the revocation should be circumscribed to the factors described in the revocation statement which led to the JG's repeal.

[103] The Court in *Agbeja v Canada (Citizenship and Immigration)*, 2020 FC 781 at para 78 [*Agbeja*], while adopting the test in *Liang*, concluded that "the nature and degree of the RAD's reliance on the JG here do not weaken its conclusions to the point of unreasonableness." Implicitly, this reasoning adheres to the same two-step procedure required to demonstrate reviewable lawyer incompetence. First, prove the effect of the revocation on the impugned decision and, thereafter, show that the effect reasonably supports a serious possibility of setting aside the impugned decision.

[104] Also referring back to *Cao*, if a decision on the issues in the matter before the RAD are similar to those giving rise to the repeal of the JG, this should be determinative, or at least sufficiently significant, so as to set aside the impugned decision.

(b) *The female Applicant's profile as a woman with children*

[105] Of particular importance in this matter are the statements of the RPD based on TB7-19851 regarding the appropriate profile of women at risk if relocating to a Nigerian IFA. As noted and worth repeating, the JG was revoked on the grounds that

> [d]evelopments in the country of origin information, including [not limited to] those in relation to the ability of single women to relocate to the various internal flight alternatives proposed in the Nigeria jurisprudential guide, have diminished the value of the decision as a jurisprudential guide.
>
> [Emphasis added].

[106] The RPD relied upon National Package Documentation and the JG TB7-19851 decision in reference to a factual situation involving an IFA for a single woman claimant fearing non-state actors. Both sources refer to a report of the United Kingdom Home Office Country Information and Guidance, from August 2016, regarding "women fearing gender-based harm or violence in Nigeria". The RPD in the present matter concluded at paragraph 21 that the JG decision should be distinguished from the circumstances of the Applicants in that they are a married couple with a child. It stated that "this JG decision makes it clear that single women with children are in a more difficult position due to discrimination against women and single women, and that a single mother supporting children has an aggravated economic situation, which is not the case for the claimants in the present decision" [emphasis added]. The RAD adopted this finding at paragraph 9 of its decision stating "relocation would not be unduly harsh for persons of the adult appellants' profile", citing RPD sources.

[107] This reasoning suggests that there is a rough hierarchy of decreasing risk of women relocating to Nigeria depending on their family circumstances. Single women with a child are most at risk; presumably having more than one child would add to the risk. Single women

without a child, as in the JG decision, occupy the next lower echelon of risk. Women with or without a child, but with a male partner, would be the least at risk. It is also fair to conclude that if the revocation of the JG presumptively applies to single women without children, the reasoning would similarly encompass single women with children, the latter scenario being the profile garnering the highest risk concerns.

[108] There appears to be little country condition documentation pertaining directly to married women with children. There was no reference to a similar JG pertaining to married women with children. Their risk profile mostly reflects a global comparative statement in relation to single women, leading to the peremptory rejection of the Applicants' submission because the female Applicant is married and her profile does not fit the country documentation concerning single women. A few points regarding this approach to assessing the single woman's risk profile beyond the comparative standard are as follows:

- Having the care of children is a shared factor common to both profiles of a single woman or a married woman with a child;
- The statement justifying the revocation of the JG states that "[d]evelopments in the country of origin information … have diminished the value of the decision as a jurisprudential guide", which it notes includes "those in relation to the ability of single women to relocate to various internal flight alternatives". This leaves hanging what those developments are, and whether they are shared amongst the other two profiles of single and married women with a child given the reliance on a comparative ranking;

- The statement regarding gender violence issues quoted above from the *Responses to Information Requests* states only that women are more likely to be abused when they are no longer with a male partner. This suggests that some degree of violence occurs for married women with children; and
- The Federal Court of Appeal in *CARL* 2020 at para 89 stated that "the prejudice suffered by refugee claimants whose claims were decided on the basis of a JG that was eventually repealed cannot be minimized."

[109] In all the circumstances, it is not clear that the reasoning in the RPD and RAD decisions sufficiently justifies the rejection of the profile of a married woman with children in the face of the Chairperson's comments revoking the JG, per *Vavilov* at paras 15, 99–100.

(c) *The profile of the female Applicant when her partner has the choice of Qatar as his preferred IFA*

[110] The Applicants advance a further submission. They argue that the profile of the female Applicant will likely be that of a single woman with children if the family is forced to relocate to a Nigerian IFA. The submission on this point, found at paragraphs 128 and 129 of the Applicants' memorandum, is as follows:

> 128. The Applicants submit that while the adult Applicants are married, they had been living apart in different countries since 2012 due to Mr. Sabitu having to leave Nigeria for employment. At the hearing, he stated "I tried before I left for Qatar. I left Nigeria in 2012".
>
> 129. As such, Ms. Saliu-Adam and the Minor Appellant's situation was akin to the profile of a single woman with a child. Therefore, the Applicants submit that the difficulties faced by single women with children due to discrimination against single women, and the

> aggravated economic situation that single mothers supporting children have, are heightened in the particular circumstances of the Applicants.
>
> [References omitted. Emphasis added.]

[111] The RPD and RAD concluded that the Applicants' family circumstances should have been construed as being similar to that of a married woman with a child, assuming that the male Applicant would be removed with the family to the chosen Nigerian IFA. The RAD considered whether the male Applicant could find engineering work in the IFAs, and if not, the requirement that he accept employment outside of his field of work in the chosen IFA. The RAD's statements on this issue at para 11 are as follows:

> The appellants argue that the RPD misconstrued the principal appellant's testimony when it found that he may have gone to Qatar for a high paying job rather than because he could not find work in Nigeria. The RAD agrees with the appellants. The principal appellant clearly testified that he went to Qatar because he could not find work in Nigeria. Nevertheless, the RAD finds that the RPD's error here is not determinative of the appeal because the principal appellant went to Qatar several years ago and the fact that he could not find work in his career in Nigeria then is not necessarily probative of whether he can find work in Port Harcourt or Ibadan now. Moreover, the concept of viable internal flight does allow for some hardship as long as it is not undue. The RAD finds that the possible necessity of having to search for employment in a different field of work is not undue hardship.
>
> [Footnote omitted.]

[112] The evidence before the RAD was that he has available a third safe IFA in Qatar, as opposed to the Nigerian IFAs. The Applicants did not pursue this argument. At that point in the proceedings there was no viable risk or safety issue available, as the female Applicant's medical condition was not presented. It poses some degree of threat to her safety that brings in other

factors not considered by the RAD. This includes the husband's choice of an IFA, which becomes relevant when raised in the context of the safety concerns of the female Applicant's medical condition, his care of her and his capacity to fund the medical expenses, if a relapse is proven to be a serious possibility as a consequence of relocation.

[113] There is little doubt that the antecedent circumstances of the family provide a third viable IFA for the husband who can choose to return to Qatar to work as an engineer. This was his choice for five years starting in 2012 based on the unavailability of engineering work in Nigeria. It is also a reasonable inference that the husband sought work in Qatar in the past to enhance the family's economic means. The choice of the three available IFAs is that of the male Applicant, subject to being influenced by the views of his spouse. Indicating a commitment to relocate to Qatar would likely terminate his refugee claim. However, it would significantly change the profile of his spouse to that of a female with children without a partner. This, in combination with her medical condition, would strengthen their refugee claim.

[114] Her medical condition raises issues of funding her health services if the family was returned to a Nigerian IFA. Health services and education are overwhelmingly a private expense and difficult to access in Port Harcourt, with the situation apparently uncertain in Ibadan according to the JG. The JG comments on cost availability of these services are noted at paragraph 47 of the TB7-19851 decision:

> The Appellant argues that the fact that health care and education must be privately paid for, and that "accessing such services is 'difficult for all' residents of Port Harcourt" mitigates against its suitability as an IFA; however, she has advanced no such argument about Ibadan. I find that the mere fact that some social services such as education and health care must be paid for privately does

> not indicate such services would be unavailable or inaccessible to the Appellant if and as required, and therefore I find that this fact does not render the proposed IFAs unreasonable on the high threshold set out in the Canadian jurisprudence.
>
> [Emphasis added.]

[115] The Court questions the statement that "the mere fact" that some social services such as education and health care must be paid for privately does not indicate such services would be unavailable or inaccessible to an appellant, without mentioning what other factors would render them available or accessible. It appears most likely that whether or not such services would be unavailable or inaccessible to an appellant would realistically depend largely upon their financial circumstances if no reasonable publicly funded services are available.

[116] The present family's financial capacity to support medical expenses would undoubtedly depend upon the ability of the husband to pay for the other essential living requirements and support services when returning to a Nigerian IFA. It appears that when considering the family's financial means and expenditures, including accessing potential health services, the male Applicant will be somewhat on the horns of a dilemma. He may relocate to Qatar, which will provide for these expenses, including covering costs associated with his spouse's potential sickle cell disease relapses; or return to an IFA in Nigeria, where his financial capacity may be insufficient to provide for the necessities of living there including responding to his spouse's healthcare costs. The same issues arise concerning the female Applicant's safety when travelling to the Nigerian IFA.

[117] If this discussion seems somewhat speculative in nature, it is due in large part to the fact that the female Applicant's medical condition was not raised during the refugee hearings. It is challenging to assess the serious possibility of these issues affecting the outcome when facing two natural justice issues and the Applicants' present circumstances that are relatively unusual in terms of the safety concerns they evoke. These concerns arise from a medical condition that may be readily triggered by relocation, and a spouse with objective choices of three IFAs, which involve safety consequences for his spouse and children in either location.

[118] The highly objective evidence before the Court suggests that there is serious possibility that her condition, which is serious and could put her at risk, will be exacerbated by a relocation to Nigeria. Then the issue appears to involve related risk scenarios for the female Applicant and her children, including affecting her profile either with or without a partner. There are simply too many variables raised by two different issues affecting her procedural fairness that could not be properly be vetted before the RPD or RAD. Justice Near's statement in *El Kaissi* at para 21 applies here that "[a] breach of procedural fairness inevitably occurs where the incompetence of counsel prevents a refugee claimant from presenting critical evidence to satisfy the [RAD]".

VI. **Conclusion**

[119] The Court allows the application for judicial review. The impugned decision is set aside and referred back to be heard by another panel member of the RAD. The Applicants may introduce new evidence in support of their claims.

VII. **Certified Question**

[120] There appear to be significant questions raised in this decision that would meet the requirements to be certified for appeal. Particularly falling under this description is the novel interpretation of section 72(2)(a) of the *IRPA* and rule 49(1) of the *Rules* as constraining the Federal Court from proceeding with a judicial review involving issues of failures of natural justice without the applicant first exhausting the RAD appeal process by requesting the reopening of the RAD appeal. This jurisprudence contradicts the traditional procedure of the Court whereby an applicant claiming a failure of natural justice, may proceed directly to have these issues considered with others raised in the principal application for judicial review.

[121] Similarly, an exceptional waiver of the collateral attack doctrine would raise a question of general importance that is determinative of this matter. Admittedly, the question whether to waive the rule to accommodate the particular facts of these Applicants may be framed narrowly as one concerning their interest of justice. Nonetheless, a general principle waiving the collateral attack is also supported on a broader scale. The question is whether waiver of the collateral attack doctrine should be permitted based on underlying policy considerations.

[122] There is also a need to settle the threshold of the effect of a counsel's incompetence as it would bear on the outcome of the original decision, being that of a reasonable probability or a serious possibility.

[123] All of these questions appear to be of serious general importance and determinative of the outcome.

[124] In light of the Court's opinion that certified questions for appeal are in order, the parties are invited to propose appropriate questions that may be agreed upon and provided to the Court for consideration, no later than 30 days after the issue of this decision. Failing an informal settling of either the need for or the content of any questions that might be certified for appeal, the Respondent should first provide submissions on these issues, with the Applicants to reply.

JUDGMENT in IMM-7880-19

THIS COURT'S JUDGMENT is that the application is allowed and the matter returned to be heard by another RAD panel member, with possible questions certified for appeal to be added to the decision at a later date.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7880-19
STYLE OF CAUSE:	ALABI ADAM SABITU, MARIAM AROMOKE SALIU-ADAM, SUMAYYAH TIWATOPE ADAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 11, 2021
JUDGMENT AND REASONS:	ANNIS, J.
DATED:	FEBRUARY 23, 2021

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