

Federal Court



Cour fédérale

**Date: 20230901**

**Docket: IMM-5781-22**

**Citation: 2023 FC 1189**

**Ottawa, Ontario, September 1, 2023**

**PRESENT: The Honourable Madam Justice Rochester**

**BETWEEN:**

**UNKNOWN DALJIT KAUR  
UNKNOWN RATTAN SINGH  
UNKNOWN RATTAN KAUR**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicants are a mother, Ms. Kaur, and her two adult children. They are citizens of India. They seek judicial review of a decision by the Refugee Appeal Division [RAD], dated May 25, 2022, dismissing the Applicants' appeal and confirming the decision of the Refugee Protection Division [RPD] to reject their claim for refugee protection, finding that the Applicants

are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] [Decision].

[2] The Applicants with their husband and father lived in Dubai for several years. In 2017, the Applicants came to Canada to visit relatives while their husband/father returned to India. The Applicants allege that in 2018 while they were still in Canada visiting relatives, their husband/father was arrested in India because he was meeting with two friends whom the police suspected of drug trafficking. He was alleged to be released after three days. Subsequently, in 2019, the Applicants allege that their husband/father disappeared. The Applicants then filed a refugee claim alleging that if they return to India they will be persecuted or seriously harmed by the police, in their attempt to obtain information about the whereabouts of their husband/father.

[3] The determinative issue for the RPD was credibility. The RPD found that the Applicants had not credibly established that they had planned to relocate to India, were vague in their testimony and had no corroborating evidence. The RPD equally concluded that they had not established that the suspected drug traffickers existed or that their husband/father is missing. The RPD found that there was no apparent reason why the police would think their husband/father was involved. The RPD concluded that the Applicants had not provided a coherent explanation as to why the police would harass Ms. Kaur given she knows nothing about her husband's whereabouts or the drug trade.

[4] The RAD, on the other hand, concluded that the issue of forward-looking risk was determinative. The RAD acknowledged that the RPD found the Applicants' fear of the police

speculative, but did so in the context of its larger analysis on credibility. The RAD found that the RPD ruled on the issue of prospective risk “if not explicitly, by providing a separate sub-heading, then at least implicitly”. The RAD concluded that even if it was accepted as credible that the Applicants’ husband/father was arrested in 2018 and disappeared in 2019, the Applicants have provided insufficient evidence that there is a serious possibility that the Indian police would persecute them or subject them to a section 97 risk on a forward-looking basis.

[5] The Applicants submit that the RAD breached its duty of procedural fairness by failing to provide the Applicants with an opportunity to make submissions on the issue of prospective risk. The Applicants submit that prospective risk was in fact a new issue, given the RPD’s decision was based on credibility. Given that the prospective risk was central to the RAD’s Decision there was a greater duty incumbent on the RAD to permit them to submit arguments on this issue. In the alternative, the Applicants plead that the Decision is unreasonable because it was not based on the parties’ submissions to the RAD – because these submissions only addressed the alleged errors with respect to the RPD’s credibility findings.

[6] The Respondent submits that prospective risk is an integral part of each of the three essential elements of a refugee claim, namely, is the claimant credible, is there state protection from the risk, and is there an internal flight alternative where the claimant will not be at risk. Prospective risk is intrinsic to the notion of risk. The Respondent pleads that the RPD identified that Applicants’ fears as speculative and thus addressed prospective risk. The Respondent relies on *Baez De La Cruz v Canada (Citizenship and Immigration)*, 2021 FC 457 [*Baez De La Cruz*], where Justice Luc Martineau concluded that prospective risk was not a new issue, as the

existence of prospective risk is always central to the risk to the right to protection under section 97 of IRPA (*Baez De La Cruz* at para 10).

[7] For the reasons that follow, this application for judicial review is allowed.

## II. Analysis

[8] In the context of a judicial review, one addresses questions of procedural fairness by asking “whether a fair and just procedure was followed” (*Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47). This standard involves no deference to the decision maker.

[9] I agree with the Applicants that, given the RPD’s findings and their submissions on appeal to the RAD, they ought to have been provided with an opportunity to make submissions on the issue of prospective risk.

[10] When a new issue is raised by the RAD, it must generally give notice to the parties so that they may make submissions on the issue (*Herrera Salas v Canada (Citizenship and Immigration)*, 2021 FC 1363 at para 18; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 66-71 [*Ching*]).

[11] In *R v Mian*, 2014 SCC 54, the Supreme Court defined what constitutes a new issue:

[30] An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally

and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.

[12] In *Ching*, Justice Catherine M. Kane concluded that the above principles apply, with necessary modifications, in the context of appeals before the RAD (at para 71). In *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600, Justice Denis Gascon described a “new question” as follows:

[25] . . . A “new question” is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

[13] In the present case, the RPD rejected the Applicants’ claim on the basis of credibility. I note that the RPD stated that it found the Applicants’ fears speculative and as such it asked Ms. Kaur during the hearing how the police would get promotions by harassing her. The RPD concluded that it found Ms. Kaur’s answers vague. In the RPD’s decision, this exchange was discussed in the context of its analysis on credibility.

[14] In the Applicants’ appeal memorandum before the RAD, the Applicants provide a number of arguments on the RPD’s credibility findings before submitting that for all the reasons stated, the RPD erred in its analysis of the Applicants’ credibility.

[15] The determinative issue for the RAD was not credibility but prospective risk. The RAD concluded that even if it accepted as credible the Applicants’ assertions as to the arrest and

disappearance of their husband/father, the Applicants failed to provide sufficient evidence that there is a serious possibility that the Indian police would persecute them or subject them to a section 97 risk on a forward-looking basis.

[16] As noted above, the Respondent relies on *Baez De La Cruz* for the proposition that prospective risk is not a new issue as the existence of prospective risk is always central to the right to protection (at para 10). Justice Martineau found that the RPD also had in mind the absence of prospective risk and that it ruled on that issue, if not explicitly, then at least implicitly (*ibid*). The Respondent submits that in the present case, the RPD considered prospective risk both explicitly, by mentioning that it found the Applicants' fear of the police speculative, and implicitly.

[17] I acknowledge it may at times be challenging to distinguish between the RAD raising a new issue and it merely supporting and/or expanding on an existing issue. In the present case, and in light of the descriptions of what constitutes a new issue, above, I find that the RAD raised a new issue. While the issue of prospective risk is a central issue in any refugee protection claim, the fact remains that the RPD did not make a clear and definitive finding on this issue, and it was not one of the Applicants' grounds of appeal.

[18] Moreover, the notion of a central issue and its interplay with the concept of a new issue was considered by Justice Avvy Yao-Yao Go in *Nmashie v Canada (Citizenship and Immigration)*, 2023 FC 437 [*Nmashie*]:

[31] Third, The Respondent asserts that the RAD had jurisdiction to consider the issue of prospective risk, as persecution and harm

are the essence of a refugee claim: *Baez De La Cruz v Canada (Citizenship and Immigration)*, 2021 FC 457 [*Baez De La Cruz*] at para 10; *Musthaffa v Canada (Citizenship and Immigration)*, 2022 FC 59 [*Musthaffa*] at para 39; see also *Kwakwa* at para 25 and *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 [*Koffi*] at para 38.

[32] However, as the Applicants submit, this Court has found the RAD's novel findings on an internal flight alternative [IFA], as in the case of *Ojarikre*, and the issue of a *sur place* claim, as in *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551, to be new issues. While I acknowledge the Respondent's argument that the issue of prospective risk is the essence of a refugee claim, the same can be said about issues of identity, credibility, IFA, and state protection. I am unable to locate a decision from this Court, nor has the Respondent pointed me to one, where the Court determines that an issue can only be new where it is peripheral to the refugee claim, rather than being part of the essence of it.

[33] Indeed, an argument can be made that the more central the issue is to the determination of a refugee claim, the greater the requirement of procedural fairness rests on the RAD's part to raise its concerns with a claimant and to afford them an opportunity to respond. This requirement would be commensurate with the guidance from *Baker* that the nature and extent of the duty of fairness owed should correspond with the importance of the decision to the individual(s) affected: at para 25.

[19] I find Justice Go's reasoning in *Nmashie* as to the interplay between a central issue and a new issue to be applicable to the matter at hand. Furthermore, and as found in *Nmashie*, *Baez De La Cruz* is distinguishable on the facts as in that case the procedural fairness argument was rejected in part because the applicant did not challenge the multiple credibility findings made by the RPD and confirmed by the RAD, thereby rendering the conclusion that there was no prospective risk reasonable (see also *Nmashie* at para 34). In the present case, insufficient evidence of prospective risk was the determinative issue before the RAD, not credibility.

[20] In my view, it is ultimately irrelevant for the present purposes whether the RAD's findings on the sufficiency of evidence of prospective risk are justified based on the record before it. Rather, the material issue here is that the Applicants ought to have been provided with an opportunity to address the issue of prospective risk before the RAD rendered its Decision. The RAD's failure to do so amounted to a breach of procedural fairness.

### III. Conclusion

[21] For the above reasons, this application for judicial review is allowed. The Decision is set aside and the matter is referred back to the RAD for redetermination by a differently constituted panel. While the outcome on prospective risk may be the same, it is essential that the Applicants be provided with an opportunity to make submissions on this issue. No question of general importance was submitted for certification, and I agree that none arise.



**JUDGMENT in IMM-5781-22**

**THIS COURT’S JUDGMENT is that:**

1. The Applicants’ application for judicial review is allowed;
2. The Decision is set aside and the matter is referred back to the Refugee Appeal Division for redetermination by a differently constituted panel;
3. The Applicants will be provided with an opportunity to make submissions on prospective risk; and
4. No question of general importance is certified.

“Vanessa Rochester”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5781-22

**STYLE OF CAUSE:** UNKNOWN DALJIT KAUR ET AL v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** AUGUST 16, 2023

**JUDGMENT AND REASONS:** ROCHESTER J.

**DATED:** SEPTEMBER 1, 2023

**APPEARANCES:**

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