Federal Court Cour fédérale

Date: 20250205

Docket: IMM-6420-23

Citation: 2025 FC 232

Ottawa, Ontario, February 5, 2025

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

IDRES ISMAIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review made in accordance with s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. It concerns a decision rendered on May 4, 2023 by the Immigration Division [ID], determining Mr. Idres Ismail [the Applicant] to be inadmissible to Canada on the grounds of serious criminality pursuant to ss. 36(1)(a) of the *IRPA*. A deportation order was issued against the Applicant. The case was referred to the ID

pursuant to s. 44(2) of the *IRPA* by a Minister's delegate, following the preparation of a s. 44(1) inadmissibility report by a Canada Border Services Agency [CBSA] officer.

[2] The Applicant does not challenge the accuracy of the ID's conclusions related to his biographical information, i.e. his name, date of birth, his status as a permanent resident of Canada, or his past criminal conviction and prison sentence (Impugned Decision at para 5). Rather, the Applicant challenges the ID's interpretation of its jurisdiction to decide on procedural fairness issues involving the Minister's delegate and the CBSA officer (the referral process) during admissibility hearings. He argues that the ID wrongly concluded that it did not have the jurisdiction to consider procedural fairness arguments, other than arguments related to abuse of process, during the referral process. Thus, this judicial review application hinges on the issue of the reasonableness of the ID's interpretation of its jurisdiction.

[3] It is important to note that while a breach of procedural fairness was raised by the Applicant as a ground for review in his notice of application, it was done in such a generic fashion as to be close to meaningless; this argument is not raised in his factum or reply. As such, it is understandable that it was not raised either in oral argument in this Court (*Kilback v Canada*, 2023 FCA 96, para 41). Rather, the Applicant makes an argument pertaining to the reasonableness of the ID's interpretation of its jurisdiction to hear arguments concerning the process followed by the CBSA officer and the Minister's delegate leading to the matter being referred to the ID for an admissibility hearing. The ID concludes that the case law does not allow for that jurisdiction, but rather finds that issues of that nature concerning s 44 of the *IPRA* can be made the subject of judicial review applications. Thus, to my understanding, the Applicant is not

arguing that the admissibility hearing before the ID was itself procedurally unfair. It is rather that the decision is unreasonable because of a failure to consider procedural fairness issues raised in relation to the s. 44 report and referral process.

I. Facts

[4] The Applicant was born to Somali parents in Saudi Arabia on January 1, 1997. The Applicant does not have legal status in Saudi Arabia and has never lived in Somalia (Applicant's memorandum at para 5). The Applicant has been a permanent resident of Canada since July 19, 2010.

[5] On November 21, 2018, the Applicant was convicted of two counts of possession for the purpose of trafficking a Schedule 1 substance (crack cocaine), in contravention of section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, an offence which carries a maximum sentence of life imprisonment. The Applicant received a six-month prison sentence and was released on March 21, 2019 (Applicant's memorandum at para 7; Respondents' memorandum at para 3).

[6] On April 23, 2019, the Applicant received a letter from CBSA informing him of his potential inadmissibility to Canada for serious criminality, pursuant to s. 36(1)(a) of the *IRPA* (Applicant's memorandum at para 8).

[7] On May 14, 2019, the Applicant attended an interview with a CBSA officer. The officer asked the Applicant to return for a second interview on June 4, 2019. However, in the meantime, on May 24, 2019, the Applicant was arrested and detained on a charge of second-degree murder

for a shooting that took place on May 27, 2019. He was eventually acquitted of the charge in 2021 (Applicant's memorandum at para 9).

[8] On November 6, 2019, a CBSA officer visited the Applicant while in detention in relation to the murder charge and brought him a draft s. 44(1) report. That constitutes the report prepared by an officer who is of the opinion that a permanent resident has become inadmissible. The report sets out the relevant facts which are established on the basis of reasonable grounds to believe (s 33 of the *IRPA*). While going over the document with the Applicant, the Officer noticed an error, and explained that he would be back in two weeks with a corrected version. According to the officer's notes, he also advised the Applicant that the next meeting would be the opportunity for the Applicant to present any submissions that he wanted considered (Certified Tribunal Record, p 68).

[9] The CBSA officer brought the corrected report to the Applicant on January 3, 2020. According to the officer, the Applicant had no submissions to make, and refused to sign the completed report (Certified Tribunal Record, p. 68). The Applicant contends that if he was afforded an opportunity to offer submissions, he did not understand. According to the Applicant, this meeting constituted a breach of procedural fairness because he either was not given the opportunity to make submissions or did not understand that it was his only opportunity to make submissions; furthermore he was not advised to consult an immigration lawyer despite the fact that he was in detention (Applicant's memorandum at paras 11-12).

[10] On January 20, 2020, the Minister's Delegate informed the Applicant that the inadmissibility report would be referred to the ID for an admissibility hearing. That is done in

accordance with s 44(2) of the *IRPA* once the Minister is of the opinion that the report is well-founded.

[11] The admissibility hearing before the ID took place on January 19, 2023. The Applicant's counsel raised arguments related to procedural fairness in the preparation of the s. 44 report and referral process (Applicant's memorandum at para 14; Respondents' memorandum at para 7). Following the hearing, the ID member invited the Applicant and the Minister to provide written representations pertaining to the jurisdiction of the ID to hear issues relating to the procedural fairness of the s. 44 process.

[12] On May 4, 2023, the ID rendered its decision in which it found it did not have the jurisdiction to consider the Applicant's procedural fairness arguments. The Applicant was determined to be inadmissible and a deportation order was made against him. That constitutes the decision under review.

II. Issues

A. *Preliminary issue: Style of Cause*

[13] The Respondents assert that the appropriate minister to be named in the style of cause is the Minister of Public Safety and Emergency Preparedness [MPSEP] and not the Minister of Citizenship and Immigration. In my view, both Ministers should be listed.

[14] Paragraph 4(2)(b) of the *IRPA* provides that the MPSEP is responsible for "the enforcement of this Act, including arrest, detention and removal". In terms of governance, this

has its importance. The matter under the jurisdiction of the Minister of Public Safety and Emergency Preparedness is distinct from the adjudication on admissibility, which is the bailiwick of a different Minister (subsection 4(1) of the *IRPA*). To put it bluntly, the job of referring cases is that of the Public Safety Minister who is responsible for its operation, not the Minister of Citizenship and Immigration who is responsible for other aspects of the immigration regime.

[15] Thus, it is the Public Safety Minister's delegate who refers appropriate matters to the ID. The Minister's delegate and the ID are not covered under the same umbrella and they operate in different areas: one brings cases of inadmissibility on behalf of the Public Safety Minister while the other, in the immigration portfolio, adjudicates. Unless the ID is given jurisdiction over the referral process, it might be awkward to pretend that it has somehow a broad jurisdiction over a process supervised by a different Minister. Here, the Applicant challenges the ID's decision that it does not have jurisdiction to supervise the actions leading to its admissibility hearing.

[16] In recognition that it is the decision of the ID which is challenged, the Minister of Citizenship and Immigration can remain in the style of cause. The Minister of Public Safety and Emergency Preparedness should be added because the process that is challenged falls under his authority. I agree with the Respondents that a responsible minister, and thus a proper respondent in this case, is the MPSEP (*See Edom v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 958 at paras 1-2, 32). This is indeed consistent with the case law in this area where the Public Safety Minister is often the only Minister in the style of cause. The style of cause is amended accordingly.

B. *Issues on the merits of the case*

[17] The Applicant contends that the ID has jurisdiction to consider procedural fairness issues which have arisen in the preparation of the two reports provided for in s 44 of the *IPRA*: the report of the CBSA officer setting out the relevant facts and the reference of the matter to the ID once the Public Safety Minister is satisfied that the report is well-founded. In effect, the Applicant raises that he was an unrepresented and vulnerable litigant when he met with CBSA officers, he did not benefit from adequate translation and the disclosure he received was not sufficient to understand the case he had to meet. The ID considered that it does not have the jurisdiction to address those issues. The remedy is elsewhere.

[18] This matter raises the issue of whether the ID's decision is unreasonable with respect to its jurisdiction concerning procedural fairness which is said to be deficient during the preparation of the officer's report and its referral to the ID.

III. Standard of review

[19] The parties agree that the applicable standard of review is reasonableness. So does the Court. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*] the Supreme Court of Canada [SCC] found that there is a presumption that a review of an administrative decision must be undertaken according to the standard of reasonableness (paras 10, 16). In fact, the presumption was already well established before *Vavilov* "in cases in which administrative decision makers interpret their home statutes" (*Vavilov*, para 25, citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers'*

Association, 2011 SCC 61, [2011] 3 SCR 54, at para 54; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3, at para 46; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293, at para 22). There exist exceptions to that presumption, none of which apply to the circumstances of this case. Thus, the presumption is not rebutted in the present case, as it does not fall within one of the exceptions recognized by the SCC (*Vavilov* at para 17). Therefore, the role of the court is to determine "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (my emphasis) (*Vavilov* at para 99).

[20] That entails that the starting point will be the principle of restraint (*Vavilov*, para 13) with the reviewing court adopting an appropriate posture of respect (*Vavilov*, para 14). If, having developed an understanding of the reasoning of the decision maker, the reviewing court recognizes an internally coherent and rational chain of analysis and a decision justified in relation to the facts and the law, that decision will be reasonable (*Vavilov*, para 85 and 101). Justification, transparency and intelligibility are the hallmarks of reasonableness. It will take serious shortcomings before a decision can be found not to exhibit those hallmarks of reasonableness (*Vavilov*, para 100-101).

[21] In the case of statutory interpretation, including cases when a tribunal is interpreting the bounds of its own jurisdiction, the role of the reviewing court is not to engage in a "disguised correctness review" (*Vavilov* at para 294, cited in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 DLR (4th) 583 [*Mason*] at para 62), but rather to analyse the reasonableness of the legislative interpretation undertaken by an administrative decision. An

administrative decision maker "need not 'engage in a formalistic statutory interpretation exercise in every case'" (*Mason* at para 69, citing *Vavilov* at para 119-120). However, the decision must still "be consistent with the 'modern principle' of statutory interpretation, which focusses on the text, context, and purpose of the statutory provision" (*Mason* at para 69, citing *Vavilov* at para 119-120).

IV. Relevant Provisions

[22] The grounds for inadmissibility to Canada are set out in sections 34-42 of the *IRPA*. Section 36 of the *IRPA* sets out an inadmissibility ground on the basis of serious criminality. In particular, pursuant to subsection 36(1)(a), a permanent resident or foreign national convicted of an offence in Canada punishable by a maximum term of imprisonment of at least 10 years is inadmissible on the grounds of serious criminality:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction prévue sous le régime d'une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction prévue sous le régime d'une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(my emphasis)

[23] Pursuant to subsection 44(1) of the *IRPA*, an officer who is of the opinion that a permanent resident or foreign national is inadmissible to Canada can prepare a report setting out the relevant facts on which they base this opinion. This report is then transmitted to the Minister, who, pursuant to subsection 44(2), can refer the report to the ID for an admissibility hearing if they are of the opinion that the report is well-founded. At this stage, the conclusions of the report are not considered final, and the preparation of the report and its referral to the ID do not result in a change of status for the person concerned (*Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 [*Lin (FCA)*] at para 4). Subsections 44(1) and (2) read as follows:

Report on Inadmissibility	**Constat de l'interdiction de territoire**
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44 (1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
Referral or removal order	**Suivi**
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations,	**(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

in the case of a foreign national. In those cases, the Minister may make a removal order.

[24] Following an admissibility hearing, section 45 of the *IRPA* sets out the list of the possible decisions that the ID panel can make. In particular, subsection 45(d) states that the ID shall make the appropriate removal order in cases when they conclude that a permanent resident of foreign national is inadmissible:

Admissibility Hearing by the Immigration Division	**Enquête par la Section de l'immigration**
Decision	**Décision**
45 The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:	**45** Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :
(a) recognize the right to enter Canada of a Canadian citizen within the meaning of the *Citizenship Act*, a person registered as an Indian under the *Indian Act* or a permanent resident;	**a)** reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la *Loi sur la citoyenneté*, à la personne inscrite comme Indien au sens de la *Loi sur les Indiens* et au résident permanent;
(b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;	**b)** octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;
(c) authorize a permanent resident or a foreign national, with or without	**c)** autoriser le résident permanent ou l'étranger à entrer, avec ou sans

conditions, to enter Canada for further examination; or	conditions, au Canada pour contrôle complémentaire;
(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	**d)** prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

(my emphasis)

[25] Pursuant to section 162 of the *IRPA*, the ID has the sole jurisdiction to determine questions of fact and law in proceedings before it:

Sole and exclusive jurisdiction	**Compétence exclusive**
162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.	**162 (1)** Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie.
Procedure	**Fonctionnement**
(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	**(2)** Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

V. The decision under review

[26] The ID considered carefully the proposition advanced by the Applicant. It identified the issue to be addressed as whether it has jurisdiction to consider allegations of violations of procedural fairness principles at the stage preceding its role, that is the drafting of the ss 44(1) report setting out the relevant facts and the referral by the Minister of the matter to the ID which conducts the admissibility hearing of s 45 of the *IRPA*. In a word, does the ID have the jurisdiction to supervise the referral process?

[27] The ID examines the jurisprudence emanating from our Court, jurisprudence that is clearly a significant legal constraint limiting the scope of what may be a reasonable interpretation of the provision (*Vavilov*, para 101, 111, 112, among others). That jurisprudence has been to the effect that the ID does not have jurisdiction to examine a s 44 report, including with a view to determining whether there has been violation of some procedural fairness principles. Are reviewed the following authorities:

- *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 [*Kazzi*]
- *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 [*Hernandez*]
- *Ghirme v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 805 [*Ghirme*]
- *Collins v Canada (Citizenship and Immigration)*, 2009 CanLII 16327 [*Collins*]
- *Haqi v Canada (Citizenship and Immigration)*, 2014 FC 1167 [*Haqi*]
- *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427
- *Burton v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 727 [*Burton*]

The jurisprudence is unanimous that the challenge to what is accomplished pursuant to s 44 of the *IRPA* must be by way of an application for judicial review before our Court.

[28] The issue is therefore whether a decision of the Federal Court of Appeal had the effect of displacing this Court's jurisprudence. That decision is in the case of *Lin (FCA)*.

[29] In that case, the Court of Appeal found in brief reasons that the judicial review of the Delegate of the Minister's referral to the ID for an inadmissibility hearing was premature. In so doing, the Court followed its well-known case law, starting with *Canada (Border Services Agency) v C.B. Powell*, 2010 FCA 61, [2011] 2 FCR 332, all the way to *Dugré v Canada (Attorney General)*, 2021 FCA 8. It is paragraph 4 of *Lin (FCA)* which attracted attention:

> In the present cases, the delegates of the Minister, acting under section 44, expressed evidence-based beliefs that the circumstances are sufficient to warrant a more formal inquiry and an adjudicated decision on inadmissibility by the Immigration Division and, if necessary, the Immigration Appeal Division. The process is akin to a screening exercise in that there is no finding of inadmissibility, nor alteration of status. The appellants will have a full opportunity to adduce evidence and advance their factual and legal arguments and concerns regarding the relevant issues in the Immigration Division and the Immigration Appeal Division. This includes any procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed. It also includes whether there were any misrepresentations giving rise to the grant of permanent residence, the relevant knowledge of the appellants, and any humanitarian and compassionate considerations. Thus, in the present cases, proceedings before the Immigration Division and the Immigration Appeal Division are both available and adequate: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 at para. 42.
>
> (my emphasis)

[30] Mr. Ismail argued that *Lin* allowed the examination by the ID of a violation of procedural fairness in the referral of a case. The panel disagreed. It did not find in the *IRPA* any authority to review for procedural fairness that which was considered at the referral level. It did not find either that *Lin* brought in a different outcome. The panel, having reviewed the *Lin* decision of this Court (*Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862), concludes that "there was no question of the ID's jurisdiction to examine whether procedural fairness had been followed" (para 25). In fact, the certified question to the Court of Appeal did not even allude to the issue. It follows, says the ID, that the interpretation to be given to paragraph 4 must be in light of the earlier case law which was not referred to.

[31] For the ID, the procedural fairness angle which could be considered by the ID, as per *Lin*, is limited to "any procedural fairness … regarding the section 44 screening process that undermines the Immigration Division's ability to proceed". The panel goes on to suggest that an abuse of process could be the kind of issue that could validly be before the ID as it could undermine its ability to proceed.

[32] The alleged violations of procedural fairness principles in this case do not meet that requirement. The panel states that the discretionary power under s 44 is limited: indeed, it is merely a screening process analogous to a prosecutor allowing the laying of criminal charges. The adjudication occurs elsewhere. I note immediately that this view is in line with *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 [*Obazughanmwen*], where we read that "the thrust of the jurisprudence relating to the limited discretion afforded to these officials in deciding whether to report a foreign national or a

permanent resident for an admissibility hearing has everything to do with administrative (as opposed to adjudication) nature of their function, and very little with the fact that the IRPA may provide other opportunities for an individual to raise H&C issues" (para 36). That was also part of the reasoning of the Court of Appeal in *Lin (FCA)*.

[33] The panel finds support for its opinion that judicial review concerning the referral process in a decision of this Court which came after *Lin (FCA)* and considered it. In *XY v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 831, [2021] 4 FCR 359 [*XY*], our Court continues to entertain a judicial review application concerning the referral process:

> [42] I find that the circumstances in Lin are distinguishable from the current facts of this case and that the Applicant does not have an adequate alternative remedy in the form of an admissibility hearing before the Immigration Division. For the reasons below, this Application is not premature.

The panel refers specifically to paragraph 47 of *XY*:

> [47] Considering the limited discretion of the Immigration Division, which "shall make" a removal order, where a permanent resident is deemed inadmissible and the discretion that an officer or the Minister may exercise to prevent a foreign national or permanent resident from being removed, I do not find this Application is premature, given the "nature of the other forum which could deal with the issue, including its remedial capacity" being more narrow than the section 44 screening process that precedes it (*Strickland* at para 42). Judicial review is appropriate in the circumstances (*Strickland* at para 43).

[34] As a result, the ID concludes that it does not have jurisdiction to review alleged procedural fairness violations during the screening process that precedes its adjudication because they do not undermine its ability to proceed:

> [42] Accordingly, the panel is of the view that the case law indicates that the ID has no jurisdiction to assess the validity of a report in light of procedural fairness arguments when taking into account humanitarian and compassionate considerations or personal circumstances in accordance with the Minister's ENF 6 manual since it does not undermine its ability to proceed. The ID has no remedial powers. It is up to the person concerned to challenge decisions made as part of the IRPA section 44 process before the FC.

[35] Looking at the merits of the inadmissibility issue, the ID assesses the evidence before it and is satisfied that the elements required to establish serious criminality have been met. Mr. Ismail is thus inadmissible for having been convicted of an offence punishable by a term of imprisonment of at least 10 years.

VI. Submissions of the Parties

A. *Applicant's arguments*

[36] In essence, the Applicant argues that the ID has jurisdiction to consider whether the report made pursuant to ss 44(1) and referred to the ID by the Minister are matters dealt with in conformity with principles of procedural fairness. As already seen, the ID found that such argument runs against well established case law in the Federal Court according to which matters of that nature are to be made the subject of judicial review: they are not for the ID to consider.

[37] The Applicant first argues that the ID unreasonably interpreted its enabling statute in a manner which arbitrarily limited its jurisdiction to address procedural fairness arguments in s. 44 proceedings to situations in which an abuse of process is alleged (Applicant's memorandum at para 19). According to the Applicant, a reasonable reading of the statutory scheme only allows

for a single interpretation, i.e. that the ID has the "jurisdiction to consider procedural fairness concerns arising out of the section 44 process beyond abuse of process issues" (Applicant's memorandum at para 30).

[38] The Applicant contends that this limited view of the ID's jurisdiction to consider procedural fairness arguments in the s. 44 process goes counter to Parliament's intent, particularly when considering that s. 44(2) and s. 45 of the *IRPA* provide for "an oral hearing before an administrative tribunal" and that the ID has the "power to consider questions of fact and law" before making its determination on admissibility (Applicant's memorandum at para 20).

[39] According to the Applicant, the starting point for the ID's statutory interpretation should have been to apply the Parliamentary presumption that a duty of fairness applies in cases where the decision "affects the 'rights, privileges or interests of an individual'" (Applicant's memorandum at paras 21-22, citing *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 [*Baker*] at para 20 and *Cardinal v Director of Kent Institution,* [1985] 2 SCR 643 at p. 653). Thus, the ID should have concluded that Parliament would not enact a provision which would allow an administrative tribunal to make a decision while failing to consider "any procedural fairness issues", and not just those related to abuse of process (Applicant memorandum at paras 22. 32).

[40] Further, the Applicant asserts that the ID "failed to analyze the text, context and purpose of sections 44 and 45 [of IRPA] meaningfully and reasonably" (Applicant's memorandum at

para 28. See *Hillier v Canada (Attorney General)*, 2019 FCA 44, 431 DLR (4th) 556 at para 31 and *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 FCR 374 para 42). Thus, the Applicant argues this interpretation would unreasonably allow the ID to "rely on a finding of inadmissibility arrived at through an unfair process" (Applicant's memorandum at para 26).

[41] According to the Applicant, the ID narrows its jurisdiction over procedural fairness issues unduly. Citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], we are reminded that procedural fairness "is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual" (para 79).

[42] Noting that procedural requirements vary with circumstances, the Applicant argues that the fact that s 45 of the *IRPA* states that the ID reaches conclusions after an inadmissibility hearing ought to signal a heightened duty of fairness. For this Applicant, the inadmissibility hearing (in French, "enquête") implies an oral hearing. He does not explain how that creates a jurisdiction to supervise other actors.

[43] There is reliance put on *Lin (FCA)* for the proposition that the ID can, and should, consider procedural fairness concerns that occurred at the referral stage. But the Applicant must address the limitation apparently put by the Court of Appeal on procedural fairness issues that will be considered by the ID to those that "undermine the Immigration Division's ability to proceed" (*Lin*, para 4). The ID acknowledges that an abuse of process might qualify. However,

the allegation of procedural fairness violations in this case are not of this ilk. On that front, it appears that the Applicant seeks to reverse the burden in requiring that the ID justify that the alleged violations in this case do not meet the test of "undermine the ID's ability to proceed" (memorandum of fact and law, para 44).

[44] Instead, the Applicant attempts to equate the alleged violations (the fact that Mr. Ismail was advised of the ss 44(1) report when not represented by counsel, the fact that he did not make representations, the lack of interpretation, which hampered his right to participate fully at this early stage) with a procedural fairness issue sufficient to trigger jurisdiction in the ID to consider such breach at a different stage than what has happened in the past, i.e. through judicial review in the Federal Court.

[45] The Applicant is right to recognize that an abuse of process requires a high threshold. Procedural fairness violations during the s 44 process, short of violations akin to abuse of process, are not seen by the ID as part of its jurisdiction in view of the case law in this Court. But that is because, in the view of the ID, *Lin (FCA)* does not displace that long-standing case law. It limits the ability to intervene in violations of procedural fairness that undermine the ability to proceed, which may include abuse of process.

[46] Hence, the Applicant is left with arguing that the ID, being the master of its own house, must be able to protect its own process. He does not account for the procedural fairness violations having to have the quality of undermining its ability to proceed.

[47] Given the limitations put on the ability of the ID to review alleged procedural fairness violations by the Court's case law (these should be submitted for judicial review), the Applicant had to address the issue. He did.

[48] In effect, the Applicant disagrees with the case law of this Court which finds that the review of allegations of violations of procedural fairness principles in the s 44 process proceed before the Federal Court.

[49] It is contended that the word "any" in paragraph 4 of *Lin (FCA)* ("This includes <u>any</u> procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed") is critical. Arguing that *Lin (FCA)* gave a broad definition of the ID's jurisdiction, the Applicant seeks to summarily dismiss the Court's decision in *Kazzi* (*supra*), which undoubtedly runs counter to the proposition advanced by the Applicant. In so doing, the Applicant reads the Court of Appeal decision in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*], on which the *Kazzi* decision relies among other authorities, narrowly.

[50] Similar efforts are made to discount this Court's decisions in *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591, *Hernandez*, *Ghirme*, *Haqi* and *Collins* (*supra*). Thus, *Hernandez*, where our Court was concerned on judicial review about the procedural fairness of the process followed pursuant to s 44, is discounted because our Court "did not directly engage with the issue of whether a breach in procedural fairness could undermine the ID's ability to proceed" (memorandum of fact and law, para 64). It is difficult to understand the

distinguishing attempted by the Applicant and the criticism addressed at the *Hernandez* decision. The case is about a judicial review application where our Court found, after reviewing the five factors from *Baker* (para 21 to 28) for determining the requirements of procedural fairness, that the s 44(1) report had been issued in breach of procedural fairness principles (para 76); the referral pursuant to ss 44(2) was accordingly also deficient. Both decisions were quashed by our Court.

[51] The cases of *Ghirme, Haqi* and *Collins* pose a significant challenge to the Applicant. The three cases stand for the proposition that the ID does not have the jurisdiction to assess a s 44 report. In *Collins*, our Court stated:

> In the impugned decision, the ID Member observed that a review of the Minister's decision to proceed with an admissibility hearing is a matter for the Federal Court to determine. He expressed discomfort with proceeding with an admissibility hearing in light of the circumstances leading up to the preparation of the report. However, he stated that his function was not to review the decision of the border officer or the exercise of Ministerial discretion. He concluded that despite his views he had been provided with a referral and a report and he was "obliged to proceed with the hearing."
>
> At the hearing of the judicial review, the Applicant reformulated the central issue as whether the ID has the jurisdiction to decline to hold a hearing if it finds that a report prepared pursuant to section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 is invalid.
>
> As the Respondent submits, this formulation is premised on the ID having the jurisdiction to inquire into the validity of the section 44 report.
>
> The Applicant was unable to point to, and I have been unable to find, any legislative, regulatory or jurisprudential support for the proposition that the ID has the jurisdiction to enter into an inquiry regarding the validity of a section 44 report. Indeed, the jurisprudence confirms the very limited jurisdiction of the ID in these circumstances: *Hernandez v. Canada (Minister of Citizenship*

> *and Immigration)*, 2005 FC 429. Accordingly, I reject the Applicant's argument that in these circumstances the ID erred in concluding that it was obliged to hold the hearing.
>
> I also wish to add that, in my view, in bringing of the application for judicial review of the ID's decision, the Applicant was attempting to indirectly attack the validity of the section 44 report. However, a challenge to the validity of this report should have been brought by way of an application for leave and judicial review of the report.
>
> (my emphasis)

Our Court can hardly make itself any clearer.

[52] Our Court is equally clear in *Haqi* and *Ghirme*. Thus, in *Haqi*, we read:

> [29] In my view, the applicant's failure to seek judicial review of the officer's Section 44 Report or the Minister's decision to refer the applicant to an admissibility hearing is fatal to the applicant, as the Board did not have jurisdiction to review the legality of either. In her short order rendered in *Collins*, above, Justice Hansen observed that she could not find a legislative, regulatory or jurisprudential support for the proposition that the Board has the jurisdiction to assess the validity or legality of a section 44 report and that the legality of the section 44 report or the Minister's decision to refer it to a hearing could not be attacked indirectly by way of an application for judicial review of the Board's decision, just like the applicant is attempting to do in the present file. Therefore, the Board did not err when it refused to stay the admissibility hearing nor did it err by rejecting the applicant's *Charter* argument.
>
> (my emphasis)

Similarly, in *Ghirme*, the Court found:

> [20] Second, *Tran* is distinguishable from the matter before this Court because the SCC decided the case on the issue of statutory interpretation. An ID hearing is the adequate forum to hear an issue of statutory interpretation about whether a conditional sentence is a "term of imprisonment" under 36(1)(a) of the IRPA as occurred in *Tran*. However, it is not an adequate alternative remedy to the judicial review of the exercise of the discretionary

> power to refer a well-founded report to the ID as occurred in this case. In the case at hand, the issue involves the exercise of the Minister Delegate's discretion. Specifically, when legislating section 44(2) of the IRPA, Parliament gave the Minister's Delegate the discretion to refrain from referring a well-founded 44(1) report to the ID (*Tran* at para 6). A review of the exercise of this special discretionary power is outside the scope of the ID's powers in the context of an inadmissibility hearing.
>
> (my emphasis)

Indeed, in *Burton*, the Court stated that "[t]he appropriate forum for challenging the referral was not the Board, but an application for judicial review before this Court" (para 31).

[53] Faced with this case law, the Applicant could only suggest that our Court in these cases did not conduct "a thorough review of the text, context and purpose of the statutory scheme" (memorandum of fact and law, para 65).

[54] Finally, the Applicant addressed the case of *XY*, a case decided after *Lin (FCA)* and to which our Court referred. In that case, our Court found on judicial review that the referral process was deficient in that some procedural fairness principles were violated. This appears to be on all fours concerning the case at bar. Thus, the application was not premature as "the applicant does not have an adequate alternative remedy in the form of an admissibility hearing before the Immigration Division. For the reasons below, this Application is not premature" (para 42). Put another way, the jurisdiction to address procedural fairness issues is in the Federal Court. The judicial review application is accordingly not premature.

[55] In the view of the Applicant, *XY* did not engage sufficiently with *Lin (FCA)* on the "holding that the ID has the jurisdiction to assess any procedural fairness concerns preventing it

from proceeding" (memorandum of fact and law, para 69). I note immediately that such is not the limitation put by the Court of Appeal in *Lin*. Rather, the Court of Appeal speaks of "procedural fairness issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed". The criticism is addressed at the *XY* Court despite the fact that the *Lin* decision is discussed at paragraphs 37, 38, 39, 40, 41, 42 and 59. The Applicant faults our Court in *XY* for relying on other Court decisions (*Sharma*, *Hernandez*), and not engaging in an exercise of statutory interpretation. That translates, he claims, into the failure to engage the question of whether abuse of process is the only issue which can validly be put before the ID. The fact that there exists a limited remedial capacity in the ID according to the case law and that, as found by our Court in *XY*, the ID does not constitute an adequate forum is not discussed at any length by the Applicant. In other words, our Court in *XY* found the remedy of judicial review for procedural fairness concerning the referral process, appropriate. Mr. Ismail believes that it is not sustainable in the face of *Lin (FCA)*.

[56] In the result, the Applicant argues that the cases in this Court are distinguishable. The precedents are never clear enough. More importantly, he asserts that the decision of the ID according to which it does not have jurisdiction to review the referral process where it is alleged that there have been procedural fairness failures is unreasonable. It has limited unduly its jurisdiction, in view of the *Lin (FCA)* decision, at paragraph 4, where the Court accepts that "any procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed" (my emphasis). The Applicant never sought to give his view as to what the limiting clause may mean.

B. *Respondents' argument*

[57] It is argued that the ID reasonably found that its jurisdiction is limited, given that the alleged breaches do not undermine its ability to proceed.

[58] The Respondents assert that the ID reasonably found that the ID's ability to proceed could be undermined if, for instance, there was an abuse of power. But the allegations were not of that nature. The case law from the Federal Court requires that in circumstances short of those akin to an abuse of process, the alleged procedural fairness issues be dealt with on judicial review, not before the ID.

[59] The referral process is no more than a screening process (*Lin (FCA)*, para 4). The referral is neither a judicial nor quasi-judicial decision. The Respondents concede, as they should, that a judicial review can be launched against the report and the decision to refer the matter to the ID. Procedural fairness arguments are to be raised at the earliest opportunity.

[60] The process for referral is different from the determination of whether a person is inadmissible: breaches of procedural fairness are not relevant to the determination that the ID must perform. Thus, it was reasonable for the ID to decline jurisdiction on allegations of violations of procedural fairness so long as it does not constitute a violation, like an abuse of process, that undermines its ability to proceed to the determination.

[61] Looking at the statutory scheme, the point is made that the ID's jurisdiction is limited by the terms of s 45 of the *IRPA*: there is no express authority to consider fairness issues within the confines of the s 44 process. That is the finding expressly made in the *Kazzi* (*supra*) case. I reproduce immediately paragraph 53 from *Kazzi*:

> [53] I note that it is not the ID's role to determine if the process leading to the inadmissibility report was procedurally unfair, as the only question for the ID is whether the person is inadmissible, and the ID has "no other option than to make a removal order against the foreign national or the permanent resident is he or she is inadmissible" (*Sharma* at para 19). Therefore, Mr. Kazzi's assertion that the ID should have taken into account the CBSA's actions toward him is ill-founded. When an inadmissibility report is deferred to the ID for an admissibility hearing, the ID has no discretion. If the person is inadmissible, the ID must issue a removal order (*Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 22, aff'd 2016 FCA 48; *Sharma* at para 19). Here, the ID carried its duties in the manner provided in the IRPA and the case law. No breach of procedural fairness has occurred.
>
> (my emphasis)

[62] Hence, the ID's decision is grounded in the statute itself and in the relevant case law. The only way there is to consider procedural fairness issues is if they undermine the ID's ability to proceed. The ID controls its own process. For instance, an excessive delay between the s 44 report and the ID's decision may be the subject of a review by the ID. A procedural fairness issue during the s 44 process does not prevent the ID from assessing the evidence for inadmissibility. These issues are rather to be reviewed on judicial review, not by the ID; there are numerous examples in the jurisprudence of judicial reviews with respect to alleged violations of procedural fairness principles during the referral process. Counsel for the Respondents puts it crisply at paragraph 40 of his memorandum of fact and law where it is stated: "The Member's determination that the ID lacks jurisdiction to hear procedural fairness arguments arising out of

the section 44 process, separate and apart from the procedure and process before it, is reasonable and justified".

[63] The Respondents consider cases relied on by the Applicant, and in particular the *Lin (FCA)* decision. The judicial review of the s 44 process was ruled to be premature by the FCA. Whatever may have been said about procedural fairness was "incidental". Indeed the FCA did not consider the jurisdiction of the ID in *Lin*.

[64] Counsel also addressed squarely the contention that the use of the word "any" in paragraph 4 of *Lin (FCA)* does have the effect of allowing the ID to consider every allegation of procedural fairness principles at the s 44 stage. She says that "the duty of fairness cannot be used as a sword to increase the jurisdictional scope of the administrative body" (memorandum of fact and law, para 52). Only the determination of questions that allow the ID to determine whether a foreign national or a permanent resident is inadmissible is part of the ID's jurisdiction: it is limited to this analysis.

[65] The ID in this case followed this Court's jurisprudence in *Collins*, *Ghirme*, *Kazzi*, *Hernandez* and *XY*. Its decision was reasonable.

VII. Analysis

[66] Following the hearing of this case, the Court sought further submissions from counsel in view of two decisions not referred to by the parties. They are *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151, and *Sidhu v Canada (Public Safety and*

Emergency Preparedness), 2023 FC 1681 [*Sidhu*]. Both these decisions, by the Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court, entertained judicial review applications in respect of the referral process of s 44 of the *IRPA*. Both decisions also came well after *Lin (FCA)*. The Court also requested from counsel that they submit questions of general importance, if any, that could be certified by the Court in accordance with s 74 of the *IRPA*. The parties offered submissions, only counsel for the Applicant suggested a question to be certified.

[67] It bears repeating that the issue presented to the Court is a narrow one. The ID ruled that it did not have jurisdiction to consider alleged violations of procedural fairness principles by the CBSA officer or the Minister's delegate acting pursuant to s 44 of the *IRPA*. Breaches of fairness principles must be addressed through applications to this Court for judicial review. The only issue before the Court is whether that decision is reasonable. The Court does not turn a reasonableness review into a correctness one. The judicial review application in this case concerns the ID decision; there has not been an application made concerning the alleged violations in relation to the referral process of s 44 which would be reviewed on a correctness standard of review (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79).

[68] In the case at hand, the Applicant failed to establish that the ID has jurisdiction to review alleged procedural fairness violations committed during the referral process of s 44. He did not satisfy the test of unreasonableness as the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para 47; *Vavilov*,

at para 86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at para 26).

[69] The Court has reviewed the decision under review under title V. The ID reckons the case law from this Court which finds that judicial review of violations of the procedural fairness lies in the Federal Court. This constitutes a significant legal constraint, one that may, and probably would translate into an unreasonable decision by an administrative decision maker if not followed, especially if the case is not an outlier. Conversely, it is difficult to see how following the case law of reviewing courts can make a decision unreasonable.

[70] In the precise circumstances such as those in this case (the ID reviewing the alleged fairness violations of the referral process), our Court has declined to find that the ID had jurisdiction. I refer to four of them: *Collins* (*supra*), *Haqi* (*supra*), *Ghirme* (*supra*) and *Kazzi* (*supra*). Relevant paragraphs from each of those decisions are found at paragraphs 49-50 and 59 herein.

[71] In an attempt to counter the case law from this Court, the Applicant relies exclusively, in the end, on a sentence in paragraph 4 of *Lin (FCA)*. The sentence reads once again as follows: “This includes any procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division’s ability to proceed”. The Applicant stresses the word “any”. He should have stressed the phrase “that undermine the Immigration Division’s ability to proceed” as it limits the procedural fairness issues which may validly be brought before the ID to only those that undermine the ability of the ID to proceed. The Court of Appeal was

careful to limit its dictum. In order to establish unreasonableness, it seems to me that the Applicant had to address the issue: that is his burden on judicial review. The Applicant did not attempt to define what that limitation means. The ID did.

[72] The ID, having reviewed the case law from this Court, sought to reconcile the case law with the finding in *Lin (FCA)*. It considered the context in which the Court of Appeal was operating. It notes that there was no question concerning the ID's jurisdiction to examine whether procedural fairness was adequate in that case. The certified question did not even allude to procedural fairness nor pertain to the ID's jurisdiction about procedural fairness. That is accurate. Moreover, the FCA did not answer the certified question, deciding instead that the judicial review of the referral was premature. The ID notes that the FCA did neither cite nor reject the Federal Court case law. That makes it conclude that the jurisdiction of the ID was "only incidentally" addressed. In some quarters, that would be called "*obiter dictum*". That makes the ID conclude that the paragraph must be interpreted in light of the known earlier case law. The Applicant has not shown how that finding is unreasonable. It is justified, transparent and intelligible, as well as justified in view of the factual and legal constraints. It falls within the range of possible, acceptable outcomes.

[73] The sentence must be read in context. The *Lin* decision in our Court (2019 FC 862) was concerned with findings by the CBSA officer and the Minister's delegate which had to do with the facts (the issue was misrepresentation of days spent in Canada by permanent residents; it appeared that it was part of a large scale fraudulent misrepresentation scheme). While Mr. Lin contended he was the innocent victim of someone who conducted the fraud on behalf of

numerous Chinese nationals residing in Canada, the referral took place anyway. Mr. Lin challenged the referral before our Court arguing his lack of individual complicity and the fact that legal issues were not resolved by the officer. They were left for the ID. We also learn that there was an abuse of process argument (see para 7 and 13) because it was asserted that the allegations could and should have been raised in earlier admissibility hearings. Mr. Lin argued that the examination of the abuse of process contention, together with the level of complicity in the fraud perpetrated by the fraudster, were matters deserving of a judicial review application in our Court.

[74] The abuse of process allegation appears to be what the FCA was referring to when it said in *Lin* that the ID would be able to consider procedural issues that undermine its ability to proceed. That constitutes a narrow category, claims the ID, and I fail to see how that can be said to be unreasonable. Such a statement by the Court of Appeal does not displace the case law already in place for many years.

[75] In *Lin (FC)*, our Court concluded that the judicial review had to be dismissed, ruling that the referral to the ID was reasonable and made in conformity with the discretion which continues to reside in s 44 of the *IRPA*. The Court of Appeal, as noted by the ID in our case, did not even consider the certified question, deciding instead that the judicial review of the referral decision was premature. A full opportunity to adduce evidence and advance arguments before the ID was available. Procedural fairness issues which undermine the ID's ability to proceed could also be brought forward. The ID in our case considered that such language does not broaden its jurisdiction to consider other procedural fairness issues which do not undermine the ID's ability

to proceed. Such issues have been ruled by our Court to be subject to judicial reviews in our Court. The ID decision has all the hallmarks of reasonableness. The ID decision is reasonable.

[76] More recent decisions, including in the Federal Court of Appeal, tend to confirm that *Lin (FCA)* is to be read narrowly. Thus, the case of *XY*, one about the referral process of s 44, when our Court found that the judicial review application had to be granted in view of the elevated level of procedural fairness owed to XY went on appeal (*Canada (Public Safety and Emergency Preparedness) v XY*, 2022 FCA 113 [*XY (FCA)*]). The *Lin (FCA)* decision, at its paragraph 4, was not ignored; it was noted because the section 44 process is akin to a screening exercise. The Crown appeal in the Court of Appeal was dismissed on the basis that the certified question was not appropriate as it was not dispositive of the appeal. The Court of Appeal refers to the decisive issue in the case as being the duty of procedural fairness at the referral stage (at para 11 and 12), but no further comment is made on whether a judicial review application was appropriate or premature.

[77] In *Sidhu*, the Chief Justice entertains a judicial review application concerning the decision made by the officer and the Minister's delegate pursuant to s 44. Mr. Sidhu argued that the process followed was not fair, a proposition our Court did not agree with. Of note for our purposes is that the *Lin* (FC and FCA) decisions did not pass under the radar (see para 60), yet it is never suggested that the matter ought to be decided anywhere but by the Federal Court on judicial review. As a matter of fact, our Court reviewed the referral decisions, both on the alleged procedural fairness violations as well as whether the officer's decision was unreasonable because

it was made in a perverse and capricious manner and without regard for the evidence, or on the ground that he applied the wrong test.

[78] *Obazughanmwen* (*supra*) is another Court of Appeal decision that came after *Lin (FCA).* It is also about a judicial review application concerning the s 44 referral to the ID. The case was concerned with the discretion in the Ministerial delegate to consider more fully humanitarian and compassionate factors, as well as the best interests of a child before the referral.

[79] The Court of Appeal found again that the question had not been properly certified; it also found that the decision was reasonable and consistent with past jurisprudence. Neither the Federal Court nor the Federal Court of Appeal suggested in that case that the judicial review was premature. In fact, neither one of the decisions ignored the existence of *Lin (FCA)* as they referred to it in support of the proposition that s 44 simply performs a screening process. Indeed the Court of Appeal quoted from paragraph 4 (para 38).

[80] The point of the matter is simply this: since *Lin (FCA)*, the federal courts have continued to entertain judicial reviews of s 44 referrals, some of which involve allegations of breaches of procedural fairness. The Applicant's attempt to read the one sentence in paragraph 4 of *Lin (FCA)* without the obvious limitation found in it does not make the interpretation of the case law and of the legislative scheme by the ID unreasonable.

VIII. Conclusion

[81] The Applicant has failed to demonstrate that the Immigration Division decision is unreasonable.

[82] The issue has never been whether an alleged breach of procedural fairness can be reviewed. No one disputes that it can. The issue is rather who reviews in the case of s 44 referrals. The review of an administrative decision is to be made by a superior court. Section 18 of the *Federal Courts Act*, RSC 1985, c F-7, grants the original exclusive jurisdiction to the Federal Court to hear any application for relief in the nature of certiorari, writ of prohibition, writ of mandamus or grant declaratory relief against a federal board (other than those falling within s 28). It is difficult to see how the review for procedural fairness is nothing other than a judicial review in the nature of certiorari. It is made especially so in view of the fact that the referral process is in one bailiwick while the adjudication is in another. The Applicant argues in the end that the appropriate forum for considering procedural fairness issues at first instance is the ID and not a judicial review in the Federal Court (additional submissions, para 26). The ID disagreed. The Applicant had to demonstrate that that decision was unreasonable and he has failed.

[83] The case law before and after *Lin (FCA)* does not support the reading by the Applicant of one sentence in paragraph 4 of *Lin (FCA)*, reading that does not account for the limiting phrase “that undermine the Immigration Division’s ability to proceed”. The application for judicial review was, and has continued to be, the recourse against allegations of violation of procedural

fairness principles. In his post-hearing submissions, the Minister remarks that the "*Sidhu* and *Obazughanmwen* decisions highlight how a JR is the appropriate forum to challenge issues relating to ss 44(1) report or ss 44(2) referral. These cases stand for the proposition that issues of procedural fairness are properly subject to judicial review" (para 21). The point is well taken.

IX. Proposed certified question

[84] The Applicant has proposed a question for certification. It reads:

> Should the ID determine that the s.44(2) referral is not well-founded and/or breaches the principles of natural justice or procedural fairness and/or is otherwise deficient, what remedies are available to the ID?

The Federal Court of Appeal has been scrupulous concerning questions which give it jurisdiction pursuant to s 74 of the *IRPA*.

[85] The jurisprudence on the issue is abundant. Recently, the Court of Appeal has declined to entertain appeals involving issues around s 44.

[86] In *XY (FCA)* (*supra*), the Court of Appeal supplied an abstract of the rules governing appeals pursuant to s 74:

- a serious question of general importance is one that is dispositive of the appeal;
- it follows that it must be a question that has been raised and dealt with in the Federal Court's decision;

- "It is a mistake to reason that because all issues on appeal may be considered once a question is certified, that any question that could be raised on appeal may be certified" (*XY (FCA)*, para 7); and
- the certification process is not a reference process; it cannot be used either to turn itself into an avenue to obtain a declaratory judgment from the Federal Court of Appeal.

[87] In the *XY* case, the Crown appealed on an issue that was not part of the certified question which was concerned with the Minister's delegate having an obligation to consider Canada's obligations under the Refugee Convention. Our Court had decided the case on the duty of procedural fairness owed to XY (provide submissions and the appropriate level of disclosure). The Crown's factum actually dealt with these issues, which formed part of the basis for the decision by the Federal Court, but were not part of the question that was actually certified. The Court of Appeal stood firm that a properly certified question was a prerequisite. It said: "The statutory requirement for a certified question set out in paragraph 74(*d*) of *IRPA* is a precondition to a right of appeal. When a question does not meet the test for certification, the necessary precondition is not met, and the appeal must be dismissed" (*XY (FCA)* at para 14).

[88] The question proposed by the Applicant cannot be accepted. The only question before the Court is whether the ID decision was reasonable, not whether it was correct. The suggested question is in search of the correct answer this Court was not tasked to reach. The question the Applicant proposes was not dealt with by the Court. It is not a question that the Court dealt with as it was not even before the Court. Moreover, as repeated in *XY*, the certification process is

neither a way to create a reference process nor an avenue to obtain a declaratory judgment from the Court of Appeal.

[89] The interpretation given by the ID to its jurisdiction was certainly one of the possible acceptable outcomes given the text, context and purpose of the legislative scheme as interpreted by the Courts, that being a legal constraint that bears on an administrative decision maker. This Court's decision merely concludes that the Applicant did not discharge his burden to show that the decision is unreasonable in view, among other things, of the case law in federal courts.

[90] In *Obazughanmwen* (FCA), the Court found that the question should not have been certified given that it had been answered on numerous occasions. That is the case here. That constitutes a supplementary reason why the proposed question should not be certified.

[91] In the result, the judicial review application must be dismissed. There is no question to be certified pursuant to s 74 of the *IRPA*.

JUDGMENT in IMM-6420-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

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

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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