

Federal Court



Cour fédérale

**Date: 20220923**

**Docket: IMM-5329-20**

**Citation: 2022 FC 1330**

**Ottawa, Ontario, September 23, 2022**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**SOVICK HASAN KHAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant, Sovick Hasan Khan, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”), dated September 24, 2020, affirming a decision of the Refugee Protection Division (“RPD”) determining that the Applicant is not a Convention refugee or a person in need of protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicant submits that the RAD erred in finding that the RPD member's conduct during the hearing did not breach natural justice and that the RAD breached natural justice by making new credibility findings on issues not canvassed by the RPD. The Applicant further submits that the RAD's decision is unreasonable because it contains flawed credibility findings.

[3] For the reasons set out below, I find that issues related to the conduct of the RPD member during the RPD hearing led to a breach of natural justice that the RAD did not remedy. This is a reviewable error. Accordingly, this application for judicial review is granted.

## II. **Facts**

### A. *The Applicant*

[4] The Applicant is a 29-year-old citizen of Bangladesh. He fears persecution from members of the political party known as the Awami League ("AL"), due to his membership in a different political party, the Bikalpo Dhara Bangladesh ("BDB").

[5] The Applicant states that in January 2015, he joined the BDB as a general member and became a cultural secretary in July 2015. He explains that his political involvement included attending protests against human rights violations and political abductions, and promoting equal employment opportunities.

[6] On July 8, 2016, the Applicant allegedly participated in a BDB rally that was attacked by AL supporters. The Applicant states that he along with other BDB members were temporarily

detained by the police. They were subsequently released after the police warned them to cease their anti-government political activities.

[7] On March 2, 2017, members of the AL allegedly phoned the Applicant, attempting to recruit him, but the Applicant refused.

[8] On January 1, 2018, the Applicant states he participated in another BDB protest that was also attacked by members of the AL. The Applicant allegedly received threatening phone calls from the AL later that evening and again at the end of January 2018.

[9] In February 2018, the Applicant alleges AL members attacked him after he visited the BDB office in Sylhet. On February 4, 2018, he received a phone call from his brother informing him that persons alleging to be police officers had gone to his house in Narayangonj to arrest him. The Applicant then fled to Chittagong and stayed with a family friend. On February 19, 2018, the Applicant claims he received a phone call from the family friend advising him not to return to the residence as people were searching for him.

[10] On June 28, 2018, the Applicant left Bangladesh with his parents and entered Canada. He made a claim for refugee protection on July 30, 2018.

B. *The RPD Decision*

[11] In a decision dated December 20, 2019, the RPD refused the Applicant's refugee claim. The RPD's decision first addressed the procedural fairness concerns raised by the Applicant's counsel before the RPD ("Applicant's RPD counsel") regarding the RPD hearing.

[12] At the hearing and through written closing submissions submitted on October 18, 2019, the Applicant's RPD counsel had argued that the RPD member's limitation on the time he had to pose questions during the hearing had breached natural justice. The Applicant's RPD counsel had argued that this was unfair, as the RPD member had questioned the Applicant for over three hours (the scheduled duration of the hearing). The RPD rejected this argument, stating that the Applicant's RPD counsel did not object to the RPD's decision to allow 20 minutes for questioning, and noted that the Applicant's RPD counsel had in fact been afforded 40 minutes for questions. Further, after reviewing the Applicant's written closing submissions, the RPD "decided to allow counsel to ask the claimant further questions [...and] instructed the scheduling unit to schedule a date with counsel's agreement. This was scheduled for November 19, 2019."

[13] Next, the RPD considered a letter from the Applicant's RPD counsel, dated November 11, 2019. The letter indicated that the Applicant's RPD counsel had tentatively scheduled the second hearing date without instructions from the Applicant. It also included an application requesting that the RPD member recuse himself due to a reasonable apprehension of bias. The letter urged the RPD to accept the application and hold a new hearing before a differently

constituted panel, or to reject the application and issue a decision. The letter stated the Applicant and his counsel would not attend the November 11, 2019 hearing.

[14] In its decision, the RPD explained that the application had been brought to its attention on November 18, 2019, and was rejected on the basis that it did not establish that an objective observer would find a reasonable apprehension of bias. The RPD dismissed the recusal application by decision dated November 19, 2019, the day of the hearing. On November 19, 2019, the hearing was convened and neither the Applicant nor his counsel appeared. Pursuant to the letter from the Applicant's RPD counsel, the RPD did not deem the matter abandoned and proceeded to issue its decision.

[15] In its decision, the RPD also considered another letter sent by the Applicant's RPD counsel, received on November 19, 2019, stating that the RPD had demanded the Applicant's attendance the day of the hearing and that the RPD had intentionally responded late to the recusal application. This letter noted that the Applicant's RPD counsel was unable to contact his client in order to determine whether he could attend the hearing. The RPD noted the Applicant's RPD counsel had initially agreed to the hearing date in his letter of November 11, 2019. The RPD "presumed there were no further questions for the claimant" given his lack of attendance, and found no breach of natural justice.

[16] Turning to the substance of the matter, the RPD denied the Applicant's claim for refugee protection. The determinative issue was credibility. The RPD found that the presumption of truth was rebutted in the Applicant's case, as the Applicant's testimony regarding issues at the

heart of his claim was “frequently evasive”, evolving, and not spontaneous. The RPD determined that the Applicant was not credible, that none of the events he described had occurred, and that he is not a member of the BDB.

[17] Alternatively, the RPD considered a change in political circumstances in Bangladesh. The Applicant had acknowledged at the hearing that the BDB had joined the AL’s coalition for the 2018 election, but asserted that he sided with a faction of the party that had not joined the AL. The RPD rejected the Applicant’s explanation, noting a lack of evidence on the schism he claimed existed within the BDB, the Applicant’s failure to mention this political change in the updates he provided in August 25, 2019, and the previous credibility findings. The RPD found that the Applicant was trying to hide the recent political changes to bolster his claim. The RPD further determined that the Applicant would be perceived as a member of the BDB, now aligned with the AL and no longer an opposition party. The RPD therefore concluded the Applicant no longer faced a serious possibility of persecution due to his political profile and rejected his claim.

### C. *Decision Under Review*

[18] In a decision dated September 24, 2020, the RAD confirmed the RPD’s decision and dismissed the appeal.

[19] The RAD affirmed the RPD’s finding that the Applicant’s testimony was inconsistent with his Basis of Claim (“BOC”) narrative and that the inconsistencies and overall contradictions undermined his credibility. The RAD also found that due to the Applicant’s submission of fraudulent documents, he is generally not credible. The RAD did find that the RPD erred in

assessing an affidavit provided by a friend of the Applicant's family on the basis of what it did not contain, and in drawing a negative credibility inference based on the Applicant's use of fraudulent documents to secure a Canadian visa. However, these errors did not displace the RAD's finding that the Applicant is not credible, given the numerous other concerns regarding his credibility.

[20] The RAD found that the RPD was correct in its assessment of the change in political circumstances in Bangladesh. The RAD noted that given the high-profile nature of politics in the Bangladesh news, corroborative evidence of an opposition faction of the BDB would be reasonably available. In any event, a review of the country condition evidence showed little information to corroborate the Applicant's claim that the BDB has parted ways with the AL, or that the BDB-AL alliance is transitory. The Applicant's omissions in this regard undermined his credibility.

[21] With respect to the Applicant's submission that he was deprived of a fair hearing before the RPD, the RAD confirmed the RPD's finding that there was no breach of procedural fairness. The RAD did not find that the RPD demonstrated a reasonable apprehension of bias against the Applicant and noted that the RPD was entitled to set time limits in order to ensure the proceedings advanced in a timely manner.

[22] Overall, the RAD concluded that, on a balance of probabilities, the Applicant is not credible, did not establish that he faces persecution by the AL in Bangladesh and is neither a Convention refugee nor a person in need of protection.

III. **Issue and Standard of Review**

[23] The issue in this application for judicial review is whether the RAD's decision is reasonable.

[24] The parties agree that the RAD's decision is to be reviewed on the reasonableness standard. I agree that the applicable standard of review of the RAD's decision is reasonableness (*Ugorji v Canada (Citizenship and Immigration)*, 2022 FC 937 at paras 18-10). The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). I find that this conclusion accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[25] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record



before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[26] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

[27] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

#### IV. Analysis

[28] The Applicant first submits that the RAD erred by failing to correct the RPD’s breach of natural justice. Specifically, the RPD improperly conducted the RPD hearing and inappropriately limited the Applicant’s evidence. The Applicant asserts that natural justice requires that an RPD member’s conduct “must, at all times, be irreproachable and objective” (*Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870 at paras 4-5).

Further, the Applicant submits that the RPD cannot prevent counsel from representing their client absent irresponsible, undue repetition or irrelevant material; and that an RPD member acts unfairly when they interrupt counsel's questioning of a claimant or instruct counsel to cease a line of questioning (*Atwal v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8836 (FC)).

[29] The Applicant maintains that the RPD breached natural justice because the RPD member questioned him for three hours and 20 minutes, longer than the length of time scheduled for the hearing, but then applied a strict time limit for the Applicant's RPD counsel's questions and re-direct questioning. The transcript shows no indication that the Applicant's RPD counsel's questioning constituted irresponsible undue repetition or regarded irrelevant material; rather, the questions sought to reveal important information that had not emerged from the RPD member's questioning. This gave rise to the Applicant's recusal application: the RPD member's behaviour disclosed a reasonable apprehension of bias, as it indicated the answers to the Applicant's RPD counsel's questions could not affect the RPD's decision. Because of this, neither the opportunity to provide written submissions, nor the possibility of another hearing before the same RPD panel remedied the breach of natural justice.

[30] The Applicant further submits that the RAD erred in rejecting the Applicant's argument that he was denied a fair hearing. The RAD stated that the Applicant did not explain why he believed the RPD's conduct disclosed a reasonable apprehension of bias, and noted the RPD's offer to reschedule a continuation of the hearing. However, the Applicant's letter of November 11, 2019 specifically stated that the basis of the request was the RPD's breach of natural justice.

The Applicant had asserted that the RPD member's interruptions during the re-direct prevented the Applicant's RPD counsel from making his arguments; that the proceeding had been tainted by the RPD member's conduct, revealing a bias; and that absent a recusal, a decision should be rendered and the continuation of the hearing cancelled. The Applicant now argues that the RAD in turn failed to correct the breach of procedural fairness that flowed from the RPD member's conduct at the RPD hearing.

[31] The Respondent maintains that the Applicant's assertions that he was denied a fair hearing do not demonstrate a reviewable error with the RAD appeal process or decision, which is currently under review. The RPD decision and hearing process is not before this Court. The RAD provided reasons for rejecting the Applicant's submission that he had not had a fair RPD hearing. The Respondent maintains that the Applicant has failed to raise a reviewable error made by the RAD on this point, merely stating that the RAD erred by rejecting the argument, and restating his case regarding the RPD's ostensible breach of natural justice. The RAD reasonably rejected the Applicant's arguments, finding that the RPD had addressed the Applicant's natural justice concerns by scheduling a subsequent RPD sitting, with input from the Applicant's counsel. Similarly, the RAD addressed the Applicant's allegations of bias, and the Applicant's arguments are a mere continuation of that reasonably rejected argument.

[32] I agree with the Applicant that the RAD breached natural justice by failing to adequately address the Applicant's concerns regarding the RPD member's conduct at the hearing.

[33] I begin by stating that I disagree with the Respondent's unsupported assertion that the RPD hearing process is not at issue before the Court. The Federal Court commonly addresses issues related to the fairness of proceedings before the RPD when considering RAD decisions: see recently *Ambroise v Canada (Citizenship and Immigration)*, 2021 FC 62 at paragraphs 8-10 and *Urbieta v Canada (Citizenship and Immigration)*, 2022 FC 815 at paragraph 13, which concern RAD decisions and consider allegations of breaches of procedural fairness stemming from the RPD's process. These authorities also confirm that the applicable standard of review in this context is that of correctness.

[34] In my view, the RAD erred by failing to adequately consider the Applicant's arguments regarding the breach of natural justice flowing from the RPD member's conduct during the hearing. Specifically, I find that the Applicant's right to a fair hearing was breached when the RPD member imposed an arbitrary time limit for the Applicant's RPD counsel's questions at the hearing. The RPD member questioned the Applicant from 1:00pm until 4:20pm. Following the RPD member's questions, the Applicant's RPD counsel raised the issue of limited timing for his re-direct questions. The transcript of the RPD hearing states:

PRESIDING MEMBER: Okay. All right, that concludes my questions. Any questions?

COUNSEL: I would certainly have some questions but I'm looking at the clock.

PRESIDING MEMBER: Yeah, we can go a little later.

COUNSEL: It's 4:20.

PRESIDING MEMBER: We can go to 4:45 if we have to.

COUNSEL: And then oral submission can't be arranged.

PRESIDING MEMBER: I'm fine with written submissions.

[...]

PRESIDING MEMBER: All right, go ahead, you have 20 minutes.

[35] After 25 minutes of the Applicant's RPD counsel's questioning had elapsed, the RPD member stated: "And I've given you an extra five minutes so far and I'll give you another five minutes [...]". Following the additional time, the transcript of the hearing reads as follows:

PRESIDING MEMBER: All right. So I've given you 20 minutes and then I gave you another 10 minutes on top under Rule 10(6), I will allow one or two more questions.

COUNSEL: So which means I will have to skip a few more questions that I had.

[36] The RPD member put an end to the questioning before the Applicant's RPD counsel had finished, reiterating that 20 minutes had been provided for questions. The transcript of the hearing states:

[...]

COUNSEL: Okay. Do you know what the, what are the allegations against you?

CLAIMANT: No.

COUNSEL: Okay. So ---

PRESIDING MEMBER: All right, so thank you.

COUNSEL: So, Mr. Member ---

PRESIDING MEMBER: Yes?

COUNSEL: --- just on the record I would like to state that I earlier raised to you that I would need – because a lot of things were not covered during your examination that I wanted to cover.

PRESIDING MEMBER: And you ---

COUNSEL: So I would need ---

PRESIDING MEMBER: --- were told that you would have 20 minutes for questions and you raised no objection to that.

COUNSEL: No, I told you at the beginning, at the beginning that I would need more time and this is why I (inaudible) to you that we are already 4:20 by that time.

PRESIDING MEMBER: Mm-hmm, and I told you you would get 20 minutes and you had no objection to 20 minutes.

COUNSEL: No, I told you ---

PRESIDING MEMBER: And then subsequently if you don't ---

COUNSEL: No, Mr. Member ---

PRESIDING MEMBER: --- please, don't interrupt me.

COUNSEL: No, you're interrupting me.

PRESIDING MEMBER: I told you that you would get 20 minutes and then I gave you an extra five minutes on top of that and then an extra 10 minutes on top of that.

COUNSEL: Yes, I told you earlier, Mr. Member, that I don't want to rush and you told me that let's give it a try.

PRESIDING MEMBER: Yes, and then I told you ---

COUNSEL: And then on that understanding I gave it a try.

PRESIDING MEMBER: Yes, and then I told you you would have 20 minutes.

[...]

[37] The exchange above shows a concerning lack of civility and care. It does not reflect a healthy environment for a refugee hearing. As the RPD member quarrelled with the Applicant's RPD counsel, they appear to have forgotten what is at the heart of the matter: a refugee claim.

[38] It was unfair of the RPD member to enforce a strict adherence to an arbitrary timeline, particularly after his own questioning had exceeded the total time allotted for the hearing. The RPD did not state, and the transcript of the hearing does not show, that the Applicant's RPD counsel's questioning was repetitive or irrelevant. In fact, the hearing concluded abruptly while the Applicant's RPD counsel questioned the Applicant on the contents and source of the documentary evidence he had adduced. As the determinative issue for both the RPD and the RAD was the Applicant's credibility, these questions were evidently relevant. The RAD also did not remedy this arbitrary limit on the Applicant's RPD counsel's questions during the RPD hearing.

[39] As counsel for the Applicant rightly brought to my attention during the hearing before this Court, the RPD only agreed to schedule a subsequent hearing after reading the Applicant's written closing submissions, which addressed the procedural fairness breach during the first hearing. I agree with the Applicant's counsel that this suggests the RPD scheduled the second sitting in an attempt to uphold the appearance that the Applicant had been afforded a fair hearing.

[40] Furthermore, while the RAD's decision states that in considering the Applicant's natural justice arguments, the RAD had "reviewed the transcript" of the hearing, there is no indication that the RAD reviewed the recording of the RPD hearing.

[41] Given the Applicant's allegations that the RPD member's manner of questioning and allocation of time gave rise to a reasonable apprehension of bias, I find that the RAD was required to listen to the recording of the RPD hearing, not just the transcript. Only such a review could reveal whether the RPD member's manner of speaking, as opposed to his specific words, disclosed a reasonable apprehension of bias. The RAD's decision reveals only a cursory examination of the record. Its review of the Applicant's procedural fairness submissions is limited to two paragraphs that adopt the RPD's reasons for finding that there was no breach of natural justice. In my view, this issue required a more careful assessment and what the RAD provided appears to have been merely an afterthought. Therefore, I am not convinced that the RAD adequately engaged with the Applicant's allegations of unfairness and of a reasonable apprehension of bias.

[42] I note that the Applicant also takes issue with the RPD's strict requirement for a formal objection, stating that while the Applicant's RPD counsel did not raise a formal objection, a review of the transcript shows that he had serious concerns about having to rush his submissions and skip some of his questions.

[43] However, I am of the view that the Applicant's RPD counsel could have dealt with this issue more proactively. While the transcript of the RPD hearing reveals that the Applicant's RPD counsel took issue with the time limit placed on his questioning, he did not formally object to the 20-minute time limit, nor did he provide reasons for why this was an unreasonable restriction on his right to question the Applicant on redirect. I accept that counsel may be hesitant to object during an RPD hearing, wary that their actions may be off-putting for the



member tasked with deciding their client's refugee claim. Nonetheless, in circumstances such as these, where an arbitrary limitation on counsel's ability to question his client affected the fairness of the hearing, the Applicant's RPD counsel had a responsibility to object and provide reasons for such an objection, as a lawyer entrusted with representing his client's interests.

[44] I therefore find that the RAD incorrectly concluded that the RPD hearing process was fair and accorded with the principles of natural justice. This was a reviewable error.

[45] Given the finding that there was a reviewable error in this case, I do not find it necessary to address the remainder of the issues raised by the Applicant. I would note, however, that I agree with the Respondent's submissions that the RAD's decision was overall reasonable and that many of the Applicant's arguments on the substance of the RAD's decision amount to a request for this Court to re-weigh the evidence.

[46] I find that the RAD thoroughly considered the Applicant's submissions regarding the RPD's credibility findings and reasonably concluded that the Applicant's claim was not credible. Specifically, I find that that the RAD made reasonable adverse credibility findings with respect to: a) the March 2, 2017 phone call inviting the Applicant to join the AL; b) the discrepancies regarding the diaries filed by the parents of the allegedly murdered BDB members; c) the timing of the publication of the newspaper report discussing the murders of the Applicant's friends; and d) the injuries the Applicant ostensibly suffered. Additionally, I find it was reasonable of the RAD to give little weight to an affidavit from the Applicant's family friend and to conclude that it was insufficient to overcome other credibility concerns. I also find that the RAD reached a

reasonable conclusion with respect to the change in political circumstances in Bangladesh, concluding that the Applicant's failure to mention the existence of the BDB faction that remains in opposition to the AL undermined his credibility.

V. Conclusion

[47] For the reasons above, I find that issues related to the conduct of the RPD member during the RPD hearing led to a breach of natural justice that was not remedied by the RAD. This was a reviewable error. Accordingly, this application for judicial review is granted. No questions for certification were raised, and I agree that none arise.

**JUDGMENT in IMM-5329-20**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.
2. There is no question to certify.

“Shirzad A.”

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Judge

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

**DOCKET:** IMM-5329-20

**STYLE OF CAUSE:** SOVICK HASAN KHAN v THE MINISTER OF  
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**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** JULY 19, 2022

**JUDGMENT AND REASONS:** AHMED J.

**DATED:** SEPTEMBER 23, 2022

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