

Federal Court



Cour fédérale

Date: 20250910

Docket: IMM-12352-24

Citation: 2025 FC 1501

Toronto, Ontario, September 10, 2025

PRESENT: Mr. Justice Brouwer

BETWEEN:

AHMAD HASSAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Ahmad Hassan seeks judicial review of the decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] rejecting his appeal. For the reasons set out below, I am allowing his application.

I. BACKGROUND AND DECISION UNDER REVIEW

[2] Mr. Hassan is a 22-year-old refugee claimant from Pakistan. A competitive squash player, he entered Canada as an unaccompanied minor in January 2000, when he was 16 years old, and claimed refugee protection based on his fear of harm from members of the Tehreek-e-Taliban Pakistan [TTP]. His evidence is that his father received threatening phone calls about Mr. Hassan's participation in the game of squash, which he says is viewed as a "Western activity" by the TTP, and that his brother was subsequently kidnapped by the TTP for the same reason.

[3] Mr. Hassan's refugee claim was refused by the IRB's Refugee Protection Division [RPD] on September 28, 2021, on the basis that he had an internal flight alternative [IFA] in Hyderabad. He retained new counsel, who I will refer to as "DT," and appealed the refusal. However, the RAD confirmed the first instance refusal, finding that Mr. Hassan's evidence regarding the identity of his brother's kidnappers was not credible. DT brought an application for leave and judicial review of the refusal on Mr. Hassan's behalf. Leave was granted and on judicial review Justice Elizabeth Heneghan quashed the RAD's decision as unreasonable (*Hassan v. Canada (Citizenship and Immigration)*, 2024 FC 293). The judgment was provided to DT.

[4] In preparation for the redetermination, the RAD sent a letter to Mr. Hassan and DT on March 6, 2024, setting a deadline of April 12, 2024, to file new evidence for the appeal. Nothing was submitted. On May 31, 2024, the RAD further notified Mr. Hassan and DT that it intended to rely on an updated National Documentation Package [NDP] prepared by the IRB's Research

Directorate and set a deadline of June 10, 2024, to make submissions about the new package of documentary evidence. No submissions were made.

[5] By decision dated June 26, 2024, the RAD again dismissed Mr. Hassan's appeal. The RAD found that the RPD had erred in accepting that the agents of persecution were members of the TTP. Although the RAD accepted that Mr. Hassan was a credible witness, it found that his allegation that it was the TTP who had targeted him was based entirely on speculation and inference. The RAD determined instead that the agents who threatened Mr. Hassan and later targeted his brother for playing squash competitively were "a group of four unidentified individuals." In coming to this conclusion, the RAD relied on evidence in the NDP to find that tactics like kidnapping and abduction are not exclusive to the TTP but are used by multiple militant and extremist groups in Pakistan, and that Mr. Hassan's profile does match the TTP's usual targets.

[6] The RAD decision was sent to both Mr. Hassan and DT.

II. ISSUES

[7] Mr. Hassan raises the following issues for judicial review:

- A. Whether Mr. Hassan was denied procedural fairness;
- B. Whether the RAD's decision was unreasonable.

[8] The standard of review applicable to decisions of the RAD is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov]); questions of procedural fairness, however, attract no deference. (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56 [Canadian Pacific Railway]).

III. ANALYSIS

[9] It is common ground that the RAD redetermined the appeal without any new evidence or submissions. Mr. Hassan alleges that he had new evidence but did not submit it to the RAD because he was relying on DT to continue to represent him as needed. DT's assistant, however, denies that DT was retained for the redetermination. Mr. Hassan concedes there may have been confusion about whether or not DT was in fact retained. He therefore does not plead ineffective assistance by counsel; rather, he asserts that the RAD's redetermination of his appeal was based on an incomplete record and this was procedurally unfair because the incompleteness stemmed from Mr. Hassan's honest but possibly mistaken belief that he was being represented by counsel. He maintains that his lack of a response to the RAD's correspondence resulted in or at least contributed to the refusal of his appeal.

[10] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker], Justice L'Heureux-Dubé identified a non-exhaustive list of five factors relevant to determining the content of the duty of fairness, and explained:

[22] ...underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an

opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[11] In *Canadian Pacific Railway*, the Federal Court of Appeal summarized the approach as follows:

[54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed.

[12] This is a fact-based, case-by-case assessment. As the Supreme Court of Canada explained in *Vavilov*, the duty of procedural fairness in administrative law is “‘eminently variable’, inherently flexible and context-specific,” and “the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances” (*Vavilov* at para 77).

[13] The RAD owes a high level of procedural fairness to those who come before it (*Siyaad v. Canada (Citizenship and Immigration)*, 2019 FC 761 at para 43) including ensuring that participants have a full opportunity to put forward their views and evidence and have them considered by decision-makers.

[14] Mr. Hassan deposed in an affidavit filed with his Application Record that he had new evidence to file in support of the redetermination of his appeal, and that he believed DT, who had represented him on both his original RAD appeal and his successful judicial review application, was continuing to represent him in the redetermination. According to his affidavit evidence, he

paid DT an \$8,000 or \$9,000 retainer and instructed DT's office to respond to the RAD's May 31, 2024, procedural fairness letter and provide further submissions regarding the new NDP. Mr. Hassan insists that he always intended to fully participate in his appeal.

[15] In response to Mr. Hassan's sworn evidence, the Respondent submitted an affidavit from an assistant in DT's law office. The assistant refuted Mr. Hassan's evidence that he paid a retainer for DT's continued representation and deposed that DT advised Mr. Hassan during a virtual meeting on an unspecified date that he probably did not need to retain counsel for the redetermination and that if the need for new counsel arose, he would have to retain other counsel. The assistant stated that she was aware of this conversation because she attended the virtual meeting as an interpreter. According to the assistant, she contacted Mr. Hassan on unspecified dates after receiving the RAD's March and May 2024 letters to advise of the correspondence and to "remind" him of the need to retain new counsel. She asserts that "Mr. Hassan specifically told me that he has no new documents to submit and would only retain counsel should a hearing be held by the RAD." The assistant also observed: "while RAD may have assumed that our office continued to represent Mr. Hassan for his RAD re-determination file, we did not send a single correspondence to the RAD indicating that we were counsel of record for Mr. Hassan's redetermination file."

[16] Mr. Hassan responds to the dispute about the alleged retainer by conceding that his evidence of the payment – beyond his own sworn evidence – is weak: all he has provided is a letter from his cousin confirming the payment. However, he insists that even in the face of the conflicting affidavit evidence there was clearly confusion about whether DT was retained, and

this confusion resulted in his evidence not being filed and no submissions being made, which he says was procedurally unfair.

[17] It is regrettable that neither party cross-examined the opposing witness, as it leaves the Court with two contradictory, untested versions of events. That said, I am not convinced that the contradiction needs to be resolved in this case. While a finding of fact likely would have been necessary to establish a claim of ineffective assistance of counsel, I agree with the Applicant that the existence of a valid retainer it is not a prerequisite to a finding that there has been a breach of procedural fairness where evidence was not submitted or submissions were not made because of a reasonable but possibly mistaken belief that counsel was retained.

[18] The evidence before me establishes on a balance of probabilities that Mr. Hassan believed that DT was acting for him, and that this belief was reasonable in the circumstances. This finding is based not just on Mr. Hassan's affidavit evidence but also the following additional considerations:

- DT remained on the record as Mr. Hassan's counsel with the RAD. Although his assistant asserted that DT's office "did not send a single correspondence to the RAD indicating we were counsel of record for Mr. Hassan's redetermination file," she conceded that the RAD appears to have assumed that they were continuing to act for him. More telling is that she did not adduce any evidence to demonstrate that DT took the requisite procedural step to remove himself as counsel of record, either immediately after receiving the Federal Court decision remitting the appeal to the RAD for redetermination; or after receiving correspondence from the RAD around March 6, 2024, regarding the redetermination; or

after receiving further correspondence from the RAD on May 31, 2024, seeking submissions. Instead, DT remained counsel of record throughout, even receiving the RAD's June 26, 2024, redetermination decision. If DT was as clear as his assistant says he was that he was no longer acting for Mr. Hassan, it is reasonable to expect that he would have followed the process for removing himself as counsel of record set out in the *Refugee Appeal Division Rules*, SOR/2012-257:

19 (1) To be removed as counsel of record, counsel for a person who is the subject of an appeal must first provide to the person and to the Minister a copy of a written request to be removed and then provide the written request to the Division.

...

(4) Counsel remains counsel of record unless the request to be removed is granted.

- Although DT's assistant insists that Mr. Hassan was told on more than one occasion that DT was no longer his counsel, the Respondent adduced no evidence that this information was ever provided to Mr. Hassan in writing, nor is there evidence of a closing letter or final bill. More importantly, even if this information was told to Mr. Hassan as deposed, it does not follow that he necessarily understood the information. Mr. Hassan came to Canada as an unaccompanied minor and is still young; the evidence does not suggest that he is a particularly sophisticated or experienced litigant and I find the opposite is likely true. Mr. Hassan's sworn evidence is that he believed DT was representing him. That DT's assistant says she told him otherwise does not persuade me that he could not have held a mistaken belief to the contrary, especially considering that DT's name continued to appear as his counsel on correspondence he received from the RAD, and DT's assistant reached out to him to discuss that correspondence whenever it was received from the RAD.

- Following refusal of the redetermination, Mr. Hassan retained new counsel. New counsel emailed DT's office on his behalf to request "the updated submissions to the RAD" as well as "the June 10th submissions." While certainly not determinative, this at least suggests that Mr. Hassan was under the impression that DT had represented him on his RAD redetermination. There is no other obvious reason to instruct new counsel to make such a request to DT's office.
- Mr. Hassan waived privilege to allow DT to respond to his evidence about what happened. As I understand counsel's explanation, he provided that waiver to opposing counsel and allowed opposing counsel to obtain and submit the evidence from DT's office. He took a risk in doing that. Assuming Mr. Hassan was well-advised by his present counsel about the risks in taking this course of action, I see this as a sign of good faith by Mr. Hassan.

[19] The Respondent also argues that I should find there was no breach of procedural fairness because Mr. Hassan's new evidence included an alleged discrepancy and DT's assistant asserted in an email that "the changes in the NDP were not significant enough to make a difference on the RAD decision." I reject both of these arguments. If there is indeed a discrepancy in the new evidence, it is properly a matter for the finder of fact at the RAD to assess and weigh, not this Court. The views of DT's assistant, expressed in an after-the-fact email to new counsel, has no bearing on this Court's evaluation of whether the deprivation of an opportunity to make submissions about the NDP was procedurally unfair. The Applicant has established to the contrary that there were submissions to make that could have had an impact on the outcome of the appeal.

[20] I am also unpersuaded by the Respondent's submission that the Applicant's procedural fairness argument cannot succeed without an allegation of ineffective assistance by previous counsel. The argument is formalistic whereas the concept of procedural fairness is anything but. As the Supreme Court explained in *Baker*, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Baker* at para 21). The values underlying the duty of fairness "relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

[21] To evaluate Mr. Hassan's argument, I must assess whether a fair and just process was followed, keeping a sharp focus on the nature of the substantive rights involved and the consequences for Mr. Hassan (*Canadian Pacific Railway* at para 54). This requires taking into account the "Baker factors," namely (1) the nature of the decision being made; (2) the nature of the statutory scheme under which the decision is made; (3) the importance of the decision to the individual(s) affected; (4) the legitimate expectations of the party challenging the decision; and (5) the procedures followed by the decision-maker itself and its institutional constraints (*Baker* at paras 21-28).

[22] The question before me is whether these requirements were met in the case at bar, in light of the principle that Mr. Hassan must have the opportunity to put forward his views and evidence fully and have them considered by the decision-maker (*Baker* at para 22). I find that they were

not. Taking into account the nature of the substantive rights involved in Mr. Hassan's refugee appeal and the consequences for him of the dismissal of his appeal – which are clearly profound – as well as the other *Baker* factors and the high level of fairness owed to Mr. Hassan, I cannot accept that the decision under review was the result of a fair and just process. I must therefore set aside the decision of the RAD and remit Mr. Hassan's appeal for redetermination.

[23] Having made this finding, there is no need to address Mr. Hassan's further arguments about the reasonableness of the RAD's findings regarding the identity of the agents of persecution and the availability of an internal flight alternative, and I decline to do so.

[24] The parties have not identified a serious question of general importance for appeal, and I agree that none arises.

JUDGMENT in IMM-12352-24

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The decision of the Refugee Appeal Division dated June 26, 2024, is set aside and the matter is returned for redetermination by a different panel in accordance with these reasons.
3. No question is general importance is certified.

"Andrew J. Brouwer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-12352-24

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