

Federal Court



Cour fédérale

**Date: 20160506**

**Docket: IMM-8286-14**

**Citation: 2016 FC 515**

**Toronto, Ontario, May 6, 2016**

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

**BETWEEN:**

**IMTIAZ NASREEN AND IMITIAZ AHMED**

**Applicants**

**and**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**JUDGMENT AND REASONS**

[1] Presently under consideration is the November 24, 2014 decision (Decision) of the Refugee Protection Division of the Immigration and Refugee Board (RPD) vacating the refugee protection granted to the wife-and-husband Applicants on August 2, 2005. The Decision was rendered pursuant to s.109 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). By that provision, the RPD may, on an application by the Minister, vacate a decision to

allow a claim for refugee protection, if it finds that the decision was obtained as result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

[2] With respect to the names of the Applicants, there are original variations in the quotations in the present reasons for decision. The narration in these reasons follows the style of cause.

[3] By way of background, the August 2, 2005 oral decision granting the Applicants' claim for protection states the following underlying facts and key findings:

Mr. Imtiaz Ahmed, and his wife Nasreen Imtiaz, are citizens of Pakistan. They have requested Canada's protection due to a risk to their lives, and a risk of cruel and unusual treatment or punishment.

They allege that Mrs. Imtiaz was working as a mid-wife. She delivered the baby of an unwed mother, who turned out to be the daughter of the senior SHO of the local police station, and the niece of Molvi Goldar. They allege that they were warned not to say anything about this birth in order not to bring dishonour upon the unwed mother's family. They were subsequently detained and abused by the police, both as a warning to keep silent, and to also try to find out the whereabouts of the unwed girl, of which the claimants were ignorant. Subsequently, further threats were made against them and a false case was made against them implicating them in the possession and distribution of alcohol, which eventually resulted in a warrant for their arrest. They allege that should they return to Pakistan given that the charges were initiated by a senior police officer, they would not be able to obtain a fair trial, false witnesses can easily be produced, and they would suffer serious, if not fatal, consequences.

(...)

Credibility was the central element analysed by the Tribunal. Both adult claimants testified in a direct and straightforward manner. They provided details of the claim as requested. They both testified spontaneously and without exaggeration. Each of their testimonies was internally consistent as well as consistent with each other's testimony and the documentary evidence presented in this claim. The area that was somewhat confused was the dual purpose of the

contention at the police station. The Tribunal was satisfied with Mr. Ahmed's testimony in this regard.

Their identities are supported by several documents including a passport for Madam, a National Identity Card (NIC), Marriage Certificate and a Family Registration Certificate. They have also presented documents which confirm both the professional background of Mrs. Imtiaz and documents as well confirming their legal difficulties in Pakistan. While their case is unusual, it is, nonetheless, plausible in the context of Pakistan. The social mores and structure in Pakistan is known to the Tribunal both through the documentary evidence and the Tribunal's specialized knowledge.

(Certified Tribunal Record (CTR), pp. 270 – 271)

[4] A key feature grounding the Minister's s.109 application is the fact that in 2007, shortly after becoming permanent residents, the Applicants applied to sponsor their four children to Canada. In the course of the effort, they admitted that one of the children named in their claim for refugee protection was not their child but the son of the husband's brother. The admission caused the Minister to open an investigation of the identity details supplied by the Applicants when they made their protection claim.

[5] On September 18, 2012, the RPD granted the Minister's s.109 application to vacate the refugee protection granted. On judicial review of that decision, by an order dated April 16, 2014, Justice Roy set aside the RPD's decision and sent the matter back for redetermination on the direction that "a more systematic attempt at explaining the identification discrepancies should be made by the respondents and the applicants would be expected to provide a clear explanation of the circumstances surrounding their arrival in Canada on February 18, 2005" (CTR, p.119). The Decision under review is the RPD's s.109 redetermination.

[6] The argument in support of the present Application advanced two discrete issues in support of an order setting aside the Decision: whether in a pre-hearing discussion between the RPD Member (Member), Counsel for the Applicants, and Counsel for the Minister an Agreement was reached that a single issue of misrepresentation on the part of the Applicant wife, Nasreen Imtiaz, would be determinative of the s. 109 application; and whether, in reaching the Decision, the Member unfairly introduced and applied evidence.

[7] Immediately prior to the hearing of the present Application, Counsel for the Applicants filed a new argument: the Member lost jurisdiction to decide the redetermination because of the appearance of bias exposed during the pre-hearing discussion with Counsel. Against the objections of Counsel for the Minister, this argument was allowed to proceed.

## **I. Issues for Determination**

### **A. *Was there an Agreement?***

[8] This issue arises from paragraphs 1 to 4 of the December 19, 2014 affidavit evidence of Mr. Bruce Perrault, Counsel for the Applicants at the RPD hearing, filed in support of the Applicants in the present Application:

I, BRUCE PERREAULT, of the city of Toronto, province of Ontario, make oath and say as follows:

I. I was counsel of record in both the application to vacate a determination heard and decided in Montreal on September 28, 2012 and in the application to vacate a determination heard and decided in Toronto on November 27, 2014, as a

result of an Order of the Honourable Mr. Justice Roy dated April 16, 2014.

2. The Immigration and Refugee Board Panel Member [...] stated at the beginning of the proceedings that, should she find that the protected persons were British citizens, the application to vacate would be allowed and should she find that they were not British citizens, the application brought by the Minister of Public Safety and Emergency Preparedness to vacate a determination by which Nasreen Imtiaz and Ahmed Imtiaz were granted protected person status in Canada, would not [sic] be denied. [Emphasis added]

3. Both the Minister's Representative and myself agreed that this would be a fair premise to proceed upon.

4. The Member found that the protected persons were not British citizens, but, in making her decision, she failed to follow her own premise stated at the outset of the proceedings.

[Emphasis added]

(Applicant's Record, p. 65)

Counsel for the Minister argues that no such agreement was made. For the following reasons, I agree.

[9] The certified transcript of the pre-hearing conversation concerning the Agreement is as follows:

MEMBER: (...) This is a vacation application brought by the Minister on file number TB4-05495. The persons protected in this claim are Nasreen Imtiaz and Imtiaz Ahmed.

The panel has asked for a pre-hearing conference in order to clarify the issues in this matter here today. What I would like to talk to you both about is the issues that you've identified; particular [sic]

Madam Minister, I would like to hear from you about the misrepresentations that you're going to be relying upon in this application here today. So whenever you're ready, if you can just give me a quick run down of that, I'd be grateful.

MINISTER'S COUNSEL: Right, okay. Madam Member, we are relying on the same vacation application package that was filed and used in Montreal and in addition, my colleague in Montreal filed three new exhibits before the case got transferred to ...

MEMBER: Yeah.

MINISTER'S COUNSEL: ...Toronto. And then I filed the transcript of the first vacation ...

MEMBER: I got that.

MINISTER'S COUNSEL: ... hearing ...

MEMBER: Thank you.

MINISTER'S COUNSEL:...last week. Okay, so we have 19 exhibits now.

The misrepresentation that the Minister alleges the respondent committed is very simple. It's one misrepresentation, so it's whether or not she is a British citizen. We acknowledge that she admitted to having used a British passport when she came to Canada in 2005. So we're not saying that she ... that she failed to mention that she used a U.K. passport but we're saying that she failed to mention that she was the British citizen, the rightful holder of that passport because the clients are alleging that she did, indeed, use that passport but that she ... that it wasn't her passport, that she's not a British citizen.

MEMBER: Okay.

MINISTER'S COUNSEL: And we're saying that we've made a prima facie case based on the information and pictures that we received from the U.K. authorities, that she is this British citizen.

MEMBER: Okay.

MINISTER'S COUNSEL: And now our position is that we've made a prima facie case and now it's up to the clients and their counsel to rebut that case and they've attempted to do so at the last hearing; mainly based on their ... the client's testimony. And now they have filed further exhibits and so the member will have to

wait. The evidence that we received from the British authorities indicating that she is a British citizen and the evidence from the clients indicating that she's not and decision based on that.

MEMBER: Well, there is an issue, as well, whether I'm actually going to admit that evidence.

MINISTER'S COUNSEL: Which evidence is that, sorry?

MEMBER: The evidence provided by counsel. So what I would like to ask both of you is the following question. I'll ... actually, I'll ask you first. What about the male claimant? Do you submit that he's made any misrepresentations or is it purely the female claimant misrepresenting her citizenship?

MINISTER'S COUNSEL: I mean we're ... I guess we ... we rely on the same application which was he misrepresented his situation. Meaning he was married ... likely married to a British citizen and he should've disclosed that because if that were the case, then I mean it would have an impact on his claim as well. Especially based on the fact that his entire claim was based on hers.

MEMBER: Mm-hmm.

MINISTER'S COUNSEL: And so we believe they should be both vacated if the panel member agrees that the female respondent is a British citizen.

MEMBER: Do you have any response, counsel?

COUNSEL: Yes, Madam. I agree a hundred percent with my colleague here. The issue to be determined by you, with respect, is whether Nasreen Imtiaz is a British citizen. If she is, then she has, indeed, misrepresented herself. And also with respect, I ... you would ... would revoke the ... the original claimant's protection. And I believe that is the issue. In regards to the husband, I also agree that if he ... if she is a British citizen, she ought to have known it and he would fall with her, if I may use that wording. So the issue is, is she a British citizen?

(CTR, p. 609, Line 23 to p. 610, Line 48)

(...)

MEMBER: Okay. So let's then just talk briefly about the issues to be ... to be discussed here today. You're seeing the sole issue as whether Nasreen is a British citizen. We all agree that if she ... if

you can prove to me that she's a British citizen, that his case will fall as well?

COUNSEL: Yes.

MEMBER: Do you agree ...

COUNSEL: Absolutely.

MEMBER: ... with that?

COUNSEL: I do.

MEMBER: Okay.

MINISTER'S COUNSEL: And if I may, we were talking a little bit earlier as to whether, you know, I was going to question the ... both respondents at length and I am not because I feel like we've made a prima facie case; the evidence that was before the first panel is before this panel again, and I don't know if you've had a chance to read the transcript but all the questions, really, that the Minister could put to both clients have been put to them and they have answered and so our position is that it's now up to them to rebut the case and they have attempted to and failed at the first hearing but then that was taken to court. And now they have filed further evidence, so they may have, you know, they may want to ask further questions on that evidence. But the only new evidence that we filed, we feel, attacks the respondents' credibility even more, because now we have filed this affidavit, from the respondent, acknowledging that he lied about his son and that he provided a fake death certificate and all of that, so we just feel that this bolsters our case in the sense that it undermines their credibility ...

MEMBER: Mm-hmm.

MINISTER'S COUNSEL: ... even more and their testimony, at the first hearing, was the only rebuttal evidence that they have provided to rebut our case.

(CRT, p. 615, Line 17 to 48)

(...)

MEMBER: (...) So let's just deal with the disclosure in this matter. The problem is when you get a vacation file, it's got two items in it which makes life very, very confusing when you have to write something to identify the items. So I have prepared a consolidated



list of documents. I've got a copy for each of you. Okay? Thank you very much.

Now, sir, what I need from you is you're going to need to tell me why I should accept your disclosure and add it to the list.

COUNSEL: Why you should accept my disclosure?

MEMBER: Yes.

COUNSEL: Well, Madam, all I can tell you is that I ... these affidavits were prepared. I had no control over them, I must admit. And they were prepared and executed in Pakistan. I don't practice in Pakistan. I have to rely upon the people who swore them. And for you to ... to state that an affidavit, even for the probative value of them, the court cannot accept them, I think would be a very serious matter, in that you'd be saying or ruling that no affidavits from any country or particular, Pakistan, because of whatever, can no longer be accepted by the court here.

MEMBER: That's not what I'm saying, sir. This is a vacation application.

COUNSEL: Yes.

MEMBER: And the Minister is entitled to adduce new evidence in a vacation application but the only evidence that I can accept from the claimants is evidence that goes to the misrepresentation. And, in this case, we've agreed that the misrepresentation is whether Nasreen is a British citizen or not.

COUNSEL: And this, these affidavits go to whether or not there was misrepresentation. In fact, the affidavits talk about where she lived; where she was born; where ... you know, that she never left Pakistan.

(CRT, p.617, Line 28 to p.618, Line 12)

[Emphasis added throughout the quoted paragraphs]

[10] I find that the evidence quoted with respect to the Agreement does not support Mr. Perrault's understanding of what transpired during the pre-hearing conference. There is only evidence of an agreement that, if it were proved that Nasreen Imtiaz is a British Citizen, the

refugee protection granted to her and her husband would be vacated. There is no evidence of an agreement that, if it were proved that she is not a British citizen, the refugee protection granted to her and her husband would not be vacated. Indeed, the Member did not make a finding that Nasreen Imtiaz is not a British Citizen:

Surely, the United Kingdom has further evidence on the female PP than the limited documentation which the panel has before it, especially given that the female PP had arrived there in 1982, and been naturalized there in 1986, and allegedly was there until she arrived in Canada in 2005. The panel finds that the Minister has not provided all the evidence it received from the United Kingdom regarding Zahida Ahmed [the name on the British passport that Nasreen Imtiaz produced upon arrival in Canada in 2005]. The panel finds that the Minister did not disclose all the evidence it had before it regarding the identity and citizenship of the female PP, and the evidence it did provide was not persuasive. The panel finds that the Minister has not met its evidentiary burden in proving that the female PP is a citizen of the United Kingdom. The burden was on the Minister under this heading and the panel finds the Minister did not meet its obligations.

(Decision, para. 31)

[11] As a result, I dismiss the Agreement argument.

**B. *Was there evidence of the appearance of bias on the part of the Member?***

[12] Counsel for the Applicants argues that the Member lost jurisdiction to conduct the hearing of the Minister's s.109 application because of the appearance of bias exposed by comments made by the Member during the course of the pre-hearing discussion. To reach a determination on the argument requires the comments to be considered in the full context of the evidence advanced by the Minister and the conversation that transpired during the course of the pre-hearing.

[13] As to the evidence advanced by the Minister, the Minister's "Application to Vacate Refugee Protection" dated May 7, 2014 states as follows:

Following The Federal Court decision, dated April 16, 2014, to send the matter back for a redetermination by a different panel of the Refugee Protection Division of the Immigration and Refugee Board, the Minister informs you that he maintains the previous application dated September 12, 2011 and wishes to add the following: Exhibits M-16, M-17 and M-18 for a question of credibility.

(CTR, p. 386)

[14] The September 12, 2011 application cited the following ground:

We are of the opinion that respondent did not declare her real identity at the time of the first determination and that she did not mentioned [sic] the fact that she had also the British citizenship.

Respondent did not claim refugee status against the United Kingdom as requested by section 96 of IRPA.

We are also of the opinion that based on the above; respondent's claim was manifestly unfounded and had no credible basis.

(CTR, p. 309)

[15] The description of the documents added is noted in the May 7, 2014 application to vacate as follows:

M-16: Bilal's declaration – 2010, pages 52-54 (CTR, p. 389);

M-17: Imtiaz AHMED' [sic] declaration – 2010, pages 54-56 (CTR, p. 392); and

M-18: CAIPS / GCMS notes, pages 57-68 (CTR, p. 395 - 405)

(CTR, p. 388)

Thus, on the redetermination, the application for vacation was based on the British Citizenship misrepresentation issue, but the added evidence also introduced an issue of fraud.

[16] The added evidence provided by the documents above identified is stated in the Decision as follows:

The PPs [Protected Persons] sought to bring their four children to Canada in 2007, shortly after the PPs became Permanent Residents. There is further evidence submitted by the Minister which evidences the bureaucratic machinations involved in the sponsoring of the children. It appears that Canadian authorities had some concerns regarding the lack of credible evidence to establish the familial relationship between Bilal Imtiaz and the male PP. The authorities then received a telephone call indicating that fraudulent documents had been provided in support of the application for sponsorship. Canadian authorities at this point requested DNA evidence, which the male PP agreed to provide. Subsequent to this request, Canadian authorities were informed that Bilal had died. The death certificate was requested. After some cursory inquiries, this document was proven to be fraudulent. Subsequent to this information being received, a fax was received by Canadian authorities. This fax is characterized by the Minister as a 'poison pen' letter. This fax indicates that Bilal was not dead, that the male PP wanted to take him to Canada along with his children, but he had escaped. Furthermore, this fax stated that the male PP "takes helpless children to Canada on fake passports to sell them in Canada . . . he paid money to get DNA test positive for his daughter Sumeria etc." It was at this point that the male PP filed an Affidavit stating:

"I submitted an application to sponsor my children from Pakistan and I take full responsibility for including a fourth child, that was not my own, in the application.

The fourth child listed as my dependent in the application, Bilal Imtiaz, born on the 10th of September 1990 is in fact not my son but my brother's son."

The male PP's Affidavit then goes on to say that he is now frightened for his children in Pakistan as he used a ghost immigration consultant who is a Canadian citizen. This consultant

is responsible for murdering a Belgian police officer and two men in Pakistan, and this ghost consultant was taking funds from him and that he had an "inside" person at the Visa office in Islamabad who was looking after his file. The male PP then makes the following statement:

" ..I would like to have my children here before I go to the Canadian authorities to report the fact that this man and his wife obtained Canadian citizenship under false names."

He then admitted to the fraud he perpetuated in the application for asylum here in Canada, and requested that Canadian authorities issue visas to his children on an urgent basis.

[Footnotes omitted relating to the documents added as noted in the Minister's May 7, 2014 application]

(Decision, paras. 6 and 7)

[17] Already examined above is the discussion with respect to the Agreement. The exchange which took place immediately following that discussion concerned new evidence being relied upon by the Minister. The opening to the exchange immediately quoted below confirms that the added evidence documents were available to the Member and were read the day before the commencement of the hearing. With knowledge of the added evidence, the Member had questions and concerns to express to Counsel for the Minister and the Applicants. The individual comments made by the Member during the course of the pre-hearing discussion relied upon by Counsel for the Applicants to ground the bias argument are emphasised by underlining:

MEMBER: Now like [sic] me tell you what I noticed when I was painstakingly preparing this case yesterday. Let me tell you what my concern is. I am very concerned that the male claimant has attempted to traffic Imitiaz [sic] to this country who is not a relative of his. He ...

COUNSEL: I'm sorry, I didn't get that.

MEMBER: Okay, he ... did you get the disclosure from the Minister which indicates that this Imitiaz [sic] is not actually his son. Have you received that package of information, sir?

COUNSEL: Oh, you mean Bilal?

MEMBER: Bilal ... what ... is that Bilal is that the one?

MINISTER'S COUNSEL: Yes.

MEMBER: Bilal.

COUNSEL: Yes.

MEMBER: Okay, so male claimant makes a refugee application indicating that Bilal is his son.

COUNSEL: Yes.

MEMBER: Turns out Bilal is not his son.

COUNSEL: I agree.

MEMBER: There's evidence before the panel that the male claimant is involved in trafficking individuals to this country. I'm wondering why we haven't looked at the issue of 1F(b) [of the IRPA with respect to the commission of serious non-political crimes].

MINISTER'S COUNSEL: The evidence that we have in terms of the trafficking is basically a statutory declaration or a poison pen letter as we would refer to by this individual Bilal. And, I mean, we ... we have investigated the matter but a poison pen letter, in our opinion, is not enough evidence and counsel has filed ... I don't know if you have received it, a new affidavit from said Bilal saying he never wrote that letter. I don't know if you've seen that.

MEMBER: I'm sorry, counsel. I ... I have done tons of Pakistan, a bunch of affidavits. Are those people ready to testify over the phone today, about the content of those affidavits?

COUNSEL: They're not.

MEMBER: Yeah. So he represented, at the time he made the refugee claim, that he was the parent of somebody who he is not; with the specific purpose of bringing that person to this country. That strongly suggests to me that there is a crime being committed, that would raise the issue of 1F(b). Clearly, the two of you haven't

had the chance to think about the implications of that. I would like to hear from both of you about whether you think that that is a legitimate avenue to pursue or not. I understand you're probably going to need some time to do that. Are we going to be able to proceed here today, if I give you a little bit of time to think about that or no?

COUNSEL: Well, if I may, Madam.

MEMBER: Yes.

COUNSEL: The issue of parents. And now we're talking here, refugee claimants before the IRB, claiming that they have children that are not theirs. It's very well determined in the Federal Court. It does not go to whether or not the ... they should ... the vacation should occur, because they did that.

MEMBER: What case are you referring to, counsel?

COUNSEL: Well, I didn't ... I wasn't prepared to argue this but I have come across this a lot in my practice. I took over this case relatively a little while ago, in terms of ... of all of this. When I found this out about Bilal, it was I who sent to ... to the visa office, the affidavit saying Bilal is not his son. I insisted on that. But that does not go to whether or not these are legitimate refugee claimants. And consequently, really I don't think has any part in this particular hearing, as to whether or not Nasreen Imtiaz' thing should be vacated. That would be my argument.

MINISTER'S COUNSEL: Okay, my understanding is the panel's concern in terms of 1F(b) is the male respondent's possible involvement in child smuggling.

MEMBER: Yes.

MINISTER'S COUNSEL: Okay. Now I mean I ... correct me if I'm wrong, but the only evidence that we have, so far, in regards to that issue is this poison pen letter, which is unsigned, and allegedly filed by Mr. Bilal. Now counsel has filed an affidavit, allegedly done by Mr. Bilal, as well.

COUNSEL: It was certainly signed.

MINISTER'S COUNSEL: Signed this one, yes.

COUNSEL: And sworn.

MINISTER'S COUNSEL: But, I mean, we still can't know for sure whether he wrote it or not. And my understanding is the panel is not ready to accept that evidence. I'm just wondering if the panel is ready to accept the poison pen letter which is unsigned because that's the only evidence, in terms of human smuggling, that we have. Now we all agree and the respondent and his counsel have acknowledged that the respondent lied about this person being his son. But he says that this person is his brother's son and that he did not coerce him or he was not trying to ... he's basically denying the allegations that are in the poison pen letter and he's just saying that he ...

COUNSEL: That he's not a smuggler.

MINISTER'S COUNSEL: Exactly.

COUNSEL: Yeah.

MINISTER'S COUNSEL: That's ... or trafficking children is, I think, the word that was used. So he acknowledges that and I'm not sure if that's the serious crime or you're more concerned about the possible trafficking of children, as related to Bilal in his letter.

MEMBER: Quite ... quite frankly, I am concerned about the bona fides of these two people, obviously. We ... I think we're all in agreement that the issue of whether the female claimant is a British citizen is paramount importance, so let's put that as number one of our list of issues, okay? Is Nasreen a British citizen? Now, obviously this is not a re-hearing of the original claim but I am concerned about the poison pen letter, as you understand. Some affidavits from Pakistan, I mean, I guess that's probably the best you can provide as far as evidence goes. But...

COUNSEL: Well, I would think it's certainly far better than a poison unsigned letter.

MEMBER: But as we ... as we have discovered, your claimants have ready access to fraudulent documents, sir. They obtained a fraudulent death certificate for ...

COUNSEL: Yes.

MEMBER: ... Bilal. This diminishes the weight that I'm able to give any affidavits provided by them that are sworn in Pakistan, as you might imagine.

COUNSEL: Yes, and I would agree with you that many affidavits, unfortunately, done in certain countries are suspect. I ... I think we



can all agree on that. However, the issue of whether my client is a smuggler is something that really I have ... I have no doubt that that's not true. And it re-originate [sic] from ... from a person which we believe we know who is angry at him and wrote the letter; and was not the nephew Bilal, and Bilal responded.

MEMBER: Are you going to be asking him questions about that today? Is that part of your plan?

COUNSEL: I have a long list of questions to ask him. A long list of questions to ask her from the beginning to the end because I believe that this does come down to credibility as to who you believe. And I was not going to ask him about Bilal but one of the issues that you did bring up and maybe I should have considered and I ... I apologize if I didn't, is this issue of the affidavits from Pakistan; because it was a poison pen letter, I thought it would be met by an affidavit and in ... in your mind, it may not be and it may well be that we should be ... I should be calling Bilal.

MEMBER: Perhaps.

MINISTER'S COUNSEL: I mean clearly, we have all concerns with this letter because if what's in this letter is true, I mean this is a very serious matter. Now we have not been able, so far, to gather more evidence ...

MEMBER: Okay.

MINISTER'S COUNSEL: ... and in terms of 1F(b) the question would be whether he committed a serious political crime before he came here. So all that he filed afterwards in support of his PR application, the fake death certificate and all of that, would not...

MEMBER: Except for the fact that he included Bilal on his refugee application ...

MINISTER'S COUNSEL: Right, now ...

MEMBER: ... right?

MINISTER'S COUNSEL: Now what he did before his claim, as far as we know, is only including a fake child on the Personal...

MEMBER: Okay.

MINISTER'S COUNSEL: ... Information form. Now does that ... is that enough, does that constitute a crime? If the circumstances surrounding him including this child, are what is said in this letter,

that he basically kidnapped this child, I mean, then yes. But we don't have further evidence, so far ...

MEMBER: Okay.

MINISTER'S COUNSEL: ... and we're a little reluctant to rely on this letter to try to make a 1F(b) case.

MEMBER: Okay.

MINISTER'S COUNSEL: So that's ...

MEMBER: Okay.

MINISTER'S COUNSEL: ...that's our position.

MEMBER: Okay, that's fair. All right. So my only question for you then, Madam, is whether or not that would be the failure to indicate or ... let me rephrase this, so I'm totally clear. I just want to know whether the male claimant inclusion of Bilal, had you known at the time that he's not his son, would that ... would that have led to a possible consideration of 1F(b)? That's all I want to know, because that's something that would've been precluded from the original panel.

MINISTER'S COUNSEL: It would've ... I think it would've been more a concern of credibility.

MEMBER: Okay.

MINISTER'S COUNSEL: I mean obviously it is a crime to make false declarations ...

MEMBER: Yeah.

MINISTER'S COUNSEL: ... but would that have been enough to seek 1F(b) exclusion? I'm not really comfortable saying ...

MEMBER: Okay.

MINISTER'S COUNSEL: ... that it would have in all honestly [sic].

MEMBER: Okay, okay. That's fine. I appreciate your candour, thank you. Okay. Do you agree with what she says?

COUNSEL: I absolutely do, Madam, otherwise we'd have a lot of applications for vacation. Maybe we should but that's not what happens on a refugee case.

(CTR, p.610 to 615)

[18] In my opinion, it was entirely appropriate for the Member to fully prepare for the hearing of the Minister's application by reading the available file material in advance of the hearing of the Minister's application for vacation. In particular, it was important for the Member to be fully informed about the added evidence to be relied upon as a critical feature of the redetermination of the vacation application. As a result, it was important for the Member to understand the exact issues that would be raised during the course of the hearing and the pre-hearing conference was the most productive manner of doing so.

[19] In the course of learning the ambit of the issues, the Member was certainly entitled to express her questions and concerns to Counsel for the Minister and the Applicants in order to understand the positions that would be taken at the hearing. As is clearly evident from the transcript, the Member was transparent in asking questions and raising concerns so that both Counsel would have notice of issues identified by the Member, and the opportunity to confirm which issues would be addressed in the course of the hearing.

[20] Counsel for the Applicants relies upon the discrete comments emphasized in the passages quoted above to argue that the Member's impairing bias was exposed during the course of the pre-hearing conference. The following is the lead paragraph of Counsel for the Applicant's argument:

It is submitted that the questions the Member raised at the outset of the hearing, including branding the male person as having been engaged in "crime" and doubting 100% the provenance or reliability of any affidavits and documentary evidence from Pakistan and in fact indicating before the hearing that, "I am

concerned about the bona fides of these two people" all raise reasonable apprehension of bias.

It is submitted that she had already locked up her mind about what the decision should be. She had already determined before hearing the evidence that the applicants (here in Federal Court) were not credible and that whatever documents they provided, were also not credible. All that remained was post facto justifications.

(Applicants' Supplemental Memorandum of Facts and Argument (Applicants' Supplemental), paras. 26 and 27)

[21] As to branding Imitiaz Ahmed as having been engaged in "crime", his admission detailed in the added evidence that, in applying for refugee status he included a child, not his own, and represented the child as his own, certainly and properly fuelled the questions that the Member raised with Counsel. In my opinion, the Member was entitled to closely question Counsel for the Minister as to whether an argument would be made with respect the commission of serious non-political crimes pursuant to s. 1F(b) of the *IRPA*. An assurance by Counsel for the Minister that no such argument would be made alleviated this concern. There is no question that Imitiaz Ahmed's conduct had the potential of placing the bona fides of both Applicants in issue, and, in my view, it was important for the Member to have given notice that this was an issue. Counsel for the Applicants expressed an understanding of this concern.

[22] As an adjunct to the commission of crime issue, Counsel for the Applicants makes a submission which relates to the last comment in the Member's statement of the added evidence as quoted above in paragraph 16 of these reasons being: "[Imitiaz Ahmed] then admitted to the fraud he perpetuated in the application for asylum here in Canada, and requested that Canadian authorities issue visas to his children on an urgent basis". The submission is as follows:

It is submitted that reasonable apprehension of bias is also displayed when the Member finds as a fact that the male person admitted to having committed fraud in his evidence during his refugee claim when in fact there is no such admission of fraud.

(Applicants' Supplemental, para. 29)

[23] To the contrary, I find that the admission was most certainly on the record as follows:

I beg your forgiveness for the fraud that I committed in the application and I am requesting that you issue immigrant visas to my children as soon as possible, so that they are no longer exposed to any risks in Pakistan, where the above-mentioned ghost consultant now lives.

[Emphasis added]

(CTR, p. 393)

[24] As to the Member's comment about the Applicants' access to fraudulent documents in Pakistan, the Member clearly related experience with the issue, and Counsel for the Applicant agreed it is an issue. I find no evidence of bias in the exchange on this purely evidentiary point.

[25] Quite apart from advancing the Member's discrete statements out of context to support the bias argument, Counsel for the Applicants even goes to the length of advancing an argument of actual bias on the part of the Member:

It is submitted that fraud was now used as a crutch by the Member to anchor her decision, which has no basis in facts, when the Government failed to prove that Nasreen was a British Citizen.

(Applicants' Supplemental, para. 31)

I find that there is absolutely no evidence to substantiate what I find to be a spurious allegation.

[26] Counsel for the Applicants correctly cites the test: “what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude? Would [he or she] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly” (*Committee for Justice and Liberty v. National Energy Board*, [1978]1 S.C.R. 369). By addressing questions and concerns with Counsel at the pre-hearing conference, and considering the bias argument in its full evidentiary context, I find that the Member sought to ensure a fair and just result. I further find that there is no evidence of the appearance of bias on the part of the Member.

**C. Was the Decision rendered in breach of a duty of fairness owed to the Applicants?**

**(1) The arguments**

[27] The breach of a duty of fairness argument advanced upon the filing of the present Notice of Application relies upon paragraphs 5 to 10 of Mr. Perrault’s affidavit evidence:

5. In the written reasons of the decision, [the Panel Member] makes reference to matters that were not put forward by the Member during the proceedings, thus preventing both the Minister's Counsel and myself from commenting upon these matters.

6. In paragraph [54] of the decision the Panel Member indicated that, in concluding that the protected persons did not follow proper procedure to obtain Pakistani passports, the Member consulted the website of the Pakistani Diplomatic Missions in Canada.

7. The Member never brought this information to the attention of either the Minister's Counsel or myself.

8. Further, the Member relied on information dated 2014 from the website of the Pakistan diplomatic Mission in Canada.

9. This website did not exist at the time my clients applied for passports and it is not known whether at the time they applied the same rules and regulations were in force in connection with applying for a Pakistani passport.

10. At no time was either the Minister's Counsel or myself advised of the introduction of this information, which was used by the Panel Member in the decision making process.

11. This affidavit is sworn in support of an application to the Federal Court for leave and for judicial review of a decision of the Immigration Appeal Division and for no other improper purpose.

[Emphasis added]

(Application Record, pp. 65 – 66)

[28] In further argument, Counsel for the Applicants presents an ancillary argument with respect to relevance of the evidence as emphasised:

The member completely ignored the [British Citizenship] issue which was before the Board. She went on analyzing the 2005 and 2014 documents on Pakistan, which were not at issue before the Board, and which were of no concern to the minister [sic].

The Member's consultation of the 2005 and 2014 Pakistani documents on the face of these documents is unjustified and much of a pre-judgment. These documents were totally irrelevant to the disposition of the vacation hearing.

[Emphasis added]

(Applicants' Reply to the Respondent's Submissions on Relevance of 2015 & 2014 Document Packages, dated April 21, 2016, paras. 5 and 6)

**(2) The evidence relevant to the Applicants' arguments**

[29] Two evidentiary elements are important to consider: the evidence presented at the hearing of the Minister's application; and Justice Roy's reasons for decision and directions.

[30] As to the evidence presented during the hearing, Counsel for the Applicants' evidentiary fairness concern is about due notice being provided about information being introduced into the hearing record by the Member, and applied in reaching the Decision. Cogent evidence with respect to each of the four features emphasised is as follows.

[31] The resource "website" consulted in paragraph 6 of Mr. Perrault's affidavit was, in fact, the Refugee Board's National Documentation Package on Pakistan (NDP) dated March 14, 2014, which was placed into evidence as Exhibit 11 (see: CTR, pp. 437 - 462) during the course of the hearing of the Minister's vacation application:

MEMBER: Okay. I am going to have to ask some questions about the passport and I'm also going to be ... because I didn't have this evidence before today, I didn't know that I was going to need to be adducing the current NDP for Pakistan but I am going to be doing that. So I'm going to add that as item number 11. I'll provide you both with an index (see: CTR, pp. 437 - 448) ...

COUNSEL: I'm sorry.

MEMBER: ... when we come back.

COUNSEL: It was what?

MEMBER: The current national documentation package for Pakistan.

COUNSEL: Okay.



MEMBER: Okay? So I'm going to provide that when we come back because it ... it contains some information about passports, which I'm going to need to canvass it some.

[Emphasis added]

(CTR, pp. 654)

[32] And further as to the purpose of the NDP:

MEMBER: I'm just going to give you both a copy of the NDP, the recent one for Pakistan.

MINISTER'S COUNSEL: Thank you.

MEMBER: And I'm disclosing them to you only to deal with the identity documents, not for anything ...

COUNSEL: It's from a CIA?

MEMBER: No, it's the ... a national documentation package produced by the Board and I'm providing it to you just to deal with the identity issues.

(CTR, pp. 664 – 665)

[33] And further as to use made of the NDP during the hearing:

MEMBER: Are you going to be questioning either of them about this document, counsel?

COUNSEL: In terms ... you mean of the national identity documents?

MEMBER: That documents that he provided, are they provided to establish their identity at the original hearing? Are you going to be asking him about that?

COUNSEL: Well, the only question I have, really, is with respect, Madam, is your question that they only last for 10 years.

MEMBER: Mm-hmm.

COUNSEL: And that answer, I don't know. I tried to find out ... out over lunch time but I will be asking him if he is aware of how long they last.

MINISTER'S COUNSEL: Sorry, what was the question, for 10 years?

MEMBER: The NADRA, the identity ...

MINISTER'S COUNSEL: Oh, right.

MEMBER: ... card that. ..

MINISTER'S COUNSEL: Okay.

MEMBER: ... they only last for 10 years.

MINISTER'S COUNSEL: Okay.

COUNSEL: Yeah. That's really ...

MEMBER: That's the evidence that I have before me in the national documentation package about the identity cards from Pakistan.

COUNSEL: Yeah, I ... and I ... I ... I don't see that.

MEMBER: Well, that's because we don't provide the document, we just provide the list and that's part of the reason I've just provided the list to you. So there is a ... an ... an article in there about the national identity cards in Pakistan and you'll find that information in there.

COUNSEL: But they're only issued for 10 years?

MEMBER: Mm-hmm. They're only valid for between 5 to 10 years.

So are you ready to proceed with questioning him then, counsel?

COUNSEL: Yes, I am, I am.

MEMBER: Whenever you're ready.

COUNSEL: Okay, Mr. Imitiaz. When were you born?

(...)

(CRT, pp. 665 – 666)

[34] In paragraph 16 of the Decision, the Member identified Exhibit 11 as follows:

The panel disclosed the current National Documentation Package (NDP) for Pakistan but noted that it was only being used to assess the identity documents provided by the PPs, and not for the merits of the claim.

[35] Exhibit 11 lists under the heading “Identification Documents and Citizenship” document 3.1: “Requirements and procedures to obtain passport; multi-biometric electronic passports, including procedures for issuance within and outside the country, including Canada; manual passport procedures: Code PAK104250.E” (CTR, p.439); and includes Response to Information Request PAK104250.E, dated December 20, 2012 (CTR, pp. 449 to 453).

[36] Paragraph [54] of the Decision quotes directly from document Code PAK104250.E under heading “3. Manual Passport in Canada” (CTR, 451):

The panel was confronted with four Pakistani passports obtained here in Canada, which ostensibly establish the identities the PPs are asserting. The panel had to address the Pakistani passports provided by the PPs, as passports are prima facie evidence of identity and nationality. The panel notes at the outset that there is an RIR in the NDP on the issuance of Pakistani passports at the Consulate here in Canada. (Consolidated List of Documents, Item #11 at 3.1) It states:

"In order to obtain a new manual passport in Canada, citizens of Pakistan must submit the following documents to the nearest Pakistani mission:

- a completed application form;
- a photocopy of a document confirming applicant's status in Canada (Canadian passport, / Citizenship Card, Permanent Resident Card, Study Permit, or visa);
- three passport photographs;

- original Pakistani passport and a photocopy of the inside cover and pages 1, 2 and 3;
- original Pakistani National Identity Card and a copy (Pakistan n.d.d; *ibid.* n.d.e).

According to the website of the Pakistan Diplomatic Mission in Canada, manual passports will be issued only to holders of a CNIC, NICOP or CRC (*ibid.* n.d.d). If an applicant does not have one of these documents, he or she must apply for a NICOP at the time of submitting a passport application (*ibid.*). The processing fee for a manual passport is C\$66.00, and for urgent processing it is C\$175.00 (*ibid.*; *ibid.* n.d.e). Manual passports are processed within seven working days and urgent processing can be done in one working day (*ibid.*). Passport applications, along with required documents, fees and a self-addressed envelope can be mailed to the mission (*ibid.* n.d.d). According to the website of the Pakistan Diplomatic Mission in Canada, applicants are also interviewed and decisions to issue manual passports are made on a case by case basis (*ibid.*)."

The consulate here in Canada appears to have a clear process and protocol in place for the issuance of passports to Pakistani citizens in this country.

[37] As to Justice Roy's reasons for decision, the following passages of the reasons set out expectations to be met on the redetermination:

(...) Obviously, the issue raised before this panel of the RPD is that of the identity of the applicants. The decision of the RPD which was to be vacated found the following: "their identities are supported by several documents, including a passport from Madam, national identity cards, marriage certificate and a family registration certificate. They have also presented documents which confirm both their [sic] professional background of Mrs. Imtiaz and, documents as well confirming their legal difficulties in Pakistan." The panel that concluded that the initial decision had to be vacated never referred to that evidence nor, for that matter, the affidavit of March 21, 2005, about a month after the arrival of the

applicants, in which [sic] was disclosed that they had travelled on false documents.

Having reviewed the record carefully, heard the parties and reviewed the record again, I am still confused. The decision of the RPD did not assist in clarifying the situation.

In the circumstances, I conclude that the decision under review lacks the features required in order to conclude that it is reasonable. In my view, the matter has to be sent back for a redetermination by a different panel. A more systematic attempt at explaining the identification discrepancies should be made by the respondent and the applicants would be expected to provide a clear explanation of the circumstances surrounding their arrival in Canada on February 18, 2005.

(Emphasis added)

(CTR, pp. 117 – 118)

[38] In the Decision, the Member refers to Justice Roy's reasons as quoted, and in specifically acknowledging the direction that "a more systematic attempt at explaining the identification discrepancies" states the challenge to be met:

It is thus that the matter has landed before the RPD for a second determination of the vacation.

(Decision, para. 3)

[39] As to meeting the challenge, the Member states:

The panel has considered the direction of Mr. Justice Roy when he returned this matter to the panel. Noting that identity was the issue in the original vacation (...) [t]he Panel has done the questioning of the PPs and conducted this analysis as suggested by Mr. Justice Roy. This analysis leads the panel to the conclusion that the original claims must be vacated due to misrepresentation and presentation of fraudulent identity documents as genuine.

(Decision, para. 38)

**(3) Conclusions on the evidence**

[40] With respect to Counsel for the Applicants' ancillary argument, I find that the Member, as required, specifically followed Justice Roy's direction. The central issue on the redetermination was the identity of the Applicants. As a result, to determine the issue, the identification documents tendered by the Applicants in making their claim for protection were relevant, very much in issue, and required the careful attention the Member gave to them. On this basis, I dismiss the ancillary argument.

[41] As to the global unfairness argument, I find that the evidence establishes that Counsel for the Applicants was provided with due notice of the information being introduced by the Member, and how that information would be applied in reaching the Decision. I further find that the 2014 NDP was disclosed and applied in a transparent manner in the course of the hearing through the detailed questioning of the Applicants, resulting in well documented findings in support of the Minister's application (see: Decision, paras: 54 to 63). As a result, I give no weight to the argument of lack of knowledge.

**(4) The result of a failure to object**

[42] On the evidence, during the course of the hearing, including final argument (see: CTR, pp. 711 - 713), Counsel for the Applicants made no objection to the introduction of the information and how it would be used in the decision-making process.

[43] Of particular importance in the present case is that no objection was made to the introduction into the record of the 2014 NDP which, from the dialogue which took place as quoted above, could be easily understood as the cornerstone of evidence upon which the Member would rely in reaching the Decision. I find that, during the hearing, the Member provided Counsel for the Applicants ample opportunity to make a request for clarification, or to voice an objection to the 2014 NDP's use; none were made.

[44] Justice Stone's decision in *Yassine v. Canada (Minister of Employment and Immigration)* (F.C.A.) [1994] F.C.J. No. 949 provides an example of the result of a failure to object. In that case the applicant claimed refugee protection based on fear of persecution from a militia in Beirut, Lebanon. At issue was whether the Refugee Division breached the rules of natural justice by receiving information after the hearing going to establish that the militia concerned had left Beirut. Paragraph 7 of the decision addresses the failure to object to the introduction and use of the evidence:

It must also be noted that no objection was taken to the procedure that the Presiding Member adopted for receiving the additional information. That procedure consisted of a direction of November 20, 1990 that the Refugee Hearing Officer make copies of the material available to the appellant's legal counsel and of giving such counsel a period of two weeks within which to submit representations by way of "reply". That procedure was followed. No such reply was submitted. Nor did the appellant raise an objection of any kind as to this way of proceeding. That surely was the time to raise an objection and to ask the panel to reconvene the hearing, assuming that the information could not otherwise be received. The appellant was then in possession of all of the new information and was aware that the panel intended to take notice of it. Not only was no objection made at that time, which I would regard as the "earliest practicable opportunity" to do so (In re Human Rights Tribunal and Atomic Energy of Canada Limited, [1986] 1 F.C. 103 (C.A.), per MacGuigan J., at pages 113-14), the appellant remained silent until after the Refugee Division's

decision was released on April 18, 1991. Thus, even if a breach of natural justice did occur, I view the appellant's conduct as an implied waiver of that breach.

[Emphasis added]

**(5) The result of the failure to object in the present case**

[45] I find that the key circumstances in *Yassine* are parallel to the circumstance in the present case: Counsel for the Applicants had notice of the introduction and intended use of the 2014 NDP and no objection was made at the “earliest practical opportunity”, which would have been during the course of hearing or after, but before the Decision was rendered. As was the case in *Yassine*, in the present case no explanation was provided for not having made an objection.

[46] Thus, with respect to the present Application, I find that, even if a breach of the duty of fairness owed to the Applicants did occur, I view Counsel for the Applicants’ conduct as an implied waiver of that breach. As a result, I dismiss the fairness argument.

**II. Conclusion**

[47] For the reasons provided, I find that the Decision under review is reasonable because it is transparent, intelligible, and defensible in respect of the facts and law.



## JUDGMENT

**THIS COURT'S JUDGMENT is that** the present Application is dismissed.

Counsel for the Applicants proposes the following question for certification:

Does failure to object on the part of counsel in the circumstances where competence of counsel does not otherwise arise but in the circumstances where confusion due to sudden confrontation with an unexpected issue and akin to an ambush seems to be present or apparent, resulting in an irreparable injustice to the client, constitute a ground for reversal of the decision?

(Filing dated May 2, 2016)

Counsel for the Respondent provides the following argument opposing certification of the question proposed:

The Court of Appeal in *Liyanagamage v Canada (M.C.I.)* (1994), 176 N.R. 4 at paras. 4 to 6 sets out the principles governing certification of a question:

- (i) The question must be one that transcends the interests of the parties to the litigation and contemplates issues of broad significance or general application.
- (ii) The question must be dispositive of the appeal. The certification process is not to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of the case.
- (iii) The certification process is not to be equated with the reference process established by the *Federal Courts Act*.

The proposed question does not contemplate an issue of broad significance, nor does it transcend the interests of the parties. This case is fact specific and dependent upon a very unique set of circumstances. The Refugee Protection Division's (RPD) decision

was a factual determination and the litigation in this case is specific to the parties.

(Filing dated May 4, 2016)

I completely agree with Counsel for the Respondent's argument. As a result, I find that there is no question to certify.

"Douglas R. Campbell"

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Judge

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

**DOCKET:** IMM-8286-14

**STYLE OF CAUSE:** IMTIAZ NASREEN AND IMITIAZ AHMED v THE  
MINISTER OF PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 15, 2016

**JUDGMENT AND REASONS:** CAMPBELL J.

**DATED:** MAY 6, 2016

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