Federal Court  Cour fédérale

Date: 20180329

Docket: IMM-3777-17

Citation: 2018 FC 353

Toronto, Ontario, March 29, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SIRAJ AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of the August 11, 2017 decision of a delegate of the Minister of Immigration, Refugees and Citizenship Canada ("Delegate"), which found that the Applicant is a danger to the public and is therefore subject to removal from Canada pursuant to s 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

[2] Given the Delegate's failure to address the Applicant's request for cross-examination, I have determined that this application for judicial review must be granted.

Background

[3] The Applicant is a citizen of Pakistan. He came to Canada in October 1993 and claimed refugee status. On January 13, 1995 the Immigration and Refugee Board, Convention Refugee Determination Division ("IRB") found the Applicant to be a Convention refugee, he became a permanent resident on May 9, 1996. In 2010, following convictions for aggravated assault in 2000, drug trafficking in 2001 and conspiracy to import drugs in 2007, the Applicant was found to constitute a danger to the Canadian public. In 2013, a Minister's delegate reopened that danger opinion, based on new evidence, and confirmed the original decision. This Court quashed the 2013 reconsideration on August 28, 2015, and remitted the matter back for redetermination. The Delegate re-determined the danger opinion on August 11, 2017, finding the Applicant was a danger to the Canadian public and that removal would not violate s 7 of the *Charter of Rights and Freedoms* ("*Charter*").

Decision Under Review

[4] The Delegate first noted that s 115(2)(a) of the IRPA creates an exception to the protection otherwise provided to Convention refugees precluding them from being returned to a country where they would be at risk of persecution. The exception applies to persons who are inadmissible for serious criminality and who constitute, in the opinion of the Minister, a danger to the public in Canada. Subsection 36(1)(a) of the IRPA describes inadmissibility on grounds of

serious criminality. The Delegate described the circumstances surrounding the Applicant's conviction in 2000 for aggravated assault, his conviction in 2001 for six counts of trafficking a controlled substance (cocaine), his conviction in 2007 for conspiracy to import a controlled substance (heroin), conspiracy to traffic in a controlled substance (heroin), possession for the purpose of trafficking (heroin), possession of a controlled substance (cocaine) and possession for the purpose of trafficking (heroin) resulting in a 16 year sentence of imprisonment, his breach of probation, and other relevant evidence including a Parole Board decision of December 23, 2016, and a correctional plan dated March 31, 2017. Based on this evidence, the Delegate concluded that the Applicant was inadmissible for serious criminality. Further, that his criminal activities were both serious and dangerous to the public and found, on a balance of probabilities, that he represents a present and future danger to the Canadian public whose presence in Canada poses an unacceptable risk. As the Applicant has not challenged this finding in this application for judicial review, it is not necessary to address the Delegate's findings on this issue in greater detail.

[5] The Delegate then undertook a risk assessment, the purpose of which was to determine whether the Applicant, a Convention refugee, would personally face a risk of persecution, risk to life, or risk of torture, or cruel and unusual punishment if removed to Pakistan. This assessment was to be informed by s 115(1) of the IRPA and s 7 of the *Charter*.

[6] The Delegate summarized the Applicant's background, referencing the content of his 1994 Personal Information Form ("PIF"), in which he asserted he was at risk because of his membership in the Muhajir Qaumi Movement ("MQM"), and noted that the transcript of the

proceedings before the IRB indicated one of the Applicant's supporting documents was a Pakistani arrest warrant dated May 6, 1993. The Delegate also referenced the November 10, 2010 danger opinion ("2010 Danger Opinion") which concluded the Applicant did not face risk upon return to Pakistan because of his membership in the MQM. The Delegate also noted that a second danger opinion, dated October 23, 2013 ("2013 Danger Opinion"), considered new evidence, including a First Information Report dated January 5, 1990 ("1990 FIR") which indicated that the Applicant had been arrested for damaging public property, and again determined that the Applicant should be removed from Canada. Further, the 2013 Danger Opinion had been quashed by this Court in its decision of *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 1024 ("*Ahmed 2015*"). The Delegate quoted portions of that decision, which concluded that the delegate had exceeded his or her jurisdiction by not accepting the IRB's finding that the Applicant was a member of the Muhajir community and a member of the MQM and used this finding to deny the reconsideration request.

[7] The Delegate noted that a newspaper article from the Daily Ummat News ("Ummat News Article") and the 1990 FIR, which had been submitted with the Applicant's request for reconsideration of the 2013 Danger Opinion (and not the arrest warrant presented to the IRB by the Applicant in 1994 as part of his original claim for protection) had been sent to the Canadian Embassy in Islamabad – Risk Assessment Unit ("RAU") on April 21, 2017 for verification. The RAU responded on May 10, 2017 advising that the 1990 FIR was fraudulent and that it was the RAU's opinion that the Ummat News Article was likely fabricated. Further, that on July 12, 2017, the RAU clarified the methodology for verifying the 1990 FIR. The Delegate also set out portions of the submissions of Applicant's counsel, which included an assertion that the

disclosure of a document by the Canadian authorities for the purpose of determining its genuineness heightened the Applicant's risk.

[8] As to the assertion that the Applicant was at risk as a Shia Muslim, the Delegate found this was not supported by the record. This finding has not been contested on judicial review. Nor did the Delegate find a risk based on the Applicant being inadmissible to Canada due to his MQM membership. This was because the inadmissibility finding against the Applicant was based on his criminal convictions, not MQM membership. And, while the decision in *Ahmed 2015* is publically accessible, it does not refer to the Applicant's date of birth or find that he was inadmissible for being part of the MQM. Similarly, as had been explained to counsel by fax of July 13, 2017, the verification process did not include the police in Pakistan being provided with a copy of the fraudulent 1990 FIR bearing the Applicant's name. Thus, the notion that the Pakistani police would have confirmed that the 1990 FIR was fraudulent to spite the Applicant was groundless as was the notion that the verification put him at risk.

[9] The Delegate also did not accept that there was a risk to the Applicant based on his family's assertions that he and they were recently threatened and that the family were mistreated by the Tehreek-e-Taliban Pakistan ("TTP"), Pakistan People's Party ("PPP") and government sources. The Delegate noted that after being granted permanent residence status in 1996 the Applicant returned to Pakistan without incident on three occasions in the late 1990s, before losing his status due to criminality. This demonstrated that, despite the 1993 arrest warrant, his membership in the MQM and his periods of detention in 1989-1992, his case was no longer of serious concern to the authorities by the late 1990s. Further, his alleged fear as well as other

additional and ongoing fears of returning to Pakistan, including the murder of the Applicant's father, did not arise until the danger opinion process was initiated in 2009. Following the issuance of the 2010 Danger Opinion, the Applicant raised further new risk allegations including that his house had been burned in 2011 and his brother had been targeted by the TTP. These were supported by affidavits of family members in Pakistan, newspaper articles and the 1990 FIR. The Delegate afforded these additional assertions and documentation very little weight given the results of the RAU verification. Additionally, the Applicant's bondsman in 2013 noted a lack of family problems in Pakistan and the affidavits from the Applicant's family members appeared to have been written to support the Applicant's attempt to stay in Canada, rather than because his family is genuinely facing difficulties. The affidavits were also somewhat vague and contained information that differed as between themselves and with the Applicant's affidavit evidence in the record, which inconsistencies the Delegate described.

[10] The Delegate also found that the Applicant was not at risk based on his MQM membership. As the Applicant had been able to return to Pakistan in the late 1990s without incident this suggested that the outstanding 1993 arrest warrant was not an issue at that time. There was also little to suggest that he had a profile of significant concern to the Pakistani authorities given the passage of time since he had been politically active. While the documentary evidence showed Karachi to be politicized and violent, the MQM remains the largest political party in the city of 27 million inhabitants. Party members have been targeted in some instances, however, there was little evidence that the Applicant has been politically active in the MQM since coming to Canada 24 years ago. Further, the individuals who do experience ill treatment represent only a small minority of MQM members. Further, the anti-MQM violence

is largely a Karachi phenomenon and the Applicant may decide to relocate to a different city in Pakistan and the documentary evidence supported viable relocation options.

[11] As to the suggestion that the Applicant would be at risk upon return as a failed asylum seeker, upon review of the documentary evidence, which the Delegate set out, the Delegate found that Pakistan had changed its electronic database at least twice since the Applicant departed and there was insufficient evidence to suggest he would be flagged as a person of concern in either of the new systems. Nor did it appear that there is a standard interview procedure for returnees. And, whether or not he was identified as a MQM member or former member, mere membership in the largest party in Karachi would not appear to be a reason for detention upon arrival.

[12] The Delegate concluded that the Applicant will not personally face a risk to life, liberty or security of the person on a balance of probabilities if returned to Pakistan.

[13] Finally, the Delegate considered humanitarian and compassionate ("H&C") grounds put forward by the Applicant, including the Applicant's operation of a successful restaurant and letters of support from members of the community. The Delegate noted that the Applicant's entire family resides in Pakistan and that Correctional Services Canada had a concern the Applicant was using his business as a means to assist in conducting illegal activities. On balance, the Delegate found while the Applicant may be missed by his friends and will likely be upset at no longer being able to run his restaurant, there was insufficient evidence that he would experience any lasting consequences upon removal, and, he would likely be able to re-establish

himself in Pakistan. The H&C factors did not outweigh the danger that the Applicant posed to the Canadian public.

Issues and Standard of Review

[14] The issues in this matter can be framed as follows:

1. Did the Delegate breach procedural fairness by ignoring the Applicant's request to cross-examine the RAU officer?
2. Did the Delegate exceed his or her jurisdiction?
3. Did the Delegate make unreasonable findings on risk?

[15] The standard of review of correctness applies to questions of procedural fairness. Delegates are not afforded deference on that standard (*Barre v Canada (Citizenship and Immigration)*, 2017 FC 1091 at para 16; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[16] The reasonableness standard applies to questions of mixed fact and law, including issues of risk assessment (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153 at para 32 ("*Nagalingam* FCA"); *Kongolo v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 489 at para 15; *Cheikh v Canada (Citizenship and Immigration)*, 2017 FC 896 at para 11; *Omar v Canada (Citizenship and Immigration)*, 2013 FC 231 at para 33). On judicial review, when conducting a review for reasonableness, the court is concerned with whether there is justification, transparency, and intelligibility within the decision-making process and also whether the decision falls within a range of possible acceptable outcomes that are

defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*")).

Issue 1: Did the Delegate breach procedural fairness by ignoring the Applicant's request to cross-examine the RAU officer?

Applicant's Position

[17] The Applicant submits the Delegate breached the duty of procedural fairness owed to him by refusing him the opportunity for cross-examination, despite his formal request to do so, and by failing to provide reasons for the refusal. According to the Applicant, the Delegate relied heavily on internal documents to discredit the 1990 FIR and Ummat News Article.

[18] A Note to File – Verification results UCI: 2941-1297 ("Note to File") indicated the Delegate sent these documents to the RAU for verification and that the RAU found the 1990 FIR to be fraudulent and the Ummat News Article likely fabricated. When the Note to File was disclosed, the Applicant objected to reliance upon it and asserted that document disclosure to the Pakistani authorities increased the risk to the Applicant upon his return there. Subsequently, the Delegate disclosed the July 12, 2017 email ("July 12, 2017 Email") which described the verification process. Thereafter, counsel for the Applicant asserted a right to cross-examine the RAU officer to understand the process used to test the reliability of the information and determine whether the RAU officer's conduct resulted in a valid *sur place* claim.

[19] Despite raising these concerns, the Delegate accepted the RAU's findings without making a finding as to the reliability of the information. The reliability of the verification of the

1990 FIR is especially important because there is no national system to track FIRs and no systemic coordination between various police organizations at inter-provincial or inter-organizational levels. The Delegate failed to address the cross-examination request and dismissed the Applicant's allegation of risk arising from the verification of the 1990 FIR as groundless. In failing to at least provide reasons for refusing the cross-examination the Delegate breached the duty of procedural fairness (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 176 at paras 160-188, 200 ("*Nagalingam*")). The Applicant asserts that the right to cross-examination is part of the duty of fairness owed to an individual facing refoulement and, when that right is refused without reasons, the decision cannot stand.

[20] In reply, the Applicant adds that nothing in *Nagalingam* stands for the proposition that cross-examination ought to be considered only where a piece of information was the sole source of a decision-maker's findings (*Nagalingam* at para 179). Further, subsequent case law interpreting that decision has found that procedural fairness requires the right to cross-examination be afforded to a refugee claimant when confronted with testimony that is adverse to the claimant's position (*Rezmuves v Canada (Citizenship and Immigration)*, 2013 FC 973 ("*Rezmuves*")). Moreover, giving respectful attention to the reasons which could be offered in support of a decision is not a carte blanche to reformulate the decision under review in a way that casts aside an unreasonable chain of analysis in favour of the Court's own rationale for the result (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54; *JMSL v Canada (Citizenship and Immigration)*, 2014 FC 114 at paras 29-30). And, where a decision is completely silent on a critical issue, the Court cannot provide reasons

that were not given (*Lloyd v Canada (Revenue Agency)*, [2016] FCJ no 374; *Akhlaghi v Canada (Attorney General)*, 2017 FC 912).

Respondent's Position

[21] The Respondent submits that while the Applicant sought to cross-examine the RAU officer "to fully understand the process used so as to test the reliability of the information and to determine whether his conduct resulted in my client having valid *sur place* claim", it is evident that no *sur place* claim could possibly arise as no information identifying the Applicant was provided to the Pakistan authorities.

[22] In any event, there is no error in the Delegate not acceding to the Applicant's request to cross-examine the RAU officer. No set procedures are required and deference should be accorded to the tribunal in its choice of procedures (*Baker v Canada*, [1999] 2 SCR 817 at para 27). And while certain procedures have developed through legislation and jurisprudence that govern disclosure and fairness requirements in rendering a danger opinion, in the normal course these do not include rights associated with a formal tribunal, such as examination or cross-examining witnesses. In this case, the Applicant knew the case to be met.

[23] The cross-examination request could only have been aimed at attempting to question the reliability of the results of the RAU inquiry. However, the Delegate relied on numerous factors, not solely the fake 1990 FIR, to conclude the Applicant would not face a risk upon returning to Pakistan. These include: his prior returns to Pakistan in the late 1990s; an assertion by former counsel which was not supported by the evidence that these returns were permitted because of

the payment of bribes; the fraudulent Ummat News Article; the Applicant's bondsperson's testimony that the Applicant's family were not experiencing problems apart from those faced generally by all citizens of Pakistan; and, the vague and internally inconsistent affidavits from the Applicant's family members. Moreover, while the Applicant now argues that the 1990 FIR is unreliable, it was the Applicant himself who submitted the document as new evidence that was probative of his risk on return to Pakistan.

[24] The Respondent also distinguishes the jurisprudence relied upon by the Applicant, including *Nagalingam*, which involved a delegate who placed strong reliance on a single affidavit of a police officer which reflected his opinion based on hearsay evidence. Here, the Delegate relied on a plethora of evidence to find the Applicant did not face a risk on return to Pakistan. Moreover, the inquiry made to the Pakistani police was solely factual, being what details were contained in the 1990 FIR issued by that police station and held within its files. The Delegate reasonably relied on factual findings made by Canadian officials in Islamabad at the Delegate's request. Further, *Nagalingam* involved a delegate who referred to numerous sources without specifying which hearsay source bolstered the other sources, preventing the Court from assessing to what extent the delegate relied on the impugned affidavit.

[25] Although the Delegate did not provide explicit reasons for denying the cross-examination request, reasons do not have to include all the details that a reviewing court would prefer, nor was the Delegate required to make an explicit finding on each constituent element leading to his or her decision (*Construction Labour Relations v Driver Iron Inc*, [2012] 3 SCR 407 at para 3; *Antrim Truck Centre v Ontario (Transportation)*, [2013] 1 SCR 594 at paras 53-54;

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at para 16 ("*Newfoundland Nurses*")). Based on the evidence and the circumstances, the Delegate's implicit decision not to permit cross-examination was reasonable.

[26] The Respondent submits that the possibility of a *sur place* claim arising from the RAU verification of the 1990 FIR was fully answered by the further inquiry of the Delegate and the July 12, 2017 Email response received from the RAU, that no information about the Applicant was disclosed. While the Applicant asserts that this is "simply unbelievable", there is no evidence that might even raise a concern that a Canadian Immigration official with no interest in the matter is lying.

[27] The Respondent also submits the Applicant failed to request cross-examination in a timely manner, knowing the decision was effectively finalized.

Analysis

[28] By way of background, by letter dated November 14, 2012, former counsel for the Applicant wrote to the Canada Border Services Agency ("CBSA") requesting that the 2010 Danger Opinion be reconsidered. The request was stated to be based on new evidence and attached, in support of the request, various documentation. This included a statutory declaration of the Applicant dated August 23, 2012, with the Ummat News Article attached, as well as the 1990 FIR. Subsequent to the Applicant's successful application for judicial review of the 2013 Danger Opinion, CBSA provided disclosure of four documents to the Applicant by way of a

fairness and disclosure letter dated May 16, 2017 ("Fairness and Disclosure Letter"). This included the Note to File, the Ummat News Article, and the 1990 FIR.

[29] The Note to File states that on April 21, 2017 the 1990 FIR and Ummat News Article were sent for verification to the RAU and that on May 10, 2017 the following information had been received:

> 1 – The FIR
>
> "Based on our research and verifications conducted, we can confirm that the FIR submitted is fraudulent.
>
> The RAU confirmed the FIR No. 193/90 made to this Police station (S.I.T.E.) exists but is not related whatsoever to this document of subject."
>
> 2 – The article:
>
> "We found the below from our online media research:
>
> - There was unrest in Sindh province and in particular in Karachi during July 2011, following a statement issued by one of the Senior Ministers of the Pakistan People's Party (PPP) against the leadership of Muttahida Quami Movement
> - This civil unrest was a result of the agitation by members of the MQM, which included damage to and burning of vehicles and public property
> https://tribune.com.pk/story/209497/karachi-violence-tension-grips-city-after-mirzas-statements/
> https://tribune.com.pk/story/209408/mirza-calls-altaf-hussain-100-timesbigger/
> - South Asia Intelligence Review Log for July 2011 does not list anything similar to what has been mentioned in the provided news article
> https://www.satp.org/satporgtp/countries/pakistan/sindh/datasheet/karachi incident2011.htm
>
> These are the only traces we could find in relation to the subject, fires, the MQM, terrorist events/activities during this time period. Additionally, the RAU has concerns about the ease of which any person can pay for an advertisement or article to appear in

> Pakistani print media. This one in particular, in which the article is written, is not considered to be the most reliable or credible of news outlets. The RAU maintains its opinion that the information has likely been fabricated."

[30] On June 28, 2017 counsel for the Applicant provided a lengthy letter in response to the Fairness and Disclosure Letter. With respect to the RAU's finding that the 1990 FIR was fraudulent, counsel was of the view that no weight could be given to the RAU's opinion without any evidence as to how it was obtained and the reliability of the source of the information. Further, that counsel had not been provided with an opportunity to make submissions on the reliability of the information due to the lack of any disclosure. More importantly, it was not known how that information was obtained and, in particular, it was not known what information was provided in order to obtain the opinion. Counsel asserted that the fact that the Canadian authorities disclosed a document for the purpose of determining whether or not it was genuine undoubtedly alerted the Pakistani authorities to the fact that the Canadian authorities were making verifications about the Applicant, thereby heightening the risk to him. Counsel also asserted that the Delegate's disregard for the direction of this Court in *Ahmed 2015,* and the fact that the Delegate directed the further research be done allegedly to verify the information submitted in support of the refugee claim, gave rise to a reasonable apprehension of bias and the Delegate must recuse him or herself and the process be commenced afresh.

[31] On July 13, 2107 CBSA provided counsel for the Applicant with the July 12, 2017 Email which states:

> "We did the verification via telephone so a copy of the fake document was never provided to the police. I have also verbally confirmed with Raza that he only provided to the police the FIR number so they can pull its record. The police then provided Raza

> with the FIR details they had, which we then compared to the FIR we were asked to verify. Note that all FIRs have a unique number, and the number used in the fake document already existed for another record."
>
> *****
>
> "RAU contacted the SITE Police station via telephone and provided the FIR number (193/90) to retrieve the record, after consulting the official records of the Police Station S.I.T.E., the Moharrar (Record Keeper) provided the details of the FIR."

[32] By letter of August 10, 2017, counsel for the Applicant took the position that the method used by the RAU to verify the document was fraught with so many uncertainties as to make any information obtained completely unreliable and therefore it was unacceptable for the Delegate, at this point, to seek to challenge in this fashion the authenticity of the document. Counsel stated that he formally requested to be allowed to cross-examine the RAU officer "in order to be able to fully understand the process used so as to test the reliability of the information and to determine whether his conduct resulted in my client having a valid *sur place* claim". Counsel again asserted that the conduct of the Delegate gave rise to a reasonable apprehension of bias, and asked that the Delegate recuse him or herself.

[33] Attached to the August 10, 2017 letter was a statutory declaration of the Applicant dated August 9, 2017. With respect to the 1990 FIR and the finding by the RAU that it is fraudulent, the Applicant states that he has always maintained that the police in Pakistan were biased against him and he was not surprised that they would alter the information and try to cover up what happened to him and his family. He also stated that he has always been told that the 1990 FIR was authentic and has never had any reason to doubt this.

[34] In my view, the Applicant's request to cross-examine the RAU officer raised the question of whether, in the circumstances before the Delegate, the content of the duty of fairness required that the cross-examination be permitted. The difficulty with the Delegate's decision is that he or she simply did not address the request. No reasons were given to justify an implied refusal.

[35] In asserting that he has been denied procedural fairness, the Applicant relies heavily on this Court's decision in *Nagalingam*. That case involved the judicial review of a delegate's danger opinion finding that the applicant could be refouled as he was inadmissible pursuant to s 115(2)(b) of the IRPA. Under s 115(2)(b) a person can be refouled if they are inadmissible on grounds of security, violating human rights or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed or the danger to the security of Canada. There, the delegate was considering the nature and severity of the applicant's past acts and concluded that there were reasonable grounds to believe that the applicant had committed violent acts against rival gang members and his past acts were of substantive gravity.

[36] The disclosure package included a statutory declaration of a detective which provided a narrative overview of his involvement in a joint task force and the applicant's suspected involvement in gang activities (*Nagalingam* at para 13). The applicant challenged the delegate's finding as to the nature and severity of the acts committed and Justice Russell found that if the applicant had any grounds for his attack on that aspect of the decision it must lie in the sufficiency of the evidence used to support the conclusion that the applicant killed on behalf of the gang or the delegate's failure to allow the Applicant to test at least some of that evidence

through cross-examination of the detective (*Nagalingam* at para 158). The applicant had repeatedly requested that he be permitted to cross-examine a detective whose sworn declaration was key to the CBSA's case against him but his requests were ignored and no explanation was given as to why the request was not granted.

[37] Justice Russell referred to various authorities to the effect that any party is entitled to cross-examine any other party who gives evidence against him to test its truthfulness. Justice Russell concluded that, given the important interests at stake, including freedom from persecution and torture and the right to life, liberty and security of the person, s 7 of the *Charter* and the common law principles of natural justice required that the applicant be given an opportunity to test the evidence of the detective. The delegate had placed very strong reliance on that evidence for her finding that the applicant was involved in violent crimes, including acts of terrorism. At the very least the delegate was required to provide the applicant with clear reasons why procedural fairness in that case did not permit him to cross-examine the detective on his sworn declaration. Justice Russell found that the delegate used evidence surrounding serious charges that were never brought against the applicant to ground her s 115(2)(b) finding concerning the reasonable grounds to believe that the applicant had committed acts of sufficient gravity.

[38] In my view, it is of note that in *Nagalingam* the applicant sought to cross-examine sworn testimony that supported the delegate's reasonable grounds of belief:

> [168] This evidence included the homicide investigator's notes (which did not lead to a criminal charge against the Applicant), Detective Fernandes's sworn declaration and Ariyaratnam's statement. In my view, it was not inappropriate for the Delegate to

> rely upon this evidence, but she appears to have forgotten the procedural fairness issues that arise when someone wishes to challenge sworn testimony. As the Federal Court of Appeal made abundantly clear in *Nagalingam* FCA at paragraph 49, paragraph 115(2)(b) discretion must be exercised within the boundaries "imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter." These boundaries include the rules of procedural fairness applicable in this context. Simply put, procedural fairness required the Delegate to at least consider whether cross-examination of Detective Fernandes was required and to provide clear reasons for any refusal, which she did not.

[39] While the delegate stated she had no reason to question the detective's credibility, Justice Russell found that just because there was no apparent reason on the face of the record to doubt the detective's credibility, this did not mean that his credibility, and the value of the evidence he provided, would look the same if cross-examined. The purpose of cross-examination being to test and contextualize apparently credible and acceptable evidence.

[40] As to the respondent's position that s 115(2)(b) discretion does not require or involve an oral hearing and cross-examination, Justice Russell stated:

> [172] I can find nothing in the Act or Regulations to suggest that Parliament intended to exclude cross-examination in all instances, or that Parliament intended to exclude procedural fairness considerations that would require a delegate to consider the issue of cross-examination. At the same time, we have specific direction from the Federal Court of Appeal in *Nagalingam* FCA that the discretion under section 115 "must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian Society and the principles of the Charter." In other words, in my view, the rules of procedural fairness articulated in *Baker* remain very much a part of the process under section 115 of the Act.

[41] Justice Russell found it important that it could not be determined with certainty how the delegate relied on the affidavit and what role it played in her conclusion that the applicant was a gang enforcer, and:

> [179] Though it is not clear how extensively the Delegate relied on Detective Fernandes's affidavit, at the very least I cannot say that she placed no reliance on it, or his credibility, to bolster her conclusions. Given the interests at stake in this application – separating the Applicant from his family, for one – it is simply not safe to say that he did not need to cross-examine Detective Fernandes on his affidavit.
>
> …
>
> [188] To allow cross-examination on evidence submitted to the Minister's delegate does not involve turning that process into an oral hearing and importing criminal rules of evidence. It simply involves applying well-recognized principles of procedural fairness taken from administrative law. In my view, this would not necessarily require that cross-examination on affidavits be allowed in all cases (although it is difficult to conceive of a set of circumstances where it would be safe to disallow it when requested), but a delegate must consider the matter and provide reasons why it is not appropriate or reasonable on the facts. The Court must be able, on judicial review, to see that the delegate's refusal to allow cross-examination is within the range of possible, acceptable outcomes. There is no evidence before me that the Delegate did either of these things. Cross-examination might well have strengthened the evidence against the Applicant or it might have provided grounds to question Detective Fernandes' assessment and the evidence upon which it was based. We will never know. All we know is that someone made a decision not to allow cross-examination, and not to tell the Applicant, or the Court, why. This is not acceptable given the interests at stake, and Canada's obligations under the Convention.

[42] In my view, *Nagalingam* can be distinguished on a number of grounds. Most significantly, because this is not a case where an applicant seeks to cross-examine an adverse witness who has given affidavit or other sworn evidence. Rather, as part of the disclosure process the Note to File was provided to the Applicant. The Fairness and Disclosure Letter

stated that the Applicant was provided with a final opportunity to provide evidence and to make written representations. The Applicant did so by his counsel's letter of June 28, 2017. This pointed out that no information had been provided as to how the RAU obtained the information that the 1990 FIR was fraudulent and how reliable the source was. In the absence of this information, no weight could be afforded to the opinion. The potential *sur place* risk was also raised. In response to this concern, the Delegate disclosed the July 12, 2017 Email. Thus, unlike *Nagalingam*, the Applicant was not seeking to cross-examine on sworn evidence.

[43] Nor is it a situation where there was a statutory right of cross-examination. While the Applicant also relies on *Innisfil (Township) v Vespra (Township)*, [1981] 2 SCR 145, where the Supreme Court of Canada found that a municipal board erred when it refused to provide an opportunity to cross-examine a representative of a minister on a letter. However, this was because the statutes at issue combined to establish a clear code of rights which required an opportunity for an objector/appellant to meet by cross-examination the case being put against the appellant's position. That is not the circumstance in this case as the IRPA is silent on procedure and does not afford the Applicant the right to an oral hearing or of cross-examination.

[44] As to *Rezmuves*, also relied upon by the Applicant, there the applicants challenged the refusal of their application for refugee protection, in part, because the Refugee Protection Division ("RPD") refused a motion for disjoinder. The applicable sections of the *Refugee Protection Division Rules* did not define the scope of procedural fairness rights that a party before the RPD enjoys at common law, however, this Court found that the refusal of the disjoinder motion amounted to a violation of procedural fairness. This was because, in the

circumstances of that case, the husband and wife applicants were opposed in interest and, while the husband was questioned about his views on his wife's claim, she was not afforded the opportunity to cross-examine her husband.

[45] Justice Gleason held that procedural fairness required the right of cross-examination be afforded to a refugee claimant when confronted with testimony that is adverse to their position. She noted that cross-examination is fundamental to the truth seeking function of a court and relied on *Nagalingam* in support of her conclusion that the right of cross-examination ought to have been afforded and that the RPD had erred by relying on the husband's evidence to deny the wife's claim without providing her an opportunity to test his evidence. Such cross-examination was envisioned under the rules only if the claims had been disjoined. The RPD's refusal of the disjoinder request, and consequential denial of the right of the wife to cross-examine her husband, therefore violated the applicants' procedural fairness rights, resulting in the decision being set aside.

[46] In this case, the RAU officer is not a party to the proceeding, there is no disjoinder issue, no statutory right to an oral hearing or cross-examination on disjoinder and the Applicant does not seek to cross-examine sworn evidence or testimony.

[47] Although not referenced by the submissions of either party, Immigration, Refugees and Citizenship Canada publishes a policy manual on danger opinions entitled "ENF 28 Ministerial opinions on danger to the public, nature and severity of the acts committed and danger to the security of Canada". This sets out the policies and procedures respecting ministerial danger

opinion reports, providing functional guidance and direction to those involved in the decision-making process and the issuance of danger opinions. As to procedural fairness, ENF 28 states that the decision-making process for a Minister's opinion must adhere to the principles of procedural fairness. The person concerned must be fully informed of the case and be given a reasonable opportunity to respond to any information the decision-maker will use to arrive at a decision. A copy of all documentation that will be put before the decision-maker must be provided to the person concerned. This would suggest that the required content of the duty of procedural fairness involves full disclosure so that the person will know the case they must meet and a right of reply to that disclosure (*Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 35 ("*Bhagwandass*")). However, the Delegate makes no reference to this or any other policy guidelines.

[48] And, while the Applicant's submissions addressed *Nagalingam*, the Delegate did not. The Delegate essentially dealt with the 1990 FIR in one paragraph which did not address the request for cross-examination:

> ***Risk based on the Canadian Embassy in Islamabad disclosing the fraudulent First Information Report to Pakistan police***
>
> It was explained to Counsel by fax on July 13th that the verification process did not include police being provided with a copy of the fraudulent document which included Mr. Ahmed's name. The notion that the police would have confirmed that the FIR is fraudulent to spite Mr. Ahmed is therefore groundless as is the notion that the verification process put Mr. Ahmed at risk.

[49] It is true that the 1990 FIR was only one aspect of risk upon return considered by the Delegate. And, unlike *Nagalingam*, it was not the key piece of evidence which was relied heavily upon by the Delegate in reaching his or her risk assessment conclusion. However, the

Delegate noted that after the 2010 Danger Opinion was issued the Applicant raised further new risk allegations indicating that his family's home had been burned in 2011 and his brother had been targeted by the TTP. Those assertions were supported by affidavits of his family members, newspaper articles and the 1990 FIR. The Delegate gave those additional assertions and documentation very little weight because of the RAU verification. The Delegate also gave the new allegations very little weight because of the bondsman's statement and because the family members' affidavits were vague, conflicting, and did not seem to have been written to demonstrate that his family was facing difficulties. While there was reliance on the verification to the extent that its findings did not support the further new risk allegations, that information was not discounted solely on the basis of the verification.

[50] I also agree with the Respondent that even if the RAU officer were cross-examined, many of the questions posed by Applicant's counsel seem to have little relevance to the reliability of the information provided – and therefore the authenticity of the document – and are questions the RAU officer would not be in a position to answer. These include asking whether the call was made from the embassy and the call's duration. Counsel also asked, if there are different FIRs at different stations, how could the RAU officer be sure he placed the call to the right station. However, the 1990 FIR itself, as provided by the Applicant, identified the police station (S.I.T.E.) and this station was referenced as contacted in both the Note to File and the July 12, 2017 Email.

[51] However, neither these nor any other reasons were offered by the Delegate to explain why the requested cross-examination was neither required nor necessary.

[52] As to the potential for a *sur place* claim, the Delegate pointed out that the July 12, 2017 Email confirmed that the verification process did not include the police being provided with the fraudulent 1990 FIR or the Applicant's name. I agree with the Respondent that this differs from the situation in *Nagalingam* as the inquiry made to the Pakistan police was factual in nature, the source of the response was disclosed, and the reasons why the RAU found the 1990 FIR to be fraudulent were clear. However, it is also clear that the Delegate relied on the verification report and further explanation of the RAU, in concluding both that the 1990 FIR was fraudulent and, more significantly, that the verification process did not put the Applicant at risk.

[53] Although it may well have been open to the Delegate to refuse to allow the requested cross-examination of the RAU officer because the communications were not sworn evidence or because the duty of fairness required only disclosure of the verification information and a right of reply, or because she was entitled to and accepted the reliability of the RAU officer's information, or for other reasons, the Delegate simply did not address the explicit request for cross-examination and gave no reasons for the implicit refusal, even though the Delegate clearly relied on the verification to dismiss as groundless the potential *sur place* claim and, to some extent, to afford little weight to the new risk allegations.

[54] As to the latter point, as the Respondent points out, the Delegate did not use the 1990 FIR to discredit the IRB's prior findings but could have afforded the document little or no weight, when assessing the allegation of new risk, on the basis that it was not consistent with the evidence that was accepted in his PIF and before the IRB. Again, however, the Delegate did not do this, it is merely a suggestion of the Respondent.

[55] In my view, given the serious impact on the Applicant of the s 115 decision, the Delegate was required to at least explain why the Applicant was not afforded the requested cross-examination and why the Delegate was satisfied with the reliability of the RAU verification and explanation as to its methodology. This corresponds with the high level of procedural fairness associated with a danger opinion, which is "adversarial from the outset and remains so until its conclusion" (*Bhagwandass* at paras 31-32). To simply ignore the request gives rise to a potential breach of the duty of fairness owed. Further, the complete absence of reasons explaining why the cross-examination was not required was unreasonable as it leaves the Court to speculate and rationalize as to the basis of the implied refusal (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at paras 25-28; *Newfoundland Nurses* at para 22). As stated by the Federal Court of Appeal's decision in *Lloyd v Canada (Revenue Agency)*, [2016] FCJ No 374 at para 24:

> In light of the adjudicator's findings, even on a generous application of the principles in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the basis upon which the 40-day suspension was justified cannot be discerned without engaging in speculation and rationalization. As I noted in *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431, at para, 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[56] In conclusion, the failure to address the request for cross-examination gave rise to a potential breach of procedural fairness. Further, the complete absence of reasons for the implicit refusal of the request to cross-examine the RAU officer renders the decision unreasonable as it results in an absence of justification, transparency and intelligibility within the decision-making process (*Dunsmuir* at para 47).

Issue 2: Did the Delegate exceed his or her jurisdiction?

[57] The Applicant submits the Delegate erred by going behind the Applicant's refugee determination in order to disprove elements of his claim that were essential to the initial grant of refugee protection and, by doing so, the Delegate exceeded his or her jurisdiction. This was precisely the situation in *Ahmed 2015* which resulted in this Court remitting the 2013 Danger Opinion back for reconsideration and the Applicant submits that the error has now been repeated. In this case, the Pakistani government laying false criminal charges against the Applicant due to his political activity was essential to his refugee claim. The Applicant submitted a 1993 arrest warrant to the IRB, the issuance of which was due to his political affiliation. The IRB found the Applicant credible as a whole and granted Convention refugee status. Despite this finding, the Delegate attempted to discredit the 1990 FIR which spoke to the same matters as were before the IRB, a history of false criminal accusations due to political activity. As such, the Delegate exceeded his or her jurisdiction through re-assessing key elements of the Applicant's refugee status. In addition, the Applicant alleged that the Delegate was biased and should recuse his or herself, yet the Delegate did not acknowledge or address this in his or her reasons. The failure to explain why the requested recusal was apparently denied gives rise to a further breach of procedural fairness.

[58] In my view, the argument that the Delegate exceeded his or her jurisdiction is without merit. In *Ahmed 2015*, Justice O'Keefe noted that the delegate found, based on a language that the Applicant speaks, that this decreased the weight of the Applicant's submission that he is a member of the Muhajir community. This indicated to Justice O'Keefe that the delegate disagreed with the IRB's finding as to the identity of the Applicant as a Muhajir and a member of the MQM. Justice O'Keefe stated:

> [56] In my view, the delegate exceeded his or her jurisdiction by not accepting the IRB's finding that the applicant was a member of the Muhajir community and a member of the MQM party. The delegate then used his finding to deny the applicant's request. I find that this was unreasonable and as a result, the decision must be set aside and returned to a different delegate for reconsideration. I have no way of knowing what the conclusion of the delegate would have been had the delegate accepted the finding of the IRB.

[59] That is not the circumstance here. The Delegate explicitly stated that he or she accepted that the Applicant was found to be a refugee in 1995 which meant that the Delegate was also bound by the IRB's findings of fact. Specifically, that the Applicant is an ethnic Muhajir, that he was a member of the MQM, and was detained by police due to his involvement with the MQM on more than one occasion in the early 1990s.

[60] Further, and significantly, the 1990 FIR was not before the IRB when it granted the Applicant refugee status in January 1995. Thus, it was not a factor that the IRB considered in reaching its decision. Rather, the 1990 FIR is new evidence submitted by the Applicant in support of the 2013 Danger Opinion reconsideration. And while the arrest warrant was in evidence before the IRB, the Delegate did not send that document for verification or make any finding which suggested that the Delegate did not accept its content or validity or failed to accept

the findings of the IRB as to the Applicant's status as a refugee. The Delegate did not remove or alter that status by his or her reasons (*Nagalingam* FCA at paras 42-43) and verifying the accuracy or authenticity of new evidence submitted in support of new allegations of risk which were not before the IRB did not cause the Delegate to exceed his or her jurisdiction.

[61] As to the allegation of a reasonable apprehension of bias, this was raised by counsel for the Applicant in his June 28, 2017 and August 10, 2017 correspondence. There, it was asserted that the Delegate's conduct, by disregard of the direction of this Court in *Ahmed 2015* and the verification of the 1990 FIR and Ummat News Article, gave rise to a reasonable apprehension of bias.

[62] As I have found above, there is no merit to the allegation that the Delegate exceeded his or her jurisdiction and, in my view, it was open to the Delegate to seek to have the new evidence submitted by the Applicant in support of his alleged new risk verified for authenticity. Doing so does not support an allegation of bias. Determining if a reasonable apprehension of bias exists involves asking "what would an informed person, viewing the matter realistically and practically- and having thought the matter through" would conclude that bias exists (*Committee for Justice & Liberty v Canada (National Energy Board),* [1978] 1 SCR 369 at pp 394-395). Further, the threshold for finding a reasonable apprehension of bias is high and the onus lies with the person alleging its existence to rebut the presumption of impartiality (*Zündel v Citron,* [2000] 4 FC 225 at para 36, citing *R v S (RD),* [1997] 2 SCR 484). In my view, the Applicant has not established the existence of a reasonable apprehension of bias in these circumstances.

[63] However, as the allegation of bias was made by the Applicant the Delegate could not simply choose to ignore it (*Bongwalanga v Canada (Minister of Citizenship and Immigration)*, 2004 FC 352 at paras 15-16; see also *Bajwa v Veterinary Medical Assn (British Columbia)*, 2011 BCCA 265 at paras 23-24, citing *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14). Accordingly, had I not been able to address this issue on the merits, the failure to address the issue could also have been a reviewable error.

[64] Given my findings above it is not necessary for me to also consider the reasonableness of the Delegate's findings on risk.

[65] With some considerable reluctance given its long history, I conclude that the matter must be remitted back to another delegate for reconsideration taking into consideration my reasons in this decision.

JUDGMENT IN IMM-3777-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the Delegate is set aside and the matter is remitted for redetermination with attention to these reasons;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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