

Federal Court



Cour fédérale

**Date: 20190228**

**Docket: IMM-3392-18**

**Citation: 2019 FC 251**

**Toronto, Ontario, February 28, 2019**

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

**BETWEEN:**

**MD. KAISER MALLICK RAJ  
(A.K.A. MD. KAISER MOLLICK)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This application judicially reviews a negative refugee protection decision, which the Applicant challenges first on a procedural, and second on a substantive ground – namely that the Refugee Protection Division [RPD, Board] failed to (i) appoint a designated representative, and

(ii) consider all the evidence presented. For the reasons that follow, I agree that this judicial review should be granted.

[2] The Applicant, a citizen of Bangladesh, fears persecution based on his father's perceived political opinion. I briefly summarize his story below.

[3] The young man moved with his family from Bangladesh to Qatar in 2001, where he resided for a decade before returning to visit his homeland in 2012.

[4] While there, the Applicant claims he was kidnapped, beaten and tortured by armed supporters of thugs related to a local member of parliament [MP], and only released after his father paid a significant ransom. He states that this extortion occurred due to his father's perceived support for another candidate in the elections.

[5] The Applicant went to see a doctor after the kidnapping in Bangladesh. He returned to Qatar shortly afterwards, suffering significant effects which he continues to experience to this day.

[6] In 2013, the Applicant's mother left Qatar and entered Canada on a student visa, and the Applicant's sister entered Canada as the mother's dependant. However, the Applicant was over the age of dependency at that time, and remained in Qatar with his father. In 2016, his father was granted a spousal work permit, and joined his wife and daughter in Canada. The Applicant ultimately made his way to Canada, claiming refugee protection in 2016. The following year, he

was diagnosed with schizophrenia and major depressive disorder. He has also been diagnosed with an intellectual disability and a learning disorder.

II. Decision under review

[7] The RPD found the Applicant's testimony generally credible and accepted as true that he was the victim of a kidnapping while visiting Bangladesh in 2012. However, the Board found that the Applicant's responses regarding his agents of persecution and the motive for the kidnapping had not been established as more than speculation.

[8] Prior to the hearing, the Applicant's representative (an immigration consultant) requested that the Applicant's mother or father serve as his representative, i.e. give evidence on his behalf, due to his mental and intellectual conditions.

[9] The Board rejected this request, after determining through a few initial questions, and observations of the Applicant in responding, that the Applicant was able to understand the nature of the proceedings.

[10] As for the claim itself, the Board found insufficient evidence that the MP in question, Shamim Osman or his supporters, kidnapped the Applicant, in large part due to the non-credible testimony of the Applicant's father, who claimed the attack occurred because he neither voted for, nor financially supported, the MP.

[11] Ultimately, the Board refused the Applicant's claim, citing his failure to establish that his kidnapping was politically motivated, and thus had no nexus between allegations and the Convention grounds. Rather, it found the kidnapping to be a random crime, which the evidence showed to be prevalent in Bangladesh, and therefore any risk in return would be general, rather than particular, to the Applicant.

### III. Standard of Review

[12] Both parties assert this Court should review the first issue on a reasonableness standard; however, the administrative law standard is more nuanced than either party would have it.

[13] A correctness review applies, but only to the Board's interpretation of the law, which lies in section 167 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], as well as Rule 20 of the *Refugee Protection Division Rules* SOR/2012-256 [RPD Rules]. However, the deferential standard of reasonableness applies to the Board's assessment of whether an applicant can appreciate the proceedings, based on the testimony at the hearing (*Ramirez Vela v Canada (Citizenship and Immigration)*, 2013 FC 1232 at paras 9–10).

[14] Both parties to this litigation agree, as do I, that the reasonableness standard also applies to the second, substantive issue regarding whether the Board erred in its assessment of whether the Applicant met the legal requirements of a refugee under sections 96 and 97 of the Act (*Da Silva v Canada (Citizenship and Immigration)*, 2019 FC 209 at para 14).

### IV. Analysis

A. *Did the Panel err by failing to permit the Applicant to have a designated representative?*

[15] Rule 20(5) of the RPD Rules provides as follows:

<b>Factors</b>	<b>Éléments à considérer</b>
<p>(5) When determining whether a claimant or protected person is unable to appreciate the nature of the proceedings, the Division must consider any relevant factors, including</p>	<p>(5) Pour établir si le demandeur d’asile ou la personne protégée est en mesure ou non de comprendre la nature de la procédure, la Section prend en compte tout élément pertinent, notamment:</p>
<p>(a) whether the person can understand the reason for the proceeding and can instruct counsel;</p>	<p>a) la capacité ou l’incapacité de la personne de comprendre la raison d’être de la procédure et de donner des directives à son conseil;</p>
<p>(b) the person’s statements and behaviour at the proceeding;</p>	<p>b) ses déclarations et son comportement lors de la procédure;</p>
<p>(c) expert evidence, if any, on the person’s intellectual or physical faculties, age or mental condition; and</p>	<p>c) toute preuve d’expert relative à ses facultés intellectuelles, à ses capacités physiques, à son âge ou à son état mental;</p>
<p>(d) whether the person has had a representative designated for a proceeding in another division of the Board.</p>	<p>d) la question de savoir si un représentant a déjà été désigné pour elle dans une procédure devant une autre section de la Commission.</p>

[16] The Applicant submits that the RPD erred when it did not allow the Applicant to designate a representative, pursuant to factors (a) and (c) of Rule 20(5), as the evidence shows his inability to instruct counsel independently and without the assistance of his parents, given his well-documented medical and intellectual conditions of a major depressive disorder,

schizophrenia, an intellectual disability and a learning disorder. The Applicant asserts that the RPD's failure to designate a representative hampered his ability to have his case presented accurately before the Board.

[17] The Respondent counters that the Board reasonably found that it was not necessary to designate a representative as it allowed his parents to testify as witnesses on his behalf. The Respondent further counters that the Applicant has not challenged the finding that he was found to be able to appreciate the nature of the proceedings which is determinative to dismiss his arguments.

[18] In its decision, the RPD found that "the claimant was not in any way prejudiced based on the fact that he was asked to give testimony in his claim." The RPD further stated that it did "not believe that additional accommodations would have made a difference, with respect to his ability to deliver testimony." The RPD weighed the expert medical evidence including that of psychiatrists, which did not explicitly state that the Applicant's intellectual or physical faculties were impaired such that he would not be able to testify in the proceeding before the RPD.

[19] In my view, the RPD erred in two respects even though I do not find it breached procedural fairness, having correctly identified the law. Rather, the two weaknesses lie in its interpretation of that law.

[20] First, the RPD erred by unreasonably only analysing the first factor in Rule 20(5)(a) which asks "whether the person can understand the reason for the proceeding" while not

analysing the second part of that factor, which reads “and can instruct counsel”, including what appears evident from the Board’s requests for the Applicant not to look to his father or his immigration consultant for assistance. I agree with the Applicant that there evidence that he may not have been able to properly instruct his representative.

[21] The Applicant’s representative requested assistance for his client both at the opening of the hearing, when he cited the Applicant’s “serious mental problem” and referred to evidence on the point, and then after the hearing, more expansively in written submissions. I note that Rule 20(5)(a) is conjunctive, in that it requires the Board to consider “whether the person can understand the reason for the proceeding, and can instruct counsel”.

[22] Second, the Board erred with respect to another of the factors, namely that outlined in Rule 20(5)(c) regarding the need to consider expert evidence. Specifically, the Board limited its assessment to the Applicant’s major depressive disorder and schizophrenia spectrum psychotic disorder diagnosis and evidence, yet failed to mention or address the evidence concerning the intellectual disability and learning disorder mentioned in the medical evidence. To quote the Board, her decision notes “the diagnosis of Major Depressive Disorder and Schizophrenia Spectrum Psychotic Disorder was considered”. Yet a Toronto-based doctor notes that the Applicant’s “insight and judgment were limited”, in speaking to his intellectual disability and learning disorder.

[23] In only mentioning psychological and psychiatric conditions – and medication – but not any of the intellectual disabilities, I find that the Board failed in its obligation to address all the

evidence relative to the legal test stipulated in Rule 20(5) which states that the Board must consider “expert evidence, if any, on the person’s intellectual or physical faculties, age or mental condition”.

[24] By specifically addressing the reports relating to the Applicant’s mental condition, but not his intellectual faculties, the Board overlooked key evidence that the law mandates must be addressed.

B. *Was the remainder of the Board’s assessment reasonable?*

[25] Given my finding on the first issue, there is no need to explore this issue in any depth.

[26] However, I will note that a concern with respect to the nexus finding (to political opinion), which is that the Board did not address the evidence on the key issue of the agent of persecution. Specifically, the Board found that the violence and extortion that took place was an act of random violence. However, given that the Applicant was generally believed to be credible, there was evidence that contradicted the Board’s findings that went unaddressed regarding MP Osman (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 at paras 15–17).

[27] Second, quite aside from overlooking evidence with respect to that MP, there was also overlooked evidence with respect to the Applicant’s father’s support (which the mother confirmed) for another candidate. While the Board found that this other candidate was a part of the same political party at the time, and therefore the MP would not have taken any issue with



such support, the evidence on the record indicates that the other candidate opposed him in an election, and thereafter, a well-publicised political feud developed between the two. Once again, this evidence should have been addressed, even if briefly, per *Cepeda-Gutierrez*.

V. Conclusion

[28] I find that the Board's decision lacked justification and intelligibility, given the evidence on the record, and the outcomes reached. Due to the badges of unreasonableness reviewed above, this application for judicial review is granted. Neither party raised a question for certification, and I agree that no question arises.

**JUDGMENT in IMM-3392-18**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is granted.
2. The matter is returned to the Refugee Protection Division for redetermination by a differently constituted panel.
3. No questions for certification were argued, and none arise.
4. There is no award as to costs.

"Alan S. Diner"

---

Judge

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

**DOCKET:** IMM-3392-18

**STYLE OF CAUSE:** MD. KAISER MALLICK RAJ (A.K.A. MD. KAISER  
MOLLICK) V THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 27, 2019

**JUDGMENT AND REASONS:** DINER J.

**DATED:** FEBRUARY 28, 2019

**APPEARANCES:**

Stephanie Fung FOR THE APPLICANT

Asha Gafar FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lewis & Associates FOR THE APPLICANT  
Barristers and Solicitors  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario