

Federal Court



Cour fédérale

**Date: 20210217**

**Docket: IMM-6396-19**

**Citation: 2021 FC 155**

**Ottawa, Ontario, February 17, 2021**

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

**BETWEEN:**

**MD ABDUL HANNAN AND  
FERDOUS AFSANA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] The Applicants seek judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated September 30, 2019, dismissing their appeal of a decision by the Refugee Protection Division [RPD] under which they were denied the status of refugees or persons in need of protection, as defined by sections 96 and 97 of the *Immigration*

*and Refugee Protection Act, SC 2001, c 27 [IRPA]*, because they have a viable Internal Flight Alternative [IFA].

## II. Background

[2] The Applicants are a married couple and citizens of Bangladesh. The Applicants both claim fearing persecution in Bangladesh but for different reasons. The Principal Applicant, Md Abdul Hannan, fears the Awami League and the Jubo League. The other Applicant, Ferdous Afsana, fears Hefazat-e-Islam.

[3] Mr. Hannan's claim is related to a conflict, which arose when he refused to issue a letter of credit to a client of the bank where he was employed in 2015. As a consequence, he was pressured and assaulted by members of the Jubo League, the youth wing of the Awami League. Following the assault, the Principal Applicant filed a complaint with the police. Thereafter, he received calls urging him to withdraw his complaint and contribute funds to the Jubo League.

[4] On February 17, 2016, several police officers took the Principal Applicant from his home and advised him to either issue the letter of credit or make a payment to the league. Mr. Hannan requested a leave from his employer two months after these events and travelled to a friend's residence in Chittagong in April 2016. He arrived in Canada on June 4, 2016.

[5] Ms. Afsana was a low-level activist within Gonojagoron Moncha, a protest movement in Bangladesh. In December 2015, she was allegedly assaulted when confronted by members of Hefazat-e-Islam, an Islamist group. She filed a complaint with the police. Thereafter, Ms. Afsana

was allegedly pressured by the group to withdraw the complaint. On April 11, 2016, she was allegedly kidnapped by the group and held for nearly 4 months. Mr. Hannan filed a missing person report when his wife disappeared.

[6] In August 2016, Ms. Afsana found herself in a hospital and was able to escape. She entered Canada on August 31, 2016. The Applicants filed refugee claims shortly thereafter.

[7] The RPD found that the Principal Applicant's testimony was, generally, credible. However, the RPD concluded that, on a balance of probabilities, Ms. Afsana was not being truthful about central aspects of her claim, specifically her alleged encounters with Hefazat-e-Islam. She testified that should she return to Bangladesh she would not become involved in any political party.

[8] The RPD determined that the Applicants had a viable IFA in Chittagong. Therefore, it held that they were not Convention refugees or persons in need of protection

[9] The RAD agreed with the RPD that Ms. Afsana had not been kidnapped by Hefazat-e-Islam. The Applicants did not request a hearing before the RAD with regard to the issue of credibility but submitted new documents pursuant to section 110 (4) of *IRPA*.

[10] The new evidence submitted by the Applicants were three documents confirming her employment with a bank in Dhaka and a recent letter from the co-applicant's mother. The RAD held that the first three items referred to information, which arose prior to the RPD rendering its

decision and were readily available to the Applicants prior to the decision. The RAD found that the Applicants had provided no reasonable explanation for their failure to provide this information prior to the RPD rendering its decision and did not accept them. While the letter from the mother post-dated the RPD decision, it did not provide any new information and was given no weight.

[11] The determinative issue was the viability of an IFA in Chittagong. The RAD found that the Principal Applicant faced no risk of serious persecution in Chittagong. Considering that Ms. Afsana would no longer be involved in any political party, the RAD found that Ms. Afsana would also face no risk of serious persecution in Chittagong. Therefore, the RAD confirmed the RPD's decision and concluded that the Applicants were not Convention refugees or persons in need of protection.

[12] In the processing of their claims, the Applicants were represented by an immigration consultant although a member of the bar appeared on their behalf for the RPD hearing. On this application, the Applicants assert that they had received negligent or incompetent assistance of counsel from the consultant.

### III. Issues

[13] The issues in this proceeding are as follows:

- A. Was the Applicants' counsel negligent or incompetent? If so, was the counsel's negligence or incompetence determinative?
- B. Is the RAD's decision reasonable?

IV. Relevant Legislation

[14] The following legislative provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 are relevant to this judicial review:

**Convention refugee**

**96** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

[...]

**Person in need of protection**

**97 (1)** A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

**Définition de réfugié**

**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

[...]

**Personne à protéger**

**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

**(b)** to a risk to their life or to a risk of cruel and unusual treatment or punishment if

**(i)** the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

**(ii)** the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

**(iii)** the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

**(iv)** the risk is not caused by the inability of that country to provide adequate health or medical care.

[...]

**b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

**(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

**(ii)** elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

**(iii)** la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

**(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[...]

## V. Standard of Review

[15] As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue

interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[16] The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable (*Vavilov* at para 83).

## VI. Analysis

### A. *Was the Applicants' counsel negligent or incompetent?*

[17] The Applicants submit that Ms. Afsana's appeal before the RAD was dismissed because her former counsel failed to disclose decisive evidence to the RPD that was in his possession and pertained to her employment with the bank, namely an employment letter, an employee ID card, and a business card. They argue that her employment at the bank was central to her kidnapping allegations and that her failure to produce proof of employment led the RPD to make a negative credibility finding that was upheld by the RAD.

[18] Allegations of negligence against former counsel must be sufficiently specific and clearly supported by evidence: *Jeffrey v Canada (Citizenship and Immigration)*, 2006 FC 605 at para 9. They must also satisfy the Federal Court's protocol on allegations against counsel or other authorized representatives in citizenship and immigration cases.

[19] In accordance with the protocol, Applicants' present counsel gave notice of the allegation of incompetence or negligence to the former counsel. Their resulting exchange of correspondence forms part of the record in these proceedings. The Applicants acknowledge that they must establish that former counsel's acts or omissions constituted incompetence without relying on hindsight and that the outcome would have been different but for the incompetence.

[20] The former counsel was asked if he had received proof of employment from Ms. Afsana before the RPD proceedings were concluded. The former counsel responded that it was provided to him in preparation for the appeal to the RAD and provided a copy of an envelope mailed from Bangladesh in support of that assertion. However, this appears to have contained the letter from the Principal Applicant's mother rather than the bank employment records.

[21] The Applicants contend that the former counsel was negligent when he failed to advise them to provide these documents before the RPD proceedings and failed to explain to the RAD why they were not previously submitted. They argue that the issue was determinative as proof of Ms. Afsana's employment would have supported her claim to have been kidnapped.



[22] At the RPD hearing, Ms. Afsana had been asked whether she had any proof of employment. She responded that such evidence could be obtained if it was necessary, thus suggesting that she did not have it in her possession at that time. Her claim to have provided the documents before the RPD hearing was disputed by the former counsel. He claims that they were received subsequent to issuance of the RPD decision and put forward to the RAD on the appeal, in response to the RPD's credibility findings.

[23] In the result, there is a conflict between the evidence of the Applicants and that of their former counsel. It is a conflict that I do not consider necessary to resolve as the Applicants have failed to demonstrate that substantial prejudice flowed from their former counsel's alleged inaction.

[24] The Applicants' present counsel were correct to make inquiries about the failure to present the documents during the RPD proceedings and their submissions about the former counsel's negligence in failing to obtain the employment documents for the purpose of those proceedings have some merit. However, the relevance of the documents to the basis of Ms. Afsana's claim is dubious. They do not establish employment at the bank at the relevant time, but rather earlier. More importantly, she said she was harassed, abused, and kidnapped because of her involvement in a political organization not because of her employment. Although, she did note that the Islamist group was opposed to women working with men. However, the conflict between her claim and the objective documentary evidence about the kidnapping practices of the Islamist group was the primary reason why she was not believed.

[25] The determinative issue in the case at hand was the viability of an IFA in Chittagong. In determining whether Chittagong was a viable IFA for Ms. Afsana, the RAD found that she would be safe in Chittagong because she no longer intends to be involved with any political party. Her proof of employment was irrelevant to this finding. The RPD's credibility finding was based on a number of implausibilities in Ms. Afsana's testimony and inconsistencies with the objective documentary evidence. In any event, the RAD did not base its decision on credibility. As a result, previous counsel's alleged omission had no impact on the outcome of the proceeding.

B. *Is the RAD's decision reasonable?*

[26] The Applicants submit that the RAD's IFA findings are speculative and that the RAD ignored important contradictory evidence, notably a letter from the Principal Applicant's friend with whom he had sought shelter in Chittagong before coming to Canada.

[27] When determining the existence of a viable IFA, the tribunal must be satisfied on a balance of probabilities that there is no serious possibility of the applicant being persecuted in the part of the country to which an IFA exists. The tribunal must also determine that, in all of the circumstances, including the circumstances particular to the claimant, conditions in the part of the country where a potential IFA has been identified are such that it would not be unreasonable for the applicant to seek refuge there: *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 711; *Ohwofasa v Canada (Citizenship and Immigration)*, 2020 FC 266 at para 19.

[28] The Applicants claim that the persons who had inquired about the new occupant of the friend's home in Chittagong while Mr. Hannan was residing there were members of the Jubo League. However, the persons inquiring had not identified themselves as members of the Jubo League nor asked for the Principal Applicant by name. During the RPD hearing, the Principal Applicant appeared to acknowledge that the people in Chittagong inquired about him because he was a stranger. Both the RPD and the RAD concluded that there was no evidence that the people inquiring about the Principal Applicant were from Jubo League or that they were looking for the Principal Applicant.

[29] The National Documentation Package [NDP] indicates that the League has a nationwide presence and had been involved in a conflict in Chittagong between its parent organization, the Awami League and the main opposition party, the BNP. This long-standing and ongoing conflict is irrelevant to the claims at issue in these proceedings.

[30] The RAD assessed the evidence and gave it the weight it considered appropriate. The RAD concluded that the Principal Applicant had failed to provide a reasonable explanation as to why he believes that he would be persecuted in Chittagong. As a result, the RAD reasonably concluded that the Principal Applicant faced no serious risk of persecution in that IFA and there was no basis for concluding that Ms. Afsana would either.

VII. Conclusion

[31] The record before the Court does not support a conclusion that the alleged incompetence or negligence of the Applicants' former counsel resulted in substantial prejudice to their appeal before the RAD.

[32] The RAD's determination that the Applicants have an internal flight alternative in Chittagong was reasonable and there is no basis for this Court to overturn that decision.

[33] No serious questions of general importance were proposed, and none will be certified.

**JUDGMENT IN IMM-6396-19**

**THIS COURT'S JUDGMENT is that** the application is dismissed. No questions are certified.

"Richard G. Mosley"

---

Judge

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

**DOCKET:** IMM-6396-19

**STYLE OF CAUSE:** MD ABDUL HANNAN AND FERDOUS AFSANA V  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING** HEARD VIA VIDEOCONFERENCE BETWEEN  
OTTAWA, ONTARIO (THE COURT) AND  
TORONTO, ONTARIO (THE PARTIES)

**DATE OF HEARING:** JANUARY 18, 2021

**JUDGMENT AND REASONS:** MOSLEY J.

**DATED:** FEBRUARY 17, 2021

**APPEARANCES:**

Richard An FOR THE APPLICANTS

Nimanthika Kaneira FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

EME Professional Corporation FOR THE APPLICANTS  
Barristers and Solicitors  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario