Federal Court  Cour fédérale

Date: 20211208

Docket: IMM-2239-20

Citation: 2021 FC 1378

Toronto, Ontario, December 8, 2021

PRESENT: Madam Justice Go

BETWEEN:

KAN CHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Kan Chan [the Applicant] is a Hong Kong citizen. As a student, she participated in the pro-democracy Umbrella Movement in 2014. In July 2017, Chinese President Xi Jinping visited Hong Kong. In that same month, the Hong Kong police investigated the Applicant for an offence of common assault based on an incident which took place some 40 days prior.

[2] Over the course of July and August 2017, the Hong Kong Police contacted the Applicant several times and attended at her home with regard to the alleged assault. Eventually, the Applicant was arrested and released on bail.

[3] The Applicant was given a notice to reappear at the police station on September 11, 2017 for an identification lineup, which the Applicant did not attend. Instead, she arrived in Canada on that day and about a month later, she filed a refugee claim.

[4] The Refugee Protection Division [RPD] denied the Applicant's claim against Hong Kong on the grounds that she did not establish persecution under section 96 or harm under section 97 of the *Immigration and Refugee Protection Act* [*IRPA*]. In a decision dated March 16, 2020 [Decision], the Refugee Appeal Division [RAD] affirmed the RPD decision.

[5] The Applicant sought judicial review of the Decision, arguing that because the RPD Member was formerly a "chairman" of an administrative tribunal in Hong Kong, there was a reasonable apprehension of bias in the RPD proceedings, which was not cured by the RAD appeal. Further, the Applicant argues that the RAD decision unreasonably assessed her risk of persecution in Hong Kong as a student who is pro-democracy.

[6] I find that the RAD unreasonably assessed the Applicant's risk of persecution in Hong Kong. I further find the conduct of the RPD Member at the hearing – but not his prior appointment with the Hong Kong Special Administration Region [SAR] – gave rise to a reasonable apprehension of bias, and the bias was not cured by the RAD appeal.

II. Background

A. *Factual Context*

[7] For the purposes of the RAD proceedings, the RAD Member assumed that the Applicant's testimony was credible; thus, the following facts do not appear to be in dispute.

[8] In 2014, the Applicant participated in the pro-democracy Umbrella Movement. During three days, she attended silent protests outside the legislative buildings to advocate for universal suffrage in Hong Kong.

[9] On June 6, 2017, the Applicant went to retrieve lost property from the campus security office at Hong Kong Baptist University, where she was a student. There, she got involved in a heated exchange with one of the security guards. She felt this officer had treated her disrespectfully and she spoke to a supervisor about it, but no action was taken.

[10] On July 14, 2017, the Hong Kong police contacted the Applicant and asked her to come to the police station, claiming they were investigating her involvement in a common assault incident on June 6, 2017. The Applicant informed the police that she would need to request time off from her employer at her new job in order to attend at the police station during daytime when the officer was on duty. The police phoned her again on July 19 and July 24, 2017, at which point the officer suggested coming to her apartment instead. The Applicant responded that she would rather come to the station herself. On July 26, 2017, she saw a police car outside of her house and heard an officer say, "she will not get away with this".

[11] On July 31, 2017, the Applicant was arriving home when she saw three officers outside her home. As she opened her door, one of them grabbed the keys in her hand, telling her that if she did not let go of the keys he would charge her with attacking the police.

[12] The Applicant asked the officers for a search warrant before they entered her home. They did not have one and entered anyway. The Applicant asked if she was under arrest, and was told she was already arrested. She was then taken to the police station, where she was not provided with a lawyer despite asking to speak with one. The Applicant learned that the campus security officer had alleged that the Applicant had assaulted her with a light coloured bag. The Applicant asked the police officer if they had watched the CCTV footage of the incident, which they said they had, but according to the Applicant if they had watched it, they would have seen that no act of physical violence had occurred.

[13] The police took the Applicant back to her apartment where she retrieved the bag that was closest to what the police had described. Then she paid 150 Hong Kong Dollars (about $25 CAD) to be released, and she was given instructions to return for the line up.

[14] The Applicant states that the police were trying to charge her on false grounds without evidence. She could not seek help from the state and the Complaints Against Police Organization is ineffective. She attempted to contact a lawyer but could not afford the fee.

[15] RPD Member J. W. Campbell heard the Applicant's claim on September 27, 2018. The Applicant was unrepresented during the RPD hearing. Her claim was denied on October 15, 2018.

B. *Decision under Review*

[16] The Applicant appealed to the RAD, again unrepresented. She submitted written arguments to the RAD, which included a statement that the RPD Member had been relying on his personal point of view, but did not explicitly use the term "bias". Additionally, prior to her appeal to the RAD, she had done an internet search of the RPD Member and discovered his past appointment with the government of Hong Kong SAR, but she did not bring this up before the RAD.

[17] The RAD addressed several grounds of appeal raised by the Applicant, which the RAD described as "underdeveloped", and made several findings, including:

a) The argument that the human rights situation has deteriorated in Hong Kong since handover is general in nature and there is no linkage between the Applicant's story of protesting or being briefly detained on suspicion of common assault and the denial of any particular rights. There is no evidence that matters in Hong Kong have so deteriorated since handover that the Applicant faces a serious possibility of persecution or likelihood of harm.

b) While noting that the RPD did not indicate in its decision that it had reviewed all of the documents the Applicant submitted, most of these documents were irrelevant to her claim. In particular, the summary by the police of their interaction with the Applicant on July 31, 2017—of which the Applicant disputed the accuracy—was of little relevance because it supported the Applicant's claim that she had been detained.

c) The Applicant's argument that the way the law in Hong Kong is implemented is at variance with the content of the law is unsupported. The example of China's decision to arrest Canadian citizens in apparent retaliation for Canada's arrest of a Huawei official is of little assistance. First, the claim that the arrests were retaliatory is not supported in evidence; second, it is not clear how such a retaliatory arrest (if it was indeed retaliatory) has any bearing on the Applicant's case; and finally, the matter is one involving the Chinese authorities and not those in Hong Kong.

[18] On the issue of whether the RPD Member relied on his own "personal point of view to judge this case and its credibility", the RAD rejected the argument and found no instance that the RPD Member considered the situation in Hong Kong through "a Canadian lens".

III. Issues

[19] The Applicant retained legal counsel after her RAD appeal was denied. For the first time before this Court, the Applicant brought up the apprehension of bias on the part of Member

Campbell based on his appointment as the Chairman of the Appeal Tribunal (Buildings) [Tribunal] for the government of the Hong Kong SAR. In support of the allegation of bias, the Applicant submits evidence about Member Campbell's LinkedIn profile, which indicates that he held a Chairman's position in the Tribunal, in the Executive Branch of the Hong Kong SAR, from 2010 to 2012. The Applicant further submits that members of the Tribunal are appointed by the Hong Kong Chief Executive, who also determines the salary and term of service of each appointee and who has the additional power to remove Tribunal members.

[20] In addition, the Applicant alleges that the Member's behaviour towards her at the hearing provide further evidence of the Member's lack of impartiality.

[21] The Applicant raises the following issues:

A. *Does the RPD Board Member's recent employment in the Hong Kong Executive branch and his conduct at the hearing give rise to a reasonable apprehension of bias in the adjudication of the Applicant's claim against Hong Kong, which was not cured by the RAD appeal?*

B. *Did the RAD decision fail to grapple with the core issue raised by the Applicant, namely that she risks arbitrary arrest and detention on the basis of her imputed sympathy for, and involvement in, the Hong Kong democracy movement?*

C. *Did the RAD misconstrue and/or fail to address critical evidence regarding the youth-driven democracy movement in Hong Kong, the Applicant's profile, and the police investigation that led her to flee Hong Kong?*

[22] The Respondent asks this Court not to consider the allegation of bias because it was not raised by the Applicant in her RAD appeal and submits that the Decision was reasonable.

IV. Standard of Review

[23] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25. The RAD decision is to be reviewed on the standard of reasonableness: *Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296 at para 8. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para 85). The onus is on the Applicant to demonstrate that Decision was unreasonable. To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100).

[24] The parties agree that the standard of review is reasonableness for the substantive issues. The parties also submit, and I agree, that the standard of review is correctness for the bias issues (*Zhou v Canada (Citizenship and Immigration)*, 2020 FC 633 at para 32).

V. Analysis

A. *Does the RPD Board Member's recent employment in the Hong Kong Executive branch and/or his hearing conduct give rise to a reasonable apprehension of bias in the adjudication of the Applicant's claim against Hong Kong?*

(1) Can this Court consider the Applicant's allegations of bias against the RPD Member?

[25] I will first consider whether I should hear the Applicant's allegations of bias. There are two aspects to this question: first, whether the Applicant waived her right to raise bias by not raising it before the RAD, and second, whether the evidence of the Member's past employment is admissible on judicial review.

[26] The Applicant admits that she knew about the RPD Member's past employment before the RAD proceeding, but did not raise this issue at the time. The Respondent argues that she waived her right to argue bias based on *Love v Canada (Privacy Commissioner)*, 2015 FCA 198 at para 27 [*Love*], in which the Federal Court of Appeal stated that "[i]t is well-settled that allegations of [bias] must be made before the administrative decision-maker and cannot be raised for the first time on judicial review".

[27] The Applicant argues that she intended to raise the issue of impartiality before the RAD, although she was unrepresented and did not know the legal concept of bias. She points to her RAD submissions stating:

> The panel member displayed a certain degree of his knowledge of Hong Kong during the hearing […] He certainly has his observation about Hong Kong but I hope he can see Hong Kong from a non-foreigner perspective, because it can be drastically different…panel member keeps using his own personal point of view to judge this case and its credibility.

[28] The Respondent argues that these brief submissions did not clearly raise the serious issue of bias.

[29] The Applicant points to *Khakh v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3007 (FC), [1994] 1 FC 548, in which Justice Nadon found that although the applicant had raised bias for the first time on judicial review, he had not been represented by a lawyer before the Board. Neither he nor his non-lawyer representative were aware of the right to object on the grounds of bias, and thus he had not waived his right to raise bias on judicial review. However, as the Respondent points out, this case was distinguished in *Johnpillai v Canada (Secretary of State)*, [1995] F.C.J. 194, in which Justice Reed states that Justice Nadon should not be taken to have set out a rule that claimants without counsel are in a more advantageous position than claimants with counsel.

[30] The Respondent does not address the next paragraph of *Johnpillai*, in which Justice Reed states that "there may be circumstances when the lack of [knowledge of the law] does lead to a finding that there was insufficient awareness of the right [to raise bias] so as to vitiate implied waiver" (cited in *Anguiano Acuna v Canada (Citizenship and Immigration)*, 2006 FC 1222 at para 38).

[31] That said, the more recent Federal Court of Appeal decision in *International Relief Fund for the Afflicted and Needy (Canada) v Canada (National Revenue)*, 2013 FCA 178 at para 19 [*International Relief Fund*], as well as *Love*, do not appear to make room for such an exception based solely on lack of knowledge.

[32] However, I find this case can be distinguished from *Love* and from *International Relief Fund* in that the Applicant did raise the issue of the Member's impartiality and hearing conduct before the RAD, although not in the precise legal language of apprehension of bias.

[33] The Applicant admitted in her affidavit that it was clear to her at the RPD hearing that Member Campbell has a connection to China and Hong Kong, because of his knowledge about Hong Kong and his ability to speak Mandarin, which made the Applicant feel uncomfortable and concerned that the Member lacked an open mind. However, it was not until after the hearing when she did an internet search that she found out about the Member's past employment with the government of Hong Kong SAR. The Applicant thought it was "very troubling" and believed it was a problem for her case. Yet she did not think she could complain to the Immigration and Refugee Board since they had made the decision to assign Member Campbell to her case and she assumed the Board knew about his background.

[34] Notwithstanding her trepidation about filing a complaint about Member Campbell, the Applicant did raise her concern in her appeal that the Member was "using his own personal point of view to judge this case". I further note that in her post-hearing submission to the RPD, the Applicant expressed her concern about the Member's presumptions about her case:

> You presume I committed the crime, and you also presume I will get convicted. You are not looking at this matter from a neutral perspective but with personal presumption and subjective prejudice; you presume [the Hong Kong] police was doing everything legally, you presume the evidence was legally obtained, and you overlook the facts that are presented right in front of your eyes, but stand by your prejudice and presumption.

[35] Although the word "bias" was never used, it is clear from the above quoted paragraph that the Applicant was alleging "prejudice" and the lack of impartiality on the part of Member Campbell based on his conduct at the hearing.

[36] More importantly, the RAD addressed the Applicant's impartiality concerns about the Member's conduct, albeit briefly, as follows:

> I find that that there is no evidence—in either the recording of the hearing of in the decision—that would indicate that the RPD member relied on his own "personal point of view to judge this case and its credibility." Without elaboration on this point by the Appellant—including, preferably, an example of where the member relied on his personal point of view—I can see no grounds for the claim that the member relied on his personal experience or viewpoint.

[37] This indicates that the RAD Member, at the very least, understood the Applicant to be raising an issue of impartiality and decided to review a transcript or audio recording of the hearing in response, but did not find the RPD Member's hearing conduct concerning.

[38] As such, given that the Applicant did raise her concern about the conduct of Member Campbell in her appeal to the RAD, I find that the Applicant has not waived her right to raise bias with respect to the Member's conduct at the hearing.

[39] However, I find that the Applicant has waived her right to raise the issue of bias based on the Member's previous employment with the government of Hong Kong SAR. Even if the Applicant could not have known about Member Campbell's prior connection with Hong Kong SAR until after the RPD hearing, by the time she filed her appeal with the RAD, she was fully aware of his previous position with the Tribunal. While I accept that the Applicant was understandably apprehensive about making a complaint against someone who has the power to determine her claim, her decision to remain silent about the facts she had uncovered and wait until the adverse outcome of the RAD appeal before raising the issue of bias based on his prior employment, is precisely the type of situation that the FCA has frowned upon in *International Relief Fund*, at para 19, and should not be condoned by this Court.

[40] Further, even if the Applicant had not waived her right to raise bias, I do not find the Member's previous employment *per se* raises a reasonable apprehension of bias.

[41] The well-established test for reasonable apprehension of bias was set out by the Supreme Court in *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[42] The Applicant submits that a reasonably informed observer would infer the following from the RPD Member's past employment: loyalty to the government of Hong Kong SAR and the Chief Executive, support for or comfort with political arrangements between Hong Kong and China, and a reluctance to conclude that the legal system he had recently represented would produce persecutory outcomes.

[43] I disagree.

[44] As the Respondent submits, RPD members are presumed to be impartial and are required to swear an oath of impartiality. This presumption applies regardless of the members' prior employment. In this particular case, Member Campbell's employment with the government of Hong Kong SAR lasted for about two years and ended before the Umbrella Movement had even begun.

[45] As noted by the Respondent, the RPD's own policy mandates a one-year cooling-off period before former Members can appear as counsel before the Board. At the time of the Applicant's hearing, Member Campbell had already left his employment with the Hong Kong SAR about six years prior. A six-year cooling-off period should be more than sufficient to put a distance between Member Campbell and his former employer when it comes to assessing claims arising from Hong Kong.

[46] More generally, the Applicant's argument could potentially bar many qualified individuals from seeking appointment to administrative tribunals, or be excluded from hearing cases by virtue of their prior employment only.

[47] My conclusion might have been different if the Member had been in direct employment in the Hong Kong police, which is the more direct agent of alleged persecution in the Applicant's claim, and if the employment history was more recent. Even then, however, I would caution against a categorical finding of bias based solely on the decision maker's past employment, without any other evidence.

[48] In summary, while I find that the Applicant has not waived her right to claim bias with respect to the Member's conduct at the hearing, she has done so with respect to the Member's past employment.

[49] Given my conclusion above, I do not have to consider whether to admit the new evidence with respect to Member Campbell's past employment.

(2) Does a reasonable apprehension of bias arise from the Member's conduct at the hearing?

[50] The Supreme Court in *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 58 endorsed the following definition of bias:

> …a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind

> which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[51] As the Applicant submits in her factum, determining whether a decision maker's interventions give rise to a potential claim for bias is a "fact-specific inquiry" where the "trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial" (*Chippewas of Mnjikaning First Nation v Chiefs of Ontario*, 2010 ONCA 47 at para 230, emphasis added).

[52] The Applicant alleges that the following aspects of the hearing cumulatively lead to a reasonable apprehension of bias:

- the RPD member immediately and unduly narrowed the issues in the case, insisting that the Applicant identify a due process breach in the conduct of the Hong Kong police – an issue which is outside the Applicant's expertise and not the core issue of the claim;

- he repeatedly advanced the perspective of the Hong Kong police and put a proactive defence of their actions to the Applicant;

- he expressed skepticism of her and of the Umbrella Movement;

- he interrupted her persistently; and

- he laughed at the Applicant's answers.

[53] The Respondent argues that bias allegations "cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions" (*Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8) and that the impressions of the Applicant's father or the law student who listened to the hearing are not proper grounding for an allegation of bias. The Respondent further submits that RPD members cannot play a passive role and are expected to be engaged to assess claims. I accept these submissions.

[54] However, I disagree with the Respondent's submission that the Member did not cross the line of badgering the witness, but was rather trying to avoid repetition and move the hearing along by asking questions determinant of the issue. Having listened to the hearing recording, I find that Member Campbell's conduct did give rise to a reasonable apprehension of bias.

[55] First of all, I find Member Campbell did, from an early moment on in the hearing, attempt to narrow the issues by reframing the Applicant's claim as one based solely on the allegations that the Hong Kong police had "abused their power" and "wrongfully charged" the Applicant. The Applicant initially appeared to be agreeing to the Member's framing of the issue, but as the hearing proceeded, it became clear that the Applicant's claim was not so much about her fear of facing a common assault charge, but more about the treatment by the Hong Kong police/government—and for that matter, the Chinese Government—of someone of her profile: a student who is pro-democracy.

[56] Several times, the Applicant could be heard asking if she could add something or say something, only to be cut off by Member Campbell. The interruptions became particularly pronounced when the Applicant attempted to describe—on questioning by the Member—the alleged unlawful conduct by the police during their interactions with her. The Applicant's testimony was repeatedly interrupted by Member Campbell, who at times was talking over the Applicant. Other times, rather than allowing the Applicant to provide further explanation on a certain point, the Member switched gears and initiated a new line of questioning, effectively denying the Applicant the opportunity to elaborate on her own testimony.

[57] In some instances, the Member could be heard reframing the issue and then told the Applicant that she had not made out the case. This happened when the Member told the Applicant that her claim was based on "excessive force" by the police, and then chastised her for not including in her Basis of Claim narrative any "serious injury" she alleged to have sustained in the hands of the police, even though the Applicant confirmed that her injury—caused by the police grabbing her key—was not serious, and she never claimed the police used excessive force.

[58] The Member also could be heard admonishing the Applicant for failing to co-operate with the police. He further admonished her for arguing with the police over a "tiny grammatical mistake" when the Applicant sought to correct an inaccuracy in a police statement implying that she was arrested on the "same day" when the alleged assault took place, instead of over a month later.

[59] When the Member asked why the Applicant did not file a police complaint, and the Applicant tried to answer, the Member interrupted her twice before moving on to a new topic, without allowing the Applicant a chance to explain. Later, the Applicant suggested that if she had gone to file a complaint, she would be told by the police she did not have enough evidence. In reply, Member Campbell said to the Applicant, dismissively: “You don’t have any evidence”.

[60] Member Campbell could also be heard defending the actions of the police by challenging the Applicant’s viewpoint on what constitutes legal police conduct. In addition, he spent much time lecturing the Applicant on what would have happened had she stayed to face trial, seemingly based on his own knowledge of Hong Kong’s legal system. In particular, he tried to convince her that the Basic Law of Hong Kong would apply to exclude any illegally obtained evidence, in response to her concerns about police entering her home without a warrant. The Applicant could be heard trying to explain, to no avail, that the Basic Law as written down by the former British government is not applied in the same way by the government of the Hong Kong SAR and the Chinese government.

[61] In his decision, the Member dismissed all the explanations that the Applicant attempted to provide and stated that she “argued unnecessarily” with the security officer and was “argumentative” with the police. He stated that “to rebuff [the police’s] kind offer to come to her home and save her the inconvenience was nonsensical”.

[62] I would also note that Member Campbell appeared to have gotten key facts and dates wrong when he tried to solicit responses from the Applicant based on his own erroneous reading

of the documents. For instance, he got the date wrong about when the police took a statement from the Applicant. Also, he switched between “arrest” and “investigation” to describe the Applicant’s encounter with the police as if the two concepts were synonymous, while he was busy convincing the Applicant that the police had done nothing wrong.

[63] I appreciate that the role of RPD is an inquisitorial one, and Members have to ask the “hard questions” that maybe inappropriate for a judge to ask: *Bozsolik v Canada (Citizenship and Immigration)*, 2012 FC 432 at para 16; *Benitez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 199 at para 21. As this Court has noted, “the inquisitorial process could give rise to sometimes extensive and energetic questioning, expressions of momentary impatience or loss of equanimity, even sarcastic or harsh language, without leading to a reasonable apprehension of bias”: *Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236 at para 28.

[64] The Ontario Court of Appeal has noted the importance for a trial judge not to “create an impression through the questioning process of having adopted a position on the facts, issues or credibility”, although “a trial judge’s willingness to debate with counsel openly over relevant factual and legal issues should not serve as a basis for a reasonable apprehension of bias”: *Chippewas of Mnjikaning First Nation v Chiefs of Ontario*, 2010 ONCA 47 at paras 238, 243.

[65] On the other hand, this Court has also stated that while the RPD is “entitled to cross-examine the [claimant] and, if circumstances require, that cross-examination may be hostile”, “a search for the truth should not be confused with harassing the [claimant]”: *De Leon v Canada*

(Minister of Citizenship and Immigration), [2000] F.C.J. No. 852 at para 19. In that case, the Board conducted a "cross-examination …worthy of a criminal trial", which likely left the claimant "feeling that his case was lost from the outset", and "[i]n addition to being accused of contradictions where none existed, he also had to tolerate remarks which may have seemed insulting to him" (at paras 17, 20).

[66] Similarly, this Court has overturned a decision of the RPD where "from the outset…the member was not at all interested in hearing the applicant's testimony", where the hearing "was more like a police interrogation than a hearing before a tribunal", and where the Member went on "long tirades … on peripheral aspects having no real relevance (except that they eloquently demonstrated the member's prejudices and biases)": *Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870 at paras 10-11. The Court concluded that the "gratuitous and uncalled for comments as well as the member's tone, impatience and aggressiveness at the hearing were unjustified" (at para 12).

[67] In this case, the Member's questioning went over the line of being inquisitive and became argumentative. His tone throughout the hearing was dismissive and almost contemptuous, as evidenced in his "laughing" or "sneering" at the Applicant's response. Cumulatively, his conduct created so much discomfort in the Applicant that she decided to search online for any connection between the Member and the Hong Kong SAR. The fact that the Applicant felt the need to do so speaks volumes about the perception that the Member's conduct had created in her about his impartiality or lack thereof. Having listened to the audio recording, I find any "reasonable and

right-minded person…viewing the matter realistically and practically—and having thought the matter through" would share the Applicant's concern.

[68] By unfairly narrowing the issue of the claim, repeatedly interrupting the Applicant's evidence, arguing with the Applicant, and employing a dismissive tone, Member Campbell's conduct at the hearing, taken as a whole, did raise a reasonable apprehension of bias.

(3) Did review by the RAD cure any reasonable apprehension of bias on the part of the RPD?

[69] The RAD's decision, in my view, did not cure the appearance of bias for two reasons. First, the RAD rejected the Applicant's argument on impartiality—which I have now accepted—and thus failed to intervene to correct the procedural unfairness. Second, as the apprehension of bias is derived from the conduct of the hearing, it may have affected the way the Applicant gave her evidence, or even the way she framed the issue in her refugee claim. By accepting almost all of the RDP's findings as is, the RAD has compounded the unfairness created by the procedural fairness breach at the RPD hearing.

B. *Was the Decision reasonable?*

[70] The Applicant raises two arguments about the substance of the decision: it does not respond to the issues she raised and it ignores critical evidence.

(1) Was the Decision reasonable in light of its engagement with the Applicant's arguments?

[71] The Applicant argues that the RAD misconstrued her allegation of persecution by treating it as an allegation that she had been arrested for protesting, rather than an allegation that she had been harassed and intimidated in connection with her imputed support for the democracy movement. She also argues that the RAD misconstrued her argument that she fears arbitrary detention and arrest, and rather treated it as an argument that the law of common assault was itself persecutory, despite her statements that it was not the punishment for common assault she feared but rather persecution from the police. In support of her position, she cites *Vavilov* at para 127, which states:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[72] The Respondent submits that the RAD engaged with the arguments before it (which it noted were “difficult” and “undeveloped”), that it assumed her account was credible, and that it could not consider arguments which were not raised before it.

[73] The Applicant submits that the RAD should have kept in mind the Applicant was self-representing. The RAD should have engaged with the Applicant’s argument, even if it was expressed in lay terms. I do not disagree with this position, but I do note the Applicant’s written submission was difficult to follow and I acknowledge the efforts made by the RAD to engage with her submission.

[74] I agree with the Respondent that the Applicant has not fully argued the issue of her profile as a young student. Nevertheless, the Applicant did raise the issue. The Applicant testified at the RPD that there were many secret arrests of young people. She talked about how young students in particular were being targeted because they are educated, and they refuse to be subjected to "forced obedience". She referred to the arrests of some of the high profile students, and the fact that even primary school students were not spared by police brutality. She noted in her memorandum to the RAD her profile as a student, stating for instance that "Beijing now sees students as an enemy to destroy – because they are young, well educated, smart, and at the same time brave enough to disobey Beijing" and that "whether they are a participator or not is no longer a concern to the Beijing and Hong Kong government, if that person is a student, something happens around them then they should take the blame" and they will be made into "an example of those who are not already submissive to Beijing".

[75] I note, however, that the RPD decision did find her claim that she is at risk as a student and a member of the democracy movement to be "the same as the political opinion ground". The RAD adopted the same approach by characterizing her claim as being based on political opinion as a supporter of the pro-democracy movement.

[76] I note in particular that the RAD addressed her claim as stemming from either "her past participation in the Umbrella Movement (or other similar movements) or from her brief detention and request for cooperation in July 2017". Ultimately the RAD rejected her claim, not due to a failure to engage with the Applicant's somewhat undeveloped argument, but due to its evidentiary finding, which I would address below.

[77] The RAD's framing of the issue may not be exactly as what the Applicant had chosen for herself, but this is due in part to the Applicant's somewhat disjointed submissions. On the whole, I find the RAD did identify the core issues raised in the Applicant's claim. I therefore reject the Applicant's argument on this point.

(2) Was the RAD's decision reasonable in light of its treatment of the evidence?

[78] The Applicant submits the RAD failed to consider the social and political context, as evidenced in the NDP that the democracy movement was ongoing in 2017 and not confined to the well publicized days of protest. The Applicant points to multiple sources of country condition evidence, including evidence in the National Document Package [NDP] that there was a surge in police intimidation and arrests of democracy activists in the period leading up to Chinese President Xi Jinping's July 2017 visit to Hong Kong, the same month that the Applicant was arrested, as well as evidence that Hong Kong is beholden to Beijing.

[79] The Respondent replies that the RAD referenced the human rights situation in Hong Kong and found the Applicant had failed to establish a link between this evidence and her claim.

[80] Putting aside for now the issue of whether the Applicant has established a link between the evidence and her profile as a student, I agree with the Applicant that the RAD ignored evidence of Beijing's growing influence over Hong Kong.

[81] Contrary to the RAD's finding that the Applicant's arguments on country conditions were "unsupported" or "general in nature", there was evidence in the NDP demonstrating Beijing's

growing influence over Hong Kong. The Applicant refers to a Henry Jackson Society Report which was included in the NDP of August 31, 2018, with a quote from the said Report that there has been “a startling and dramatic decrease of Hong Kong’s democratic and legal rights in only 10 years” and that “China has engaged in a number of direct and indirect ways to subvert both the legislative process and judicial system in Hong Kong, making those sectors beholden to Beijing”.

[82] In addition, there were, before the RAD, a number of articles with regard to the premature loss of Hong Kong’s independence from China, some twenty-odd years before the end of the “One Country, Two Systems” promised in the Sino-British Joint Declaration. They include an article dated October 16, 2017 from Hong Kong Free Press indicating that a number of international lawyers from six different countries - including Canada - expressed their concern over the arrest of young democracy activists, calling these arrests “a serious threat to the rule of law and a breach of the principle of ‘double jeopardy’ in Hong Kong”. Quoting from the Court of Final Appeal Judge Kemal Bokhary’s warning of “storm clouds” over the judiciary from Beijing pressure five years earlier, the same article expressed serious concerns over the independence of the judiciary in Hong Kong. The article further noted China issued a White Paper back in 2014 declaring that Beijing has “comprehensive jurisdiction over Hong Kong” – instead of the “high degree of autonomy” provided for in the Sino-British Joint Declaration and the Basic Law.

[83] In the face of the above evidence and other articles published in 2017 contained in the record, it is hard to fathom how the RAD could reasonably have reached the conclusion that there is "no evidence that matters in Hong Kong have so deteriorated since handover."

[84] Strictly as an *obiter*, I take judicial notice of the recent release of the "two Michaels" (Michael Spavor and Michael Kovrig) immediately following the release of Meng Wangzhou, which seems to lend credence to the Applicant's claim of China's retaliation against Canada's arrest of the Huawei official, a claim rejected by the RAD as irrelevant and lacking in evidence.

[85] Clearly, the Applicant carries the burden of demonstrating that she faces a serious possibility of persecution by drawing the link between her claim and the broader social and political context. But the RAD's conclusion about the lack of deterioration of human rights in Hong Kong since the handover was unreasonable. To what extent this erroneous finding affected the RAD's conclusion with respect to the Applicant's particular claim is not something that I could determine, nor is it necessary for me to do so.

[86] In light of the serious breach of procedural fairness, and the RAD's unreasonable finding with respect to the deterioration of the conditions in Hong Kong, this matter should be sent back to the RAD to be determined by a different member.

VI. Certification

[87] Counsel for both parties were asked if there were questions requiring certification. They submitted that there may be a question for certification with respect to the issue of bias. Given

that my finding on the issue of bias is specific to the facts and circumstances of this case, I do not believe that this case raises any serious question of general importance.

VII. Conclusion

[88] The application for judicial review is allowed. This matter is returned to the RAD to be determined by a different member.

JUDGMENT in IMM-2239-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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