

Federal Court



Cour fédérale

**Date: 20240509**

**Docket: IMM-3155-22**

**Citation: 2024 FC 713**

**Ottawa, Ontario, May 9, 2024**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**SUBHAN MOHAMMED**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Subhan Mohammed seeks judicial review of the rejection of his refugee claim by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB]. He argues the process leading to the RAD's decision was unfair because he was not given an adequate opportunity to present evidence. He therefore asks this Court to consider evidence that was not placed before the RAD or the Refugee Protection Division [RPD]. He also contends that

the RAD's conclusion that he was not a Convention refugee or a person in need of protection was unreasonable as the RAD ignored relevant evidence regarding conditions for Muslims in India, and made unjustified credibility findings.

[2] For the reasons below, Mr. Mohammed has not satisfied me that I should consider the evidence he now puts forward on judicial review. Such evidence is generally inadmissible and Mr. Mohammed has not demonstrated that an exception to the general rule applies. I have also not been convinced that the process leading to the RAD's decision was unfair, or that the RAD erred in its assessment of the evidence relevant to his refugee claim or of his credibility. The application for judicial review will therefore be dismissed

## II. Issues and Standards of Review

[3] Mr. Mohammed's application for judicial review raises the following issues:

- A. Should the Court consider the new evidence Mr. Mohammed has filed in his application record on this application for judicial review?
- B. Was the process leading to the RAD's decision fair?
- C. Did the RAD err in concluding Mr. Mohammed was not a Convention refugee or a person in need of protection?

[4] The first of these issues relates to the evidence before this Court on judicial review. No administrative tribunal has made a decision on this issue and no standard of review applies.

[5] The second issue raises the duty of procedural fairness. The Court reviews such issues on a standard akin to correctness, in which the Court asks whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. At the same time, factual findings or assessments of evidence that are made in addressing a procedural issue will themselves warrant deference: *Ganeswaran v Canada (Citizenship and Immigration)*, 2022 FC 1797 at para 27; see also *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at paras 173–174, *per* Côté J, dissenting.

[6] The third issue goes to the merits of the RAD’s decision. The Court reviews such issues on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. When applying the reasonableness standard, the Court assesses whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on it: *Vavilov* at para 100.

### III. Analysis

#### A. *The new evidence is inadmissible*

[7] Judicial review involves an assessment of the legality and fairness of an administrative decision, in which the Court reviews the decision below but does not undertake its own fact-finding on the merits of the decision: *Vavilov* at paras 12–13, 125; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18–19. The general rule is therefore that the evidentiary record before the

Court on judicial review is restricted to that which was before the decision maker, here the RAD: *Access Copyright* at para 19. There are some exceptions to this rule, including that the Court may accept evidence that (a) provides “general background” where it may assist the Court; (b) demonstrates procedural defects not found in the evidentiary record; or (c) highlights the absence of evidence before the decision maker: *Access Copyright* at para 20. These exceptions do not permit a party to add new evidence going to the merits of the decision on judicial review.

[8] Mr. Mohammed seeks to file on this application for judicial review an affidavit from his wife, three newspaper articles, and one academic article. The affidavit and one of the articles pertain to an alleged attack on Mr. Mohammed’s brother in August 2021, while the other two newspaper articles and the academic article relate to the treatment of Muslims in India, particularly during the COVID-19 pandemic. The evidence goes directly to the merits of Mr. Mohammed’s refugee claim and, as he submits, purports to corroborate his allegations of risk under sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. Despite Mr. Mohammed’s submissions, I find the evidence does not fall within any of the three exceptions described by the Federal Court of Appeal in *Access Copyright*. It does not simply provide general background, it does not relate to defects in the procedure before the IRB, and it is not directed to showing the absence of evidence before the IRB but to supplementing the evidence that was presented to the IRB.

[9] Mr. Mohammed’s primary argument is that the evidence was not available at the time of his RPD hearing or his RAD appeal. Mr. Mohammed’s affidavit asserts that the evidence was “not reasonably accessible or obtainable to [him] being here in Canada.” He states that he has

some family in India, but says the situation for Muslims in India, and the risk to his family in particular, meant they were unable to obtain the evidence. In particular, he asserts that it was very difficult and dangerous for his wife to prepare her affidavit.

[10] Even if it were established that the evidence was not available at the time of the hearing, this is not alone a ground for admitting the evidence on judicial review. As noted, judicial review is directed to the legality of an administrative decision and its reasonableness based on the facts and evidence before the decision maker. The fact that new evidence may arise after an administrative decision is made does not turn a judicial review into a new hearing on the merits.

[11] In any event, Mr. Mohammed has not established that the evidence he seeks to file was unavailable at the time of the RAD's decision. Notably, all of the evidence predates the RAD's decision. The wife's affidavit is dated September 16, 2021, which is about two months after the RPD issued its decision on July 12, 2021, and well before the RAD's decision in February 2022. Indeed, the affidavit was sworn before Mr. Mohammed's RAD file was reopened at his request on November 30, 2021. Mr. Mohammed's affidavit sworn in support of this application for judicial review refers in generalities to dangers his wife faced in swearing her affidavit. However, nothing in the evidence explains why he was unable to put it before the RAD once it was prepared in September 2021. While counsel submitted that Mr. Mohammed had not received the affidavit in Canada, there is no evidence to support this assertion or to explain the circumstances in which the affidavit was sworn but not conveyed to Mr. Mohammed for many months. Notably, as discussed below, Mr. Mohammed was apparently able to receive affidavits from his wife and brother within a day of them having been sworn in India in July 2021.

[12] The same concern arises with respect to the remainder of the evidence. The news articles are dated in April 2020, August 2021, and September 2021, while the academic article is dated in July 2021. Beyond his general statements that the evidence was not accessible, Mr. Mohammed has provided no explanation why these documents could not have been obtained at around their dates. Indeed, two of the news articles and the academic article appear to come from online electronic sources (including the BBC News and National Public Radio websites), such that Mr. Mohammed's assertion that they were not available to him in Canada is difficult to understand. With respect to the third news article from August 2021, this appears to be a photocopy of a page from the Shalimar Times, said to be an English language newspaper in Hyderabad. Mr. Mohammed has provided no evidence as to when he received this, how it was sent to him or by whom, or why they could not have sent it earlier.

[13] Mr. Mohammed also argues he was unfairly denied the opportunity to present evidence before the RPD and the RAD, and that this ought to weigh in favour of the Court admitting the evidence on the merits of the judicial review. I disagree. Evidence may be filed on judicial review in support of an argument of procedural unfairness, *i.e.*, to demonstrate the unfairness and the consequence of it. However, if a procedural unfairness has been shown, the usual remedy is to remit the matter to the administrative tribunal to give it an opportunity to correct the procedural error through a new hearing: *Canada (Attorney General) v McBain*, 2017 FCA 204 at para 9, citing *Cardinal v Director of Kent Institution*, 1985 CanLII 23 (SCC). It is not for the Court to admit new evidence and conduct its own assessment of the merits of the matter based on that new evidence. In any event, as discussed below, I conclude that Mr. Mohammed was not unfairly denied the opportunity to present evidence.

[14] The new evidence submitted by Mr. Mohammed is therefore inadmissible on judicial review and will not be considered.

B. *There was no breach of the duty of procedural fairness*

(1) Background to the claim for refugee protection

[15] Mr. Mohammed is a Muslim citizen of India. He claims he is at risk from the Hindu nationalist Bharatiya Janata Party [BJP] and from the Rashtriya Swayamsevak Sangh [RSS], a Hindu nationalist volunteer organization, because of his activism against BJP policies and in support of Muslim rights as a member of the Congress Party. He states that after he began vocally opposing legislation with an adverse effect on Muslim rights, representatives of the BJP and RSS physically attacked him on at least two occasions and threatened him and his family. He reported the attacks to the police, but they did not assist and instead warned him against his activism. He claims he left his home in Hyderabad in early 2018 to live with an uncle in Khammum. However, after violence against Muslims escalated, he again began networking and organizing resistance.

[16] Mr. Mohammed claims that in May 2018, he and members of his group were again attacked, and that in an ensuing fight, one of his colleagues was killed and two more were seriously injured. With the assistance of an agent, he left India, arriving in Canada in June 2018. His family remains in Hyderabad.

[17] In March 2020, Mr. Mohammed filed a claim for refugee protection in Canada.

(2) The request for an adjournment

[18] Mr. Mohammed's refugee hearing was scheduled for July 5, 2021. About ten days before the hearing, Mr. Mohammed, through his immigration consultant, applied to change the date and time of the hearing [CDT application]. He claimed he had documents to submit in support of his refugee claim that were to be sent to him from India, but that because of the outbreak of COVID-19, India was in a state of emergency and complete lockdown, with government offices and court houses being closed, leaving him unable to get the required documents.

[19] The RPD denied the CDT application. The RPD noted that the application did not set out what evidence Mr. Mohammed had sought but been unable to obtain; the sources of the evidence; the efforts he had made to gather the evidence; or when he attempted to obtain evidence since his arrival in Canada in 2018. The RPD noted that Mr. Mohammed had been in Canada for two years before the start of the pandemic, and found that his application did not establish that the evidence was not available during that time or that he had been diligent in his attempts to obtain evidence.

[20] Mr. Mohammed's refugee hearing therefore proceeded as scheduled on July 5, 2021.

(3) The request to file post-hearing evidence

[21] At the hearing, Mr. Mohammed testified as to the basis for his claim, but presented little documentary evidence related to the substance of the claim. Mr. Mohammed asserted he had no supporting documents because most of them had been left at his home, where his family was



afraid to go for fear of his agents of persecution. He said that his wife and brother had affidavits and had been trying to gather documents, but that they were not submitted since his family was waiting to gather more documents to send them together in a single package.

[22] Four days after the hearing, Mr. Mohammed's immigration consultant filed an application requesting that the RPD accept additional documents, pursuant to Rule 43 of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*]. In particular, Mr. Mohammed sought to file two affidavits, one from his wife and one from his brother, each sworn on July 8, 2021. The request again asserted that other documents, such as medical documents from the hospital, were at Mr. Mohammed's home, which he and his wife had left and where it was now too risky to return.

[23] In its decision on Mr. Mohammed's refugee claim, the RPD refused to admit the additional affidavits. The RPD noted that Rule 43(3) of the *RPD Rules* required it to evaluate any relevant factors, including (a) the document's relevance and probative value; (b) any new evidence the document brings to the proceedings; and (c) whether the party, with reasonable effort, could have provided the document prior to the hearing, as required by Rule 34. The RPD found that the affidavits were of moderate relevance and very weak probative value given the sparse details they contained of the alleged persecution, the contradictions in them, and the absence of identity documents of the affiants. It also found the affidavits disclosed no new evidence not previously covered in Mr. Mohammed's basis of claim [BOC] or testimony, and did not address their alleged efforts to locate other evidence. The RPD noted the absence of any explanation as to why the affidavits could not have been sworn and provided before the hearing,

particularly since it was clear that the wife and brother were able to swear their affidavits within three days of the hearing.

[24] In addition to the enumerated factors in Rule 43, the RPD also considered the circumstances of the COVID-19 pandemic, but noted that (a) Mr. Mohammed had been in Canada for almost two years prior to the pandemic; (b) state and central government offices in Telangana were functioning at full strength as of May 11, 2021, and that all COVID restrictions had been lifted on June 19, 2021. Finally, from a broader policy perspective, the RPD noted that while the *RPD Rules* contemplated a flexible, accessible, and adaptive tribunal process, the timely disclosure of documents in accordance with the *Rules* promoted efficiency and access to justice. Since the factors weighed against admission of the evidence, the RPD declined to admit the affidavits.

(4) The appeal to the RAD

[25] On appeal to the RAD, Mr. Mohammed challenged the RPD's decisions with respect to the CDT application and its assessment of how COVID-19 pandemic restrictions affected his ability to obtain evidence. With respect to the late disclosure, Mr. Mohammed's submissions stated that the family were not completely literate and were not aware of the errors in the affidavits, noting that "the contents of the affidavits were not translated to [Mr. Mohammed] or his family." Mr. Mohammed did not seek to file the affidavits, or any other additional evidence, as supplementary evidence on appeal pursuant to subsection 110(4) of the *IRPA*.

[26] The RAD found that the RPD had correctly rejected the CDT application and the application to submit post-hearing evidence. The RAD noted that while the RPD did not expressly refer to Rule 54 of the *RPD Rules*, which governs applications to change the date or time of a proceeding, or to the IRB Chairperson's Guideline 6: *Scheduling and Changing the Date or Time of a Proceeding*, the factors and principles set out in the Rule and Guideline supported the RPD's conclusions. The RAD noted its agreement with the RPD that Mr. Mohammed's explanation that his family was waiting to submit all documents together was not a reasonable basis on which to grant an adjournment. It also agreed with the RPD's conclusions regarding the relevant factors on the application to file post-hearing evidence. It concluded there had been no breach of natural justice in the RPD's refusal to grant an adjournment or to admit post-hearing evidence.

(5) Mr. Mohammed had a reasonable opportunity to present evidence

[27] The common law duty of procedural fairness generally requires that "a party must have an adequate opportunity of knowing the case that must be met, of answering it and putting forward the party's own position": *Thomson v Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (SCC), [1992] 1 SCR 385 at p 402, citing *Cardinal* at p 653. The common law duty may be displaced, modified, or supplemented by statutory provisions governing the procedures to be followed by an administrative tribunal: *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 19–22, 42–43; *Westjet v Lareau*, 2024 FCA 77 at para 19.

[28] Section 170 of the *IRPA* sets out procedural requirements for the RPD, including that it must hold a hearing, must give the claimant notice of the hearing, and must give the claimant “a reasonable opportunity to present evidence, question witnesses and make representations”: *IRPA*, ss 170(b), (c), (e). These statutory requirements govern notwithstanding any common law rule. These requirements are implemented through the *RPD Rules*, which set out details regarding the providing of notice, the conduct of hearings, and the filing of evidence: *RPD Rules*, Rules 3, 10, 11, 34–36. The *RPD Rules* adopt a flexible but rigorous approach, setting out rules for the timely disclosure of evidence, while permitting extensions of time and supplementary evidence where a claimant can show they are warranted: *RPD Rules*, Rules 34, 36, 40, 43. Among the factors to be considered in permitting additional time or late evidence is whether “the party, with reasonable effort, could have provided the document as required by rule 34”: *RPD Rules*, Rules 36(c), 43(3)(c).

[29] These provisions underscore the onus on a refugee claimant to present their claim, including the evidence in support of it, in a timely and efficient manner. Neither section 170 of the *IRPA* nor the *RPD Rules* grant to a refugee claimant the unlimited ability to obtain extensions of time or file late evidence. As the RPD pointed out, these principles support the RPD’s mandate to be an efficient and accessible tribunal.

[30] As the RAD found, the record shows that Mr. Mohammed had a reasonable opportunity to present evidence to support his refugee claim. On the evidence before it, the RAD found that Mr. Mohammed had not shown that an adjournment or the filing of post-hearing evidence were justified and that there was no breach of natural justice in the consideration of his claim. In

particular, the RAD found that Mr. Mohammed had not established that restrictions associated with the COVID-19 pandemic prevented him from obtaining and filing evidence, as restrictions had been lifted in India prior to the hearing, Mr. Mohammed had been in Canada for two years before the pandemic and three years before his hearing, and he had not specified what evidence he was trying to get or what efforts he had made to get it.

[31] These findings regarding the impact of the COVID-19 pandemic on Mr. Mohammed's ability to obtain evidence are largely factually driven and are entitled to deference, notwithstanding that they arise in the context of a procedural fairness question.

Mr. Mohammed's submissions on this application, which largely repeat concerns about the impact of the pandemic and the situation of Mr. Mohammed's family and ask the Court to make different factual findings, do not satisfy me that I should interfere with the RAD's conclusions. I note, in particular, that Mr. Mohammed provided no satisfactory explanation, to either the RAD or this Court, as to why he was unable to obtain affidavits from his wife and brother at any time prior to his refugee hearing, but was able to do so within three days after his hearing.

[32] In any event, as the RAD points out, to the extent Mr. Mohammed could establish that he was unable to present evidence to the RPD in a timely way, he had the opportunity to file such evidence before the RAD pursuant to subsection 110(4) of the *IRPA*. Mr. Mohammed made no effort to file with the RAD either the July 8, 2021, affidavits originally tendered as post-hearing evidence or the further evidence from April 2020 and July, August, and September 2021, that he sought to tender on this application for judicial review.

[33] I conclude Mr. Mohammed had a reasonable opportunity to present evidence, and that the RAD made no reviewable error in concluding that his CDT application and his application to file post-hearing evidence were correctly dismissed. There was no breach of either the statutory procedural obligations set out in the *IRPA* or the duty of procedural fairness.

C. *The decision was reasonable*

(1) The RPD's dismissal of the claim

[34] The RPD found that Mr. Mohammed was not credible and that his allegations of risk had not been credibly established. The RPD referred to inconsistencies in Mr. Mohammed's BOC narrative and testimony with respect to his political involvement with the Congress Party, his movements in India after being attacked, and new allegations of risk. The RPD found Mr. Mohammed's explanations for these inconsistencies unreasonable. It also noted the lack of documents supporting the merits of his claim, including his asserted membership and position in the Congress Party, the attacks, the injuries he suffered, and the death of one of his colleagues at a meeting he attended. For reasons similar to those given for refusing the request to file late evidence, the RPD rejected Mr. Mohammed's explanations for the absence of documents as not credible. The RPD also noted that Mr. Mohammed's delay in making a refugee claim after arriving in Canada, when he alleged that he had come to Canada explicitly to seek protection, undermined his credibility.

[35] The RPD also assessed Mr. Mohammed's residual risk based on his profile as a Muslim citizen of India. The RPD considered the evidence of discrimination and acts of violence against

Muslims in India, and their vulnerability to communal violence and scapegoating. It also considered the context of amendments to India's *Citizenship Act* in 2016, which excluded Muslim non-citizens from certain pathways to regularize their status. The RPD recognized that the statute was discriminatory on its face, and considered the demonstrations and violence that arose from its enactment. However, it found that Mr. Mohammed's inference that the statute portended extreme discrimination, torture, and arbitrary detention for Muslims in India, had no factual foundation in the evidence. The RPD concluded that the record did not support a claim that the fact of being a Muslim in India gave rise to a serious possibility of persecution or a risk under section 97 of the *IRPA*. It therefore dismissed Mr. Mohammed's refugee claim on its merits.

(2) The RAD's dismissal of Mr. Mohammed's appeal

[36] On appeal, Mr. Mohammed challenged the RPD's credibility findings, although most of his arguments on this issue pertained to the RPD's refusal of the CDT and post-hearing evidence applications. He also challenged the RPD's conclusions regarding the risk to Muslims in India, asserting that the RPD had engaged in a selective review of the evidence.

[37] The RAD upheld the RPD's conclusions. After conducting its own review of the evidence, it found the RPD had not erred in its determination of credibility. It did not accept Mr. Mohammed's explanations regarding the discrepancies in the evidence or for the lack of corroborating documents. It also found that the RPD was correct in its assessment of Mr. Mohammed's residual risk as a Muslim, based on its review of the objective country

condition evidence in the IRB's national documentation package [NDP] for India regarding the situation of Muslims.

(3) Mr. Mohammed has identified no reviewable error

[38] Mr. Mohammed asserts generally that the RAD's credibility findings were unreasonable, microscopic, and based on peripheral issues. However, he has identified no particular aspect of the RAD's reasoning that it asserts is flawed. Nor does he demonstrate why the RAD's conclusions amount to microscopic analysis based on peripheral issues. To the contrary, the RAD's conclusions, like those of the RPD, were based on inconsistencies regarding central aspects of Mr. Mohammed's narrative, including his involvement with the Congress Party, his actions in fleeing the BJP and the RSS, and threats alleged to have been received by his family. These concerns were heightened by the absence of corroborating evidence regarding his membership in the Congress Party and the violence he alleged he suffered at the hands of the BJP and the RSS, and by the delay in presenting his refugee claim.

[39] Having reviewed the RAD's reasons and having considered counsel's submissions, I am not satisfied that Mr. Mohammed has met his onus to demonstrate that there is a sufficiently central error in the RAD's reasoning with respect to his credibility that would render its decision unreasonable: *Vavilov* at para 100.

[40] Mr. Mohammed also asserts that the RAD's analysis of his residual risk as a Muslim was unreasonable, for two reasons. First, he asserts that the RAD inappropriately attempted to correct the RPD's error in failing to conduct a proper risk analysis without allowing him to respond.



This submission is somewhat difficult to comprehend, as the RAD did not purport to correct an error in the RPD's analysis of Mr. Mohammed's residual risk. To the contrary, the RAD expressly held that "[t]he RPD correctly assessed the Appellant's profile as a Muslim," noting that Mr. Mohammed had not articulated in his appeal any specific errors regarding the RPD's assessment of his profile as a Muslim in India. Despite Mr. Mohammed's submissions, I cannot read the RAD's analysis of those risks as an effort to "correct" a failure or error in the RPD's analysis.

[41] Second, Mr. Mohammed submits that the RAD ignored relevant evidence in the NDP for India, citing passages referring to violence against Muslims. I disagree. The RAD recognized that the documentary evidence indicated that Muslims are "among the most vulnerable groups" in India in relation to societal violence. It also referred to the evidence of incidents of religion-motivated violence against Muslims. However, it concluded that despite being disproportionately affected by communal violence, the evidence did not establish that all Muslims, or Mr. Mohammed in particular, faced a serious possibility of persecution or a likely risk of a section 97 harm.

[42] I note that the portions of the NDP that Mr. Mohammed now cites were not among those that he cited in submissions to the RAD. In submissions to the RAD, Mr. Mohammed asserted that the RPD had failed to consider evidence relevant to the issue of an internal flight alternative (a surprising submission, as the RPD did not address the existence of an internal flight alternative), and his risk of arrest and detention on return as a Muslim minority and failed asylum seeker with an expired passport. He now cites other portions of the NDP entirely, including a passage dealing with the treatment of Muslims during the COVID-19 pandemic, an issue not

raised at all before the RAD. In my view, it is difficult for an applicant to establish that it is unreasonable for the RAD not to refer to portions of the NDP that the applicant themselves did not consider important enough to cite to the RAD: *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 at para 30; *Cova Torres v Canada (Citizenship and Immigration)*, 2023 FC 1672 at paras 43, 58–59.

[43] I am therefore unable to accept Mr. Mohammed’s submission that the RAD ignored relevant evidence or conducted a selective or biased review of the country condition evidence.

#### IV. Conclusion

[44] As Mr. Mohammed has not demonstrated that the RAD’s decision was unreasonable or that the process leading to it was unfair, the application for judicial review is dismissed.

[45] Neither party proposed a question for certification. I agree that none arises in the matter.

**JUDGMENT IN IMM-3155-22**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.

“Nicholas McHaffie”

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Judge

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

**DOCKET:** IMM-3155-22

**STYLE OF CAUSE:** SUBHAN MOHAMMED v THE MINISTER OF  
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**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 25, 2024

**JUDGMENT AND REASONS:** MCHAFFIE J.

**DATED:** MAY 9, 2024

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