Federal Court Cour fédérale

Date: 20130308

Docket: IMM-5351-12

Citation: 2013 FC 250

Ottawa, Ontario, March 8, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

VIKTOR GALYAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 7 May 2012 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 37-year-old man from Hungary. He fears persecution in Hungary due to his Roma ethnicity. Much of the following sequence of events is in dispute.

[3] The Applicant is from the town of Lakon. He was beaten at school for being Roma. He complained to teachers, but they did nothing. The Applicant attended vocational school where he was the only Roma student. Two skinheads in his class routinely harassed him. They assaulted him on two occasions, once in the classroom. The Applicant was refused entry to public places because of his ethnicity, and had trouble finding work. He heard about a racially-motivated murder in a town near him, and that the Hungarian Guard were planning an attack on another nearby town. The Applicant fled to Canada on 19 November 2009, and made his claim upon arrival at the airport.

[4] After arriving in Canada, the Applicant was told by a neighbour to go to the law offices of Viktor Hohots. He met with an interpreter who told him to write out the reasons for his claim and to sign the Personal Information Form (PIF) before he left. The interpreter did not tell the Applicant that what he was writing would be used as his PIF narrative; nor did he explain what should be in a PIF narrative or its relevance to the Applicant's claim. The Applicant was not given any instructions on what to write, so he just wrote a short and general paragraph about his experiences in Hungary.

[5] Prior to the Applicant's 9 March 2012 hearing date, the Applicant met with interpreters at Mr. Hohots' office for the purpose of preparing amendments to his PIF. The interpreters did not ask the Applicant for more details about his claim, nor did they explain to him what should be included in the PIF or its purpose. The Applicant inquired about adding more information, but he was advised not to do this. The amended PIF was translated to the Applicant before he signed it, but

Question 31 of the PIF form was not read to him. This question provides instructions for what should be included in a PIF narrative.

[6] One of the interpreters told the Applicant to obtain copies of police or medical reports. He also asked him some general questions, such as whether he had any brothers or sisters. The Applicant says he was not told to obtain any other documents in support of his claim, nor was the test for a successful refugee claim explained to him. The Applicant was also not told that he could obtain a medical report in regards to memory problems he experiences, or that Legal Aid would be able to cover the cost of such a report.

[7] The Applicant met with Vikramjit Uppal, a lawyer from Mr. Hohots' office, a few days before his hearing. This appointment lasted about 20 minutes. Mr. Uppal asked the Applicant some questions about the reason for his claim, but did not ask for a full account of the events causing him to flee Hungary. He did not explain to the Applicant the test that must be met in order to be accepted as a refugee, nor did he inform him of things that might be asked at the hearing.

[8] The Applicant never met with Mr. Hohots himself. He was represented at his hearing by Mr. Uppal. The only document Mr. Uppal submitted into evidence was a document about country conditions in Hungary. The RPD found that there was no credible basis for the Applicant's claim, and thus refused him refugee status.

[9] After receiving his negative decision, the Applicant decided to hire a new lawyer. He also filed a complaint with the Law Society of Upper Canada concerning both Mr. Hohots and Mr. Uppal. The Affidavit of Karina Azanza lays out the details of this complaint.

[10] Both counsel who were involved in representing the Applicant vigorously deny the Applicant's allegations of incompetent representation. In a letter to the Law Society of Upper Canada (LSUC) dated 18 August 2012, Mr. Hohots indicates that the Applicant himself was often not diligent and missed a number of appointments (see Exhibit K of the Affidavit of Karina Azanza). Contrary to the Applicant's assertions, Mr. Hohots says that he met with the Applicant on 19 November 2009, along with the firm's interpreter, Mr. Sarkozi. He further says that the Applicant was advised about the refugee process in Canada, told to provide a detailed narrative containing instances of persecution, and instructed to gather or obtain documents corroborating his claim.

[11] In Mr. Uppal's response to the LSUC dated 20 August 2012 (Exhibit B of the Affidavit of Karina Azanza), he says that he met with the Applicant twice: on 27 February 2012 and on 6 March 2012, each time for an hour to prepare for the hearing. Mr. Uppal says that he instructed the Applicant to obtain documentary evidence, that he prepared him to testify at the hearing, and that he competently represented him at the hearing.

[12] The Applicant disputes this version of events. He points out that a letter sent by Mr. Hohots to the RPD on 22 December 2009 to explain why the Applicant's PIF was submitted late says that "we were working to obtain the Legal Aid certificate for this family." The Legal Aid Certificate (page 94 of the Affidavit of Karina Azanza) says that it was issued on 24 November 2009. The Applicant also points out that Mr. Uppal says in his letter to the LSUC that the Applicant was initially Mr. Jozsef Sarcozi's client. Mr. Sarcozi is an immigration consultant and translator at Mr. Hohots' firm. The Applicant says that the evidence of Mr. Uppal and Mr. Hohots diverges with regards to who from the firm met with him.

[13] Mr. Uppal asserts that he was present at the meetings where the Applicant met with the interpreters. The Applicant says that Mr. Uppal has presented no evidence such as notes from the meetings in support of this. Mr. Hohots says that he did advise the Applicant to obtain documentation, but the Applicant says that Mr. Hohots has not provided any documentation in support of this assertion.

DECISION UNDER REVIEW

[14] By Decision dated 7 May 2012, the RPD determined that, pursuant to subsection 107(2) of the Act, there was no credible basis for the Applicant's claim, and thus he was not entitled to refugee protection.

[15] The RPD noted that throughout the hearing there was a number of discrepancies between the Applicant's oral testimony and the information contained in his PIF. For example, the Applicant said at his oral hearing that he was beaten at least five times as a child and that his parents complained, but the teachers said that they could do nothing. The complaints made by his parents to teachers and their being rebuffed for racist reasons was not mentioned in the PIF.

[16] The Applicant explained that his PIF was written on the day it was due to be submitted and that he did not know what to do, and did not know he could amend his narrative. The RPD did not find this explanation satisfactory. Claimants have 28 days to prepare their PIFs and the Applicant was represented by counsel. He amended his PIF just prior to the hearing on other points, so he must have known that amendments were possible. He also affirmed at the beginning of the hearing that the PIF, as amended, was complete and accurate. The RPD found that the Applicant's failure to mention the teachers' racist inaction in his PIF undermined his credibility.

[17] In his oral testimony, the Applicant said that on one occasion at school a classmate fell in front of him and pretended that it was the Applicant who was responsible for the fall. Because he was Roma, the teacher gave the Applicant a severe slap to the face. This incident was not mentioned in the PIF. The Applicant gave the same explanation as for the previous omission, and the RPD did not accept it for the same reasons. The RPD also thought that the Applicant obviously considered the incident significant when recounting it. The RPD found that the failure to mention this incident in the PIF further undermined the Applicant's credibility.

[18] In his oral testimony, the Applicant said that he was beaten twice at school by his classmates. He reported the incident to his teachers but they did nothing because he is Roma. The RPD noted this was not included in his PIF. The RPD did not think this a minor incident and that if it had really happened it would have been included in his PIF. The RPD thought that this omission further undermined the Applicant's credibility.

[19] The Applicant said in his oral testimony that he was beaten a number of times for racist reasons. However, in the notes the immigration officer made at the time the Applicant made his claim, the Applicant mentioned threats, humiliations and racial slurs, yet never mentioned being beaten. The Applicant said that at the time he made his claim he did not know where he was, he felt weird, and he was scared, surprised and startled. The RPD said that it understood that the Applicant may have been jet-lagged, but even if the Applicant could not concentrate on small details in listing problems that he experienced in his life, it would be reasonable to expect the Applicant to have mentioned multiple beatings instead of, or at least in addition to, the ones that he did mention. The RPD found that this discrepancy further undermined his credibility.

[20] In his oral testimony, the Applicant said that he had no faith in the police in Hungary because a Roma friend of his had tried to get into a place of entertainment, and was not only refused entry but was chased away by two policemen, one of whom hit him. This incident was not mentioned in the Applicant's PIF. The RPD noted that the directions for filling out the PIF are quite clear that all attempts to obtain protection from the authorities are to be detailed, and if attempts are not made the reasons should be given. The Applicant was quite clear in his oral testimony that it was this incident that caused him not to have confidence in the police. Considering this, the RPD felt it would be reasonable to expect the incident to have been mentioned in the PIF, and the fact that it was not further undermined the Applicant's credibility.

[21] In the Applicant's oral testimony he said that he had never been threatened by the Hungarian Guard, and did not know anyone personally who had. However, in the immigration officer's notes it appears that the Applicant stated that he had been personally threatened by the Hungarian Guard. The Applicant explained at the hearing that he meant that the Hungarian Guard threatened Roma people in general. The RPD did not find this explanation satisfactory. The notes of the immigration officer are fairly clear in that the Applicant fears the Hungarian Guard, and that "they threatened my life." The RPD thought the way in which the notes are written indicates that something happened to the Applicant personally, not a general threat against Roma. It found that this discrepancy further undermined the Applicant's credibility.

[22] The RPD thought that the Applicant generally seemed vague and evasive throughout his testimony. It said that at times he seemed to be concocting his answers to avoid further credibility concerns. For example, when the RPD noted that it seemed strange that the Applicant did not seek medical attention or police help after being beaten by racist thugs, one time for several minutes, the

Applicant said he had not been seriously injured and did not think the incidents were major. The RPD thought it appeared the Applicant realized that he was going to be asked about corroborative documents and claimed not to have sought medical or police help as a way of avoiding the need for documents.

[23] The RPD found the Applicant to be generally lacking in credibility, and simply did not believe, on a balance of probabilities, what the Applicant alleged had happened to him. It also noted that the Applicant had dark hair and white skin, whereas Roma are stereotypically identified by dark skin pigmentation. Counsel submitted that the Applicant had a slight sun tan, and that white Hungarians would not have this. The Applicant said that he could be identified as Roma by his behaviour and other physical features such as his eyebrows. The RPD did not find these explanations satisfactory. It was not aware of any objective evidence that white Hungarians are unable to get a sun tan. Furthermore, while it noted that some Roma people have light or white skin, the only thing offered to establish the Applicant's ethnicity as Roma was his own testimony, which it did not believe. The RPD found, on a balance of probabilities, that the Applicant is not Roma. As such, his claim under sections 96 and 97 of the Act failed.

[24] The RPD also found that pursuant to subsection 107(2) of the Act there was no credible or trustworthy evidence on which a favourable decision could have been made and therefore there is no credible basis for the claim.

ISSUES

[25] The Applicant raises the following issues:

1) Was there a breach of natural justice due to the incompetence of the Applicant's former counsel?

2) Was the RPD's credibility finding that the Applicant is not Roma reasonable?

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] The first issue goes to the Applicant's right to fully present his case, which is an issue of procedural fairness (see *Xu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 718, *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817 [*Baker*] at paragraph 22). In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that it "is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review applicable to the first issue is correctness.

[28] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Negash v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1164, Justice David Near held at paragraph 15 that the standard of review on a credibility determination is reasonableness. The standard of review on the second issue is reasonableness.

[29] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[30] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality,	**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,

membership in a particular social group or political opinion,

de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

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

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;

[…]

[…]

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

(*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 themself 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

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) 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

generally by other individuals in or from that country,	de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
No credible basis	**Preuve**
107 (2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.	**107** (2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

ARGUMENTS

The Applicant

The Incompetence of Counsel

[31] The Applicant says that the test for determining whether the incompetence of counsel amounts to a breach of procedural fairness is found at paragraph 26 of the Supreme Court of Canada's decision in *R. v G.D.B.*, 2000 SCC 22. The Supreme Court of Canada said in that case

that: "it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted."

[32] The Applicant submits that he was incompetently represented by his former counsel in the following ways:

a. No lawyer assisted the Applicant in preparing his PIF, and the assistant who did assist the Applicant did not explain to him what should be included in a PIF, the relevance of the contents to his claim, or translate the instructions to him;

b. No one from Mr. Hohots' staff advised the Applicant that he should obtain documentation to corroborate his claim, such as police or medical reports;

c. No one from Mr. Hohots' staff advised the Applicant of the legal test he would have to meet for his refugee claim to be accepted, including that he must establish that state protection would not be forthcoming to him in Hungary;

d. Neither Mr. Hohots nor his staff were adequately prepared for the Applicant's hearing and their conduct and inaction were deficient for the following reasons:

   i. Failing to arrange for the Applicant to meet with a lawyer at an earlier time than a few days before the hearing;

   ii. Failing to obtain a full account of the facts behind the Applicant's claim prior to the hearing;

   iii. Failing to ask the Applicant questions at the hearing that could have helped to prove to the RPD that he is Roma, and instead submitting that the Applicant is

Roma because he has a Romani name, even though this does not appear to be supported by the evidence;

iv. Failing to inform the Applicant that he might be required to answer questions concerning the form that was completed by immigration officials when he made his claim for refugee protection, and failing to prepare him accordingly;

[33] The Applicant points out that neither of his former counsel specifically contends that they advised the Applicant as to the definition of "refugee." Mr. Uppal states that he advised the Applicant of the need to obtain documentation at their meeting on 6 March 2012, which was three days before his hearing. Mr. Hohots states that the Applicant was advised to provide documents, but does not provide specifics. Mr. Uppal also says that he did advise the Applicant that the notes from the immigration officer might be relevant, but the Applicant notes that the notes from 6 March 2012 provided by Mr. Uppal do not make any identifiable reference to the CIC notes.

[34] The Applicant submits that the Court has found breaches of procedural fairness in similar cases. In *El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234 Justice Near found that there was a miscarriage of justice when counsel did not assist the applicant in filling out his PIF and instead left this to an assistant, did not meet with the applicant until two days before the hearing, and failed to produce a letter concerning an arrest that proved to be critical to the applicant's claim.

[35] In *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196, counsel was found to be incompetent based on the cumulative effect of her incompetent representation. The interpreter made errors in the narrative and counsel then failed to review the English version of it

with the applicant before it was submitted. Because counsel was unaware of the errors in the narrative she failed to file an amendment correcting them. She also failed to procure a medical report corroborating the applicant's injuries. The Court found that counsel's inadequate representation "was sufficiently serious to compromise the reliability of the Board's decision."

[36] In *T.K.M. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 927, the Court held counsel to be incompetent due to his conduct at the applicant's hearing, and because "when a claimant retains a representative it is his or her duty to advise the client as to what evidence will be required."

[37] Although decided in the context of a humanitarian and compassionate (H&C) decision, the Court in *K.I.K. v Canada (Minister of Citizenship and Immigration)*, 2012 FC 687 found that counsel was incompetent for failing to advise the applicant that financial establishment is relevant in an H&C decision, and that a miscarriage of justice had occurred because, in refusing the application, the officer specifically referred to the lack of this evidence.

[38] The Applicant points out that he has provided a detailed affidavit in support of this application describing his interactions with his former counsel and their staff. He has also provided copies of the complaint he filed with the Law Society of Upper Canada about his former counsel.

[39] The Applicant further submits that it is apparent from his PIF narrative that it was prepared without competent representation. The Applicant's entire PIF is as follows:

> Ny name is Galyos Viktor [*sic*] I was born on October 21st 1975. I left my country because theirs [*sic*] a huge racism and discrimination. Since I was a boy I struggled because I am a gypsy, I was humiliated, discriminated, threatened, and beaten. I got into problems with

> organizations that hated and killed gypsies. Like the Hungarian guardsmen or the skinheads, but most of the population judges the gypsies and discriminates them. I struggled to get a job [*sic*] I called a location if they have a job position available they told me yes and if I could come in for an interview when I did as soon as they seen [*sic*] my skin colour they said the position is filled and they will contact me if there is an opening. They never allowed us in to clubs and when I went into a restaurant [*sic*] they told me that I cant [*sic*] go in because I am a gypsy. I came to this country with high hopes that I wont [*sic*] be discriminated because of who I am.

[40] Guidance as to what should be included in a PIF narrative is set out in the instructions to question 31. The Applicant states that the instructions were never translated or explained to him. The instructions tell an applicant to set out in chronological order all significant events and reasons that led him or her to seek protection in Canada. It also tells applicants to provide details of any interactions with the authorities, and any steps that were taken to seek refuge in other parts of their home.

[41] The Applicant submits that the content of his narrative should have alerted his former counsel to the fact that he had experienced significant events that should have been specifically referenced in the PIF. He wrote "I was humiliated, discriminated, threatened, and beaten." The narrative generally acknowledges that persecutory events occurred, but contains no information setting out the specific incidents. The Applicant states that it cannot be alleged that he failed to inform his counsel that these events occurred because they are set out in his PIF. Further, competent counsel would have included some information in the narrative as to whether the Applicant sought state protection in Hungary.

[42] The Applicant recognizes that there are many contradictory allegations in evidence before this Court, particularly relating to the meetings between the Applicant and different people from Mr.

Hohots' law office. The Applicant points out that the evidence from his two former counsels is contradictory. However, what cannot be contested is the content of the PIF that was filed. It is clear from looking at the PIF that it does not conform to expectations of what would be included in a PIF by a claimant who is represented by competent counsel. The PIF contains absolutely no particulars of the incidents of persecution suffered by the Applicant, and as a direct result the RPD found him not to be credible. The Applicant states that this is apparent on the face of the record.

[43] Further, former counsel do not appear to challenge the Applicant's contention that he was left to write his own statement of reasons for his refugee claim, or that after doing so he was not advised that what he had written did not conform to the expectations as to what should be in a PIF narrative, or that he was not told that additional detail should be included. Counsels' role seemed to be limited to translating the Applicant's statement from Hungarian to English and submitting it to the RPD.

[44] Mr. Hohots admits that he left the Applicant to write his own narrative and deliver it to his office. Mr. Uppal also confirms that the Applicant wrote his own narrative, and likens the role of counsel to that of a police officer who is taking a statement from a witness. He says that the Applicant should not complain about a PIF he wrote himself, and that it was up to him to describe the events with accuracy. Counsel do not appear to challenge that they never advised the Applicant to amend his PIF to include more detail, but rather blame the Applicant for failing to raise the issue himself.

[45] Former counsel acknowledge that the Applicant's PIF was deficient in detail and that they did not advise him of its deficiency. They also acknowledge that failing to provide the appropriate level of detail in a PIF can be detrimental to the outcome of a refugee claim. Counsel were retained

to help the Applicant with his claim, yet the PIF narrative is deficient on the face of it and fails to provide particulars even though the narrative says that the Applicant was "humiliated, discriminated, threatened and beaten." The Applicant submits that former counsel's failure to adequately represent him is apparent on the face of the record, and this resulted in a miscarriage of justice.

[46] The Applicant points out that it was the omission of specific events in the PIF that caused the RPD to find that he was not credible. In the Decision, the RPD addressed each incident of persecution raised by the Applicant at his hearing, but then went on to find the Applicant not credible in relation to each incident because it was not addressed in his PIF. The RPD did address some other concerns, but it is apparent that its findings with regards to the omissions permeate the entire Decision. Essentially, the RPD relied on omissions to discredit each and every persecutory event referenced by the Applicant at his hearing.

[47] The present situation is very similar to *El Kaissi*, above. At paragraph 21 of that decision the Court held that "a breach of procedural fairness inevitably occurs where the incompetence of counsel prevents a refugee claimant from presenting critical evidence to satisfy the Board and leads to negative credibility findings that permeate the entire decision." In the present case, it was the omissions from the Applicant's PIF that were central to the RPD's finding that the Applicant was not credible, and which led to the refusal of his claim.

[48] In his affidavit, the Applicant says that had he better understood what had to be proven in a refugee claim he could have discussed past interactions with the police in Hungary, and testified about his Roma identity. Had he known that the notes from the immigration officer might be relevant, he could have testified that the interpreter assisted by phone, and that the form was not

read back to him before he signed it. Had his former counsel been sufficiently familiar with the background to his claim, he could have asked questions at the hearing to help elicit this evidence.

[49] The Applicant further attests that had he known what documents would be helpful to his claim, he could have provided a letter from his friend who was beaten by a police officer as well as letters from family members confirming that he is Roma and that he was beaten at school because he is Roma as well as a psychological report addressing any difficulties he experienced in presenting evidence at his hearing. The Applicant submits that had he had a meaningful opportunity to present this oral and documentary evidence to the RPD, it may not have reached the same conclusion. As such, he submits that a miscarriage of justice has occurred.

The RPD's Finding that the Applicant is not Roma

[50] While the Applicant submits that the breach of procedural fairness due to counsel's incompetence is enough to warrant allowing this application, he further submits that the RPD's finding that he is not Roma is unreasonable because it relies on speculation, conjecture and racial profiling.

[51] The Federal Court of Appeal has held that it is an error for the RPD to base its findings on mere speculation or conjuncture (*Canada (Minister of Employment and Immigration) v Satiacum*, [1989] FCJ No 505 (FCA)). The RPD reiterates the finding that the Applicant is not credible, but also relies on its finding that the Applicant has "white skin."

[52] The Applicant submits that the Court has quashed decisions that make negative findings about a person's identity based on generalizations, stereotypes and racial profiling. In *Szostak v*

Canada (Minister of Citizenship and Immigration), 2001 FCT 938, at paragraphs 20-24, the Court found that:

> …when reviewing decisions of the Refugee Division in cases involving claimants who said that they were Roma and where the issue was whether they were or not and where the Refugee Division based its decision on physical appearance and other characteristics of those who were before the tribunals.
>
> In *Pluhar*, *supra*, Justice Evans wrote this at paragraphs 10 and 11 of his decision:
>
>> In my opinion, the Refugee Division erred in law by effectively basing the decision on its assessment that Ms. Pluharova was not dark skinned, especially since it claimed no relevant "expertise". It is inherently dangerous for Board members to base a finding on whether people in another country would regard a claimant of a particular ethnicity solely on the basis of the member's observation of the person concerned.
>>
>> There may, of course, be some situations in which it will be quite obvious from a person's appearance that the person is not of a particular ethnicity. However, since Ms. Pluharova had black hair and a "suntanned" appearance, the panel's "common sense" was an unsufficiently reliable basis for the panel's assessment of such a sensitive matter. Skin tone cannot be characterized simply as either "light" or "dark": there is a broad spectrum between these polarities. Racists may be able to identify a person as a member of a minority group by physical characteristics that would not be apparent to people in other countries.
>
> In *Mitac*, *supra*, Justice Lutfy endorsed what Justice Evans had said in *Pluhar*. He then focussed on the evidence that was before the tribunal and concluded that certain of the Board's findings were made without regard to the material before it. He was also critical of the absence of a Romany interpreter.
>
> In my view, cases involving Romany claimants are no different than any other case which comes before the Refugee Division where identity is an issue. Panels of the Refugee Division must make their findings of identity based on the evidence adduced, whether

> documentary or by way of testimony. Moreover, inferences drawn must be based on the evidence and be reasonable as was made clear in *Aguebor v. MEI* (1993), 160 N.R. 315 (F.C.A.).
>
> This principle ensures that generalizations, typifying, racial profiling, averaging, and preconceptions are held in check. In this case, except as to language and education, the tribunal had no documentary evidence the Court was made aware of which provided a solid basis for assessing the identity of this claimant who said he was a Roma and who testified as to the dangers of "the typical physical characteristics of the Roma in Poland" (certified record, page 541) and who expressed his concern about the dialect he spoke (certified record, page 588).

[53] In *Vodics v Canada (Minister of Citizenship and Immigration)*, 2005 FC 783, at paragraph 17, Justice Douglas Campbell emphasized at paragraph 17 that an applicant's sworn evidence as to his or her ethnicity is presumed to be truthful and cannot be rebutted by stereotypical assumptions:

> …Therefore, where sworn testimony of ethnicity is presumed to be true, without the required level of certainty being attained, the failure of the person giving the evidence to meet a decision-maker's understanding of an ethnic stereotype does not constitute reliable evidence which can be used to rebut the presumption. That is, the mere fact that a person is the exception to an ethnic profile, even on a number of factors, does not provide a sound basis for deciding that he or she is not who he or she claims to be. It might very well be that, where there is no admissible and reliable evidence contrary to the claim of ethnicity, such as a reliable evaluation of a person's ethnic lineage or admissions or other direct contradicting evidence, the person's own sworn statement of his or her ethnic identity must be accepted.

[54] The Applicant says that this Court has gone so far as to hold that basing a finding of ethnicity on stereotypical assumptions is sufficient in and of itself to warrant setting aside a decision. In *Kotkova v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1706, at paragraphs 3-4, the Court had the following to say on point:

> In support of his opinion that the applicant is not credible and that state protection is available, the panel member expressed the following in his decision, among other things:

> ... De plus, la revendicatrice en apparence, ne semble pas Juive et elle-même a admis que ses traits physiques n'indiquent pas qu'elle est Juive. Suite à cette analyse du profil de la revendicatrice, le Tribunal a voulu savoir comment les gens pouvaient l'identifier comme Juive?

> Whether it is expressed consciously or not, this kind of stereotypical consideration, entirely based on the appearance of an individual, is unfortunately such that it fosters unacceptable prejudice toward Jews and cannot be used to discredit the applicant's stated fear of being persecuted on the basis of her Jewish religion. In my view, comments such as these, under the circumstances, vitiate the whole decision at issue.

[55] The Applicant testified at his hearing that he can be recognized as a Roma person. In his affidavit in support of this application, he disputes the RPD's finding that he has "white skin." He also attests that "Roma people identify as Roma because we share joint origins and customs and not because we share a similar physical appearance."

[56] The Applicant submits that it is unfair and problematic to make factual findings concerning a claimant's physical appearance, particularly findings that attempt to classify a claimant's skin colour into categories such as "white" or "dark skin pigmentation," as occurred in the Decision. The RPD engaged in racial profiling in determining that the Applicant's skin falls into the "white" category and that he did not meet the stereotypical characteristics of a Roma person from Hungary.

[57] As in *Kotkova*, above, this error is sufficient to warrant setting aside the entire Decision. Had the RPD not reached this erroneous finding, it would have had to consider the other evidence on the persecution the Applicant had faced in Hungary (*Horvath v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1350).

The Respondent

The Incompetence of Counsel

[58] The Respondent submits that the Applicant is now trying to blame his former counsel for his failed refugee claim when he was repeatedly told by his counsel to submit documents relevant to his claim, and was aware that he could amend his PIF, having actually done so once. As such, his allegations of solicitor incompetence do not reach the threshold needed to establish a breach of procedural fairness.

[59] The Respondent also submits that an allegation of incompetent counsel is not sufficient grounds to warrant the intervention of the Court. In *Frenkel v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 96, the Court said at paragraph 11 that

> Generally speaking it is not for the Courts to deal with allegations of incompetence of counsel: see *Williams v. M.E.I.* (1994), 74 F.T.R. 34 at 38. In an extraordinary case, competency of counsel may give rise to a natural justice issue. However there is a heavy burden on an applicant to come within this exception: see for example *Sheika v. Canada* (1990), 71 D.L.R. (4th) 604 at 611 (F.C.A.); *Huynh v. M.E.I.* (1994), 21 Imm. L.R. (2d) 18 at 21 and following (F.C.T.D.); *Shirwa v. M.E.I.* (1994), 23 Imm. L.R. (2d) 123 at 128 and following (F.C.T.D.); and *Drummond v. M.C.I.*, [1996] F.C.J. No. 477 (A-771-92) an 11 April 1996 decision of Mr. Justice Rothstein, who sums up the law in this area:
>
> > "... The authorities are to the effect that as a general rule, where counsel is freely chosen, it is the professional accreditation body such as the Law Society of Upper Canada... and not the Courts which have the mandate to deal with incompetence of counsel; .... However, in extraordinary cases, competency of counsel may give rise to a natural justice issue. In such cases, the facts must be specific and clearly proven; .... (page 2)."

> …The Applicants have not demonstrated that this is an exceptional case in which the competency of counsel is specifically and clearly proven so as to give rise to review by way of a denial of any of the elements of natural justice.

[60] The Respondent notes that the Applicant did not raise his concerns about incompetent representation at the first opportunity at his hearing. If the Applicant had issues with the way that he was being represented and the way counsel conducted the proceedings and/or submissions made on his behalf, these matters should have been raised at the "earliest practicable opportunity" at his hearing. See *Dragomirov v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 337 (FCA); *Jasiel v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1234; *Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949 (FCA).

[61] The Respondent points out that the threshold for establishing a breach of procedural fairness on the basis of counsel's incompetent performance is very high (*Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 173; *El Ghazaly v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1329). The general rule is that the client must bear the responsibility for his or her choice of counsel, and that this type of allegation will only succeed in the most "exceptional case" (*Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 (FCA)).

[62] An applicant must establish three things in order to establish a breach of fairness on the basis of counsel's performance: (i) he must provide corroboration by giving notice to the former counsel and providing them an opportunity to respond; (ii) he must establish that his counsel's act or omission constituted incompetence without the wisdom of hindsight; and (iii) he must establish that the outcome would have been different but for the incompetence. See *G.D.B.*, above. The Respondent submits that the Applicant has not established that his counsel was incompetent or that,

but for their incompetence, the outcome of his refugee claim would have been different (*Yang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 269 at paragraphs 17-21).

[63] The second element has been described as the "performance" requirement whereby the Applicant has to establish that counsel's performance constituted incompetence. The threshold is high and the Applicant must establish "extraordinary incompetence" (*Julien v Canada (Minister of Citizenship and Immigration)*, 2010 FC 351 at paragraph 36).

[64] The third element requires the applicant to establish that "there is a reasonable probability that but for this alleged incompetence, the result of the original hearing would have been different" (*Yang*, paragraph 26). As such, it is only where an applicant has "acted with care" that he or she may obtain relief (*Goudarzi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 425 at paragraph 46). Where a claimant is partly at fault, by failing to be diligent for example, he is not entitled to relief (*Gomez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 568 at paragraph 28).

[65] The Respondent submits that the Applicant has not established that his former counsel were incompetent or that the result would have been different had they acted differently. The Applicant must demonstrate that there is a reasonable probability that the result would have been different, but for the incompetence of his representatives (*Parast v Canada (Minister of Citizenship and Immigration)*, 2006 FC 660).

[66] Both counsel in this case have denied the Applicant's allegations and assert that they did meet with him on different occasions, that they explained to him the refugee process, and that they

instructed him to gather documents to corroborate his claim. Mr. Uppal said that he prepared the Applicant for the hearing and competently represented him there.

[67] Given the letters from counsel instructing the Applicant to obtain documentary evidence (see the Affidavit of Karina Azanza), the Respondent submits that the Applicant must bear some responsibility for failing to provide corroborative documents which may have assisted with his claim. As the Applicant himself failed to act with care, he has not demonstrated that, but for his lawyer's actions, the result of his hearing would have been different.

[68] The Respondent points out that, consistent with former counsel's assertion of competent representation, the Applicant's original PIF was amended prior to his hearing. The Applicant therefore knew, contrary to his affidavit, that he could update/amend his PIF before the hearing. The Applicant also admits that he met with Mr. Uppal before the hearing to prepare for it, and nothing in the transcript establishes that counsel conducted himself incompetently at the hearing. In fact, the transcript indicates that counsel explored the key issues that were before the RPD: credibility concerns arising from omissions in the PIF; state protection; and discrimination and/or persecution of Roma in Hungary.

[69] Furthermore, the Applicant's oral evidence contradicted what he originally told immigration officials upon entry. Thus, it is even more unclear that the result would have been different but for counsel's alleged incompetence. There is also no documentary evidence objectively substantiating the Applicant's allegations such as police and/or medical reports.

The RPD's Finding that the Applicant is not Roma

[70] The Respondent says that the Applicant is effectively suggesting that the RPD was biased in that it made negative findings about his Roma identity based on generalizations, stereotypes and racial profiling. In *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, the Supreme Court of Canada stated the test for a reasonable apprehension of bias is whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator.

[71] In *R. v R.D.S.*, [1997] 2 SCR 484, the Supreme Court of Canada said at paragraphs 112-113 that

> …the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough…
>
> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[72] The Supreme Court of Canada also emphasized the stringent test in paragraph 76 of *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259:

> First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> (*Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 395)

[73] The Respondent submits that the RPD's findings about the Applicant's identity do not amount to bias or establish reliance on generalizations, stereotyping, or racial profiling. Quite simply, having found him not credible, the RPD analyzed whether the Applicant was Roma as he asserted. In doing so, the RPD considered counsel's submissions and the Applicant's explanation at the hearing as to what other evidence there was for the RPD to determine whether he was Roma, including the Applicant's skin pigmentation, hair, facial features, and last name. The RPD then properly concluded that, while "some Roma people have light or even white skin, all [the RPD] [had] to establish the claimant's ethnicity as Roma is his testimony, which [the RPD] did not believe." As such, the Respondent submits that the Applicant's argument should be dismissed.

[74] Furthermore, questions of credibility and weight of evidence are within the jurisdiction of the RPD as the trier of fact (*Brar v Canada (Minister of Employment and Immigration)*, [1986] FCJ No 346). The RPD is in the best position to assess the Applicant's oral testimony (*Zheng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 673 at paragraph 17). There were numerous discrepancies between the Applicant's oral testimony, PIF narrative and the notes of the immigration officer. The Respondent submits the RPD's negative credibility findings are therefore reasonable.

The Applicant's Reply

The Incompetence of Counsel

[75] The Applicant points out that in *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 604 the Federal Court of Appeal explicitly held that a refugee determination can be set aside because of incompetence of counsel. Thus, the Respondent's assertion that an allegation of misconduct is not sufficient grounds for the intervention of the Court and that "clients will be held to their choice of advisers" has no merit.

[76] The Applicant also submits that there is no requirement that he raise the issue of counsel incompetence at his hearing. None of the cases cited by the Respondent on this point relate to the issue of incompetence of counsel. *Dragomirov* was about an applicant's objections to evidence that was submitted to the RPD in support of his refugee hearing. Both *Jasiel* and *Yassine* relate to objections raised to RPD procedures by applicants at the Federal Court which were not raised before the RPD. The Applicant submits that the Respondent has not cited any jurisprudence that actually supports its assertion that an applicant is required to raise the issue of the incompetence of counsel at the hearing of his or her claim.

[77] In any event, the Applicant submits that the earliest practicable opportunity for him to raise his concerns about the competence of his former counsel was not at the hearing of his refugee claim. In his affidavit, the Applicant indicates that he only became aware of the extent of his former counsel's incompetence after he met with his new counsel.

[78] As regards the Respondent's assertion that judicial review on the grounds of counsel incompetence will only be allowed in "extraordinary circumstances," the Applicant submits that this

is such an extraordinary circumstance. The Applicant reiterates the jurisprudence he previously cited where the Court has allowed judicial review in similar circumstances (*El Kaissi*; *Memari*; *K.I.K.*). The Applicant further submits that his case is extraordinary because there is a clear link between the RPD's reasons for refusal and his counsel's incompetent representation. It was due to the omissions in the Applicant's PIF that the RPD found virtually all of his allegations to be not credible. Even though the Applicant submitted an amendment to his PIF before the hearing, he could not have realized it should have been amended to include more detail because he was never advised by counsel as to what should properly be included in the narrative. The Applicant had no reason to believe that his narrative did not comply with the RPD's expectations.

[79] In response to the Respondent's assertion that it is not clear the result of the Applicant's claim would have been different but for counsel's alleged incompetence, the Applicant submits that it is not necessary for him to demonstrate that but for the incompetence the result "would have been different." The Court held in *Memari* that "the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form." The jurisprudence is clear that it is only necessary to establish that the reliability of the result is compromised (*K.I.K.*, paragraph 16; *El Kaissi*, paragraph 16).

The RPD's Credibility Findings

[80] The Applicant submits that the Respondent's argument that the RPD's negative credibility finding was reasonable is not the relevant issue in this case. A finding that the Applicant's right to natural justice was breached is sufficient to allow this application for judicial review regardless of whether the Decision would have been reasonable but for counsel's incompetence.

The RPD's Finding that the Applicant is not Roma

[81] The Respondent submits that the Applicant is effectively suggesting that the RPD was biased. The Applicant submits that this is not the case, and that it is not necessary for him to establish the test for bias in order for his argument to be successful. In none of the cases of this Court cited by the Applicant finding that the RPD erred by relying on stereotypical assumptions does the Court find it is necessary to establish the test for bias in order to warrant overturning the decision (*Szostak*; *Pluhar v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1318; *Vodics*; *Kotkova*). In any event, the Applicant submits that a reasonably informed person would perceive bias on the part of an adjudicator as a result of his findings concerning the Applicant's skin colour and ethnicity.

[82] The Respondent submits that this aspect of the Decision was reasonable because the RPD based its finding on the evidence before it, including "the Applicant's skin pigmentation, hair, facial features, and last name." However, the Respondent has not cited any jurisprudence that says it is appropriate for the RPD to base credibility findings on a claimant's skin colour and physical appearance in this or any other circumstance. By contrast, the Applicant has referenced numerous cases holding that such findings are unreasonable and can warrant setting aside a decision as a whole.

ANALYSIS

[83] As the Respondent points out, the threshold for establishing breach of procedural fairness on the basis of incompetent counsel is very high. See, for example, *El Ghazaly*, above, at paragraph 20.

Incompetence will only constitute a breach of natural justice under extraordinary circumstances. See *Memari*, above, at paragraph 36.

[84] It is generally recognized that if an applicant wishes to establish a breach of fairness on this ground, he or she must:

a. Provide corroboration by giving notice to former counsel and providing them with an opportunity to respond;

b. Establish that former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and

c. Establish that the outcome would have been different but for the incompetence.

See, for example, *Memari*, above; *Nizar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 557; and *Brown v Canada (Minister of Citizenship and Immigration)* 2012 FC 1305.

[85] The Respondent says that, on the facts of the present case, the Applicant has not established that his former counsel was incompetent or that the result would have been different. I disagree.

[86] Former counsel dispute the evidence put forward by the Applicant but, in my view, there can be no disputing the inadequacies that appear on the face of the Applicant's PIF narrative which clearly support his allegation that he was left to prepare this important document by himself, without guidance on what it should contain and what the RPD would be looking for in such a narrative. Competent counsel would have known that the Applicant's narrative does not comply with the expectations of the RPD and that it would be extremely detrimental to the Applicant at the hearing. Anyone with experience before the RPD knows that it consistently and relentlessly draws negative credibility findings from a failure to include important incidents in the PIF and that, where an

applicant is assisted by a lawyer, it will not accept a lack of knowledge as to what should be included in a PIF as a reasonable explanation. In that regard, the Applicant's PIF is a negative credibility finding waiting to happen.

[87] The evidence before me is undisputed that the Applicant was left to write his PIF on his own and that, after doing so, he was not advised that what he had written did not conform with the requirements set out in question 31 as to what should be in a PIF narrative.

[88] I am also satisfied that incompetent representation, at least as regards the PIF, caused the RPD to find the Applicant was not credible with regard to his fear of persecution in Hungary and that the result could very well have been different had the Applicant been guided to prepare a PIF that met the expectations of the RPD. It is apparent from the RPD's reasons that it found the Applicant not to be credible after addressing each incident of persecution raised by the Applicant, and then finding it was not addressed in his PIF. I agree with the Applicant that the findings based on the inadequate PIF permeate the whole Decision. Further, the Applicant has made clear in his affidavit that he could have adduced additional evidence to support his claim if he had had proper guidance from former counsel.

[89] I am satisfied that this is one of those extraordinary cases such as *El Kaissi*, above, and *Memari*, above, where the incompetent acts of former counsel ultimately proved critical to the RPD's assessment of the claim and where the inadequate representation is sufficiently serious so as to compromise the RPD's Decision.

[90] The Applicant raises other issues, but there is no point in considering them further as I am convinced this matter must be sent back for reconsideration.

[91] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is referred back for reconsideration.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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