

Federal Court



Cour fédérale

**Date: 20160722**

**Docket: IMM-4882-15**

**Citation: 2016 FC 867**

**Ottawa, Ontario, July 22, 2016**

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

**BETWEEN:**

**TIHAMER SZARKA  
TIHAMERNE SZARKA  
TIHAMER SZARKA  
TIHAMERNE SZARK  
TIHAMER SZARKA (a minor)  
RENATO SZARKA (a minor)  
NIKOLASZ SZARKA (a minor)  
NORBERT SZARKA  
EDIT HORVATH  
BIANKA VANDA SZARKA (a minor)  
NORBERT SZARKA (a minor)  
GYORGY SZARKA  
NIKOLETTA SZARKA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. OVERVIEW

[1] Mr. Tihamer Szarka and his family are citizens of Hungary. They have claimed protection in Canada based on their fear of persecution in Hungary due to their Roma ethnicity.

[2] The claim was heard and considered by David McBean, a Member of the Refugee Protection Division, of the Immigration Refugee Board of Canada [RPD]. Member McBean heard the claim in five separate sittings over a three year period. The final sitting took place in January, 2015 after Mr. McBean discovered he had failed to question some members of the Szarka family during the previous four sittings.

[3] In October 2015 the RPD rejected the Szarka family's claim. The RPD found the family generally lacked credibility and as a result did not believe that any of the significant events the Szarka's alleged in support of their claim actually happened. The RPD concluded that the family members were neither Convention refugees nor persons in need of protection.

[4] The Szarka family is seeking a review of that decision. The Szarkas argue that the delays between sittings cast doubt on the RPD's ability to adequately recall the subjective elements of the family's evidence; as a result the delay constitutes a breach of procedural fairness. The Szarka's further argue a reasonable apprehension of bias relying on data regarding Member McBean's acceptance rate of Roma refugee claims, the procedural history of the claim and Member McBean's conduct. The procedural fairness and bias issues had been advanced before the RPD in an unsuccessful recusal motion brought prior to the fifth and final sitting of the RPD.

[5] The Szarka family also argues the RPD's rejection of documentary evidence coupled with credibility findings based on speculation render the decision unreasonable.

[6] I agree with the applicants and find that the decision was unreasonable. I will therefore grant this application for judicial review. As the reasonableness issue is determinative, I need not address the issues of procedural fairness and bias.

## II. Decision Under Review

[7] Credibility was the determinative issue. The RPD assessed the Szarka's evidence against their Personal Information Forms [PIF] and the information provided at the Point of Entry [POE], identifying a number of discrepancies, omissions and implausibility's. Based on these discrepancies the RPD concluded that the family generally lacked credibility.

[8] The RPD also gave little weight to supporting letters from neighbours and friends, concluding that "these people would have an interest in seeing the claims succeed so I give these letters little weight."

[9] The RPD also considered two documents by Aladar Horvath a former Hungarian politician, filed in support of the claim. The RPD gave little weight to this evidence as well. Noting that Mr. Horvath is not a lawyer, the RPD took issue with Mr. Horvath's statement that the applicants appeared in Toronto at a free legal counselling session Mr. Horvath had held for refugee claimants. The RPD further notes that Mr. Horvath criticizes numerous things as being detrimental to Roma in Hungary but fails to mention anything that might be good. The RPD

assesses the statements made by Mr. Horvath and concludes the document is filled with bald statements and is an “unbalanced collection of random statements all critical of Hungary.” The RPD then concludes “As such, and given the rather odd statement that the author was providing legal counseling to the claimants I give the documents little weight.”

[10] The RPD concludes by noting that “Since I do not believe anything in the claimants’ evidence, to find in their favour, I would have to find that all Roma people in Hungary face more than a mere possibility of persecution regardless of their circumstances. For this to happen, Hungary would have to essentially be in a state of complete breakdown. It is not.” The RPD then rejects the claim.

### III. Standard of Review

[11] The reasonableness standard applies to the RPD’s decision on the merits, including on credibility (*Exantus v Canada (Minister of Citizenship and Immigration)*, 2015 FC 39 at paras 25, 27).

### IV. Was the RPD Decision Reasonable?

[12] The respondent submits that the RPD’s credibility findings were reasonably open to the RPD and that the RPD is entitled to reject implausible evidence. For example the RPD could reasonably find it implausible that Tihamer had no visible injury after being repeatedly hit in a five hour interrogation. In addition, the respondent argues that the RPD could draw negative inferences against the Szarkas’ credibility due to contradictions in their testimony and between

their testimony, PIFs and POE statements. Moreover, the respondent submits the RPD did not disbelieve the claims merely because they were included in an amended PIF and not the original PIFs; rather the discrepancies and omissions between the two were sufficient to impact the applicants' credibility. The respondent argues that "where, as here, the RPD's inferences are not so unreasonable as to warrant intervention, they are not open to judicial review."

[13] Similarly the respondent argues that the RPD provided clear reasons for assigning little weight to the Horvath affidavits after having carefully considered them. The respondent submits that it is not for the court to re-weigh the evidence.

[14] While I do not take issue with the general principles articulated in the respondent's argument, I am of the opinion that the decision is neither intelligible nor transparent (*Dunsmuir v New Brunswick*, 2008 SCC 9 para 47).

[15] I recognize that credibility is the heartland of the RPD's jurisdiction (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2015 FC 5 at para 13) and the Court must accord deference to the RPD's determinations on an applicant's credibility and plausibility findings (*Aguebor v Canada (Minister of employment and Immigration)*, [1993] FCJ No 732 at paras 3-4, 160 NR 315 (CA)). However, this Court may grant relief where a tribunal has based its decision on "an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it" (*Federal Courts Act*, RSC 1985, c F-7 paragraph 18.1(4)(d)).

[16] In *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319, Justice Mary Gleason discusses the meaning of “perverse” and “capricious” as those terms are used paragraph 18.4(1)(d), noting:

[36] In the seminal case interpreting section 18(1)(d) of the FCA, *Rohm & Haas*, Chief Justice Jacket defined “perversity” as “willfully going contrary to the evidence” (at para 6). Thus defined, there will be relatively few decisions that may be characterized as perverse.

[37] The notion of “capriciousness” is somewhat less exacting. In *Khakh v Canada (Minister of Citizenship and Immigration)* (1996), 116 FTR 310, [1996] FCJ No 980 at para 6, Justice Campbell defined capricious, with reference to a dictionary definition, as meaning “marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment, intent or purpose”. To somewhat similar effect, Justice Harrington in *Matando v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 at para 1, [2005] FCJ No 509, defined “capricious” as being “so irregular as to appear to be ungoverned by law”. Many decisions hold that inferences based on conjecture are capricious.

[17] In my view, the RPD’s credibility findings were, in many instances, based on microscopic distinctions or conjecture. Similarly, while the RPD does, as the respondent argues, provide clear reason for assigning little weight to the Horvath affidavits, those clear reasons either do not accord with the content of the affidavits or reflect a microscopic approach to the evidence that appears aimed at discrediting it.

#### A. *Credibility*

[18] In finding that Tihamer Szarka’s allegation that he had been struck repeatedly by police was implausible Member McBean states “The way in which Tihamer described being struck made it clear these were not light slaps that would not cause any harm. To be struck repeatedly

by police officers over the course of five hours would obviously leave marks on his body and to say that there were none is simply implausible given the way that the claimant testified.”

[19] However, it was not Tihamer Szarka’s evidence that he was repeatedly struck by police for five hours. His evidence was that he was detained and questioned for five hours. He could not identify how many times he was struck but clearly states that the striking was not continuous throughout the five hours. He described the strikes as “Hitting as on the neck, like you would do it with a child. They punching me into my side. And they caught me on the head. They done ... in ... in a police, they don’t beat the people that would have any mark on their body.”

[20] Member McBean has characterized the evidence in a manner that simply is not consistent with the evidence that was before him. In turn his conclusion that the abuse described “would obviously leave marks on his body” is nothing more than conjecture that is then relied upon to make a negative credibility finding.

[21] Member McBean relies on discrepancies between the statement Tihamerne Szarka gave at the POE in April, 2011 and her testimony before Mr. McBean almost four years later in 2015 to support other negative credibility findings. This Court has highlighted the dangers of relying on POE statements because the circumstances in which they are given are far from ideal (*Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at paras 50-51, *Wu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1102 at para 16). Member McBean did not heed this warning but instead relied on microscopic discrepancies to support a negative credibility finding.

[22] The evidence of Tihamer Szarka reflects another similarly microscopic discrepancy where he used of the word “push” in his PIF and “punch” in his testimony when relating an incident of racist harassment. The RPD notes that Tihamer affirmed orally and in writing the accuracy of the PIF and goes on to find “this discrepancy to further undermine the credibility of the claimants.”

[23] In the case of Nikoletta Szarka the RPD dedicates a paragraph to describing racist conduct she alleged in an amended PIF, conduct that took the form of racist comments, often of a sexual nature. The RPD did not question Nikoletta until the fifth day of hearing on January 8, 2015 when she was asked to explain why this information was not included in her original PIF. Nikoletta describes herself as “shivering” and not being able to reply with her family present. She states when asked why the information contained in her amended PIF that was not included in her original PIF:

If this would be a question my only reply would be I have talked about this thing with my lawyer and there were just the two of us. Nobody was there from my family. That’s why it was mentioned later, because I was too scared of saying anything in front of my family...I was only a little girl, if Mr. Member could understand what I mean with this, and I couldn’t understand anything.

[24] Neither Nikoletta’s allegations, nor her testimony before the RPD are addressed in the RPD’s analysis. The RPD does not explain why the general negative credibility findings applied to her in light of the evidence she provided in response to the concerns raised. The failure to address Nikoletta’s evidence, coupled with the conjecture and microscopic search for discrepancies casts doubt on the RPD’s general finding that the family lacked credibility.



[25] There are discrepancies and inconsistencies in the various statements made by the Szarka family. However, the RPD's, conjecture, failure to address evidence inconsistent with the general credibility finding of the RPD and the reliance on inconsistent POE statements without considering that the circumstances in which those statements were made; evidence that was before the RPD, render the decision unreasonable.

B. *Horvath Affidavits*

[26] Two affidavits from Mr. Horvath were before the RPD. One addressed the situation of Roma in Hungary. The other corroborated the Szarkas' claim that they are from Olaszliska and Mr. Szarka's claim that he was Vice President of the Roma Minority Self Government in the town.

[27] In considering Mr. Horvath's evidence of the situation of Roma in Hungary, the RPD creates the impression of a ranting declaration advancing unsubstantiated criticism of the Hungarian state's treatment of the Roma. However, Mr. Horvath often refers to programs and laws designed to assist Roma that in reality have little effect: "There are bodies in Hungary that may appear to be able to assist Roma in terms of police misconduct and societal discrimination, but in practice they do not offer protection." Mr. Horvath acknowledges "The penal code was changed to address street marches in uniform but I do not know of any case that has been prosecuted under this law. I do not have much hope in this new law as there are criminal laws that have been in existence that could help Roma but that are not properly enforced for the lack of will to do so."

[28] Mr. Horvath's affidavit evidence addresses Hungary's positive laws and initiatives but forms the opinion that those laws and initiatives are not meeting their goals. He provides substantiation for the statements made and notes the limits on his knowledge and belief. The RPD's conclusion that "Generally speaking, the document is filled with bald statements lacking in context or any indication as to how the author knows this information" is, again, simply not reflective of the evidence. Further, while taking issue with Mr. Horvath's evidence as to the plight of the Roma in Hungary the RPD does not demonstrate how or where that evidence is inconsistent with the objective documentary evidence before it; an analysis that one would expect where the objectivity and motives of the affiant are being called into question as they were.

[29] In rejecting Mr. Horvath's evidence corroborating elements of the Szarkas' claim the RPD takes issue with the statement that Mr Horvath was providing a free legal counselling session to the claimants when he is not a lawyer. The record demonstrates Mr. Horvath is a leader in the Roma community, not a fact that the RPD took issue with. I agree with applicants' submission, the manner in which Mr. Horvath characterized the session he conducted in the applicants' presence is irrelevant to the issues that were before the RPD and was not a reasonable basis upon which to assess the weight to be given to Mr. Horvath's evidence.

## V. Conclusion

[30] The RPD's general credibility findings and its findings relating to the weight given to the Horvath evidence lack justifiability, transparency and intelligibility and in some areas appear capricious. What I would charitably characterize as a disjointed and disorganized hearing of the

matter, coupled with the unexplained delay in rendering a timely decision, may well have contributed to the errors identified.

[31] The decision is unreasonable and for this reason the application is granted.

[32] The parties did not identify a question of general importance for certification.

**JUDGMENT**

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

1. This application for judicial review is granted;
2. The matter returned for reconsideration by a differently constituted Board; and
3. No question is certified.

"Patrick Gleeson"

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Judge

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

**DOCKET:** IMM-4882-15

**STYLE OF CAUSE:** TIHAMER SZARKA ET AL. v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 5, 2015

**JUDGMENT AND REASONS:** GLEESON J.

**DATED:** JULY 22, 2016

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