

Federal Court



Cour fédérale

**Date: 20121029**

**Docket: IMM-1705-12**

**Citation: 2012 FC 1250**

**Toronto, Ontario, October 29, 2012**

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

**BETWEEN:**

**MARTIN BRYNDZA  
JITKA BRYNDZOVA  
JITKA BRYNDZOVA  
REBECA BRYNDZOVA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The present Application for judicial review concerns a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD), dated January 18, 2012 (the Decision), in which it was found that the Applicants, citizens of the Slovak Republic, are not Convention refugees or persons in need of protection pursuant to section 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*). The refugee claim, based on the Applicant

mother's Roma ethnic identity, was refused by the RPD because the Applicants failed to rebut the presumption of state protection.

[2] The main issue identified in this Application for judicial review is whether the RPD erred in refusing the Applicants' request to postpone the hearing for their claim to a day on which the Applicants' counsel would be available.

[3] Jurisprudence has established that the right to counsel before the RPD is an issue of procedural fairness (*Cervenakova v Canada (Minister of Citizenship & Immigration)*, 2012 FC 525 (FC); *Li v Canada (Minister of Citizenship & Immigration)*, 2011 FC 196 (FC) at para 11).

Procedural fairness is a matter of law and thus a correctness standard is required (*C.U.P.E. v Ontario (Minister of Labour)*, [2003] 1 SCR 539 (SCC) at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 (FCA)).

[4] For the reasons which follow, I find that the RPD's decision to proceed with the refugee hearing constitutes a breach of procedural fairness because the factors required to be considered were not considered.

## **I. Background**

[5] The Applicants arrived in Canada on June 20, 2009 and made their claim for protection immediately. Their refugee claim was referred to the RPD on July 15, 2009 and the Applicants' Personal Information Forms (PIFs) were filed with the RPD on July 21, 2009. At the time that the PIFs were filed the Applicants were represented by counsel obtained through Legal Aid.

[6] The Applicants experienced significant problems getting in touch with that counsel and ultimately lost faith in his representation. On October 27, 2011, the Applicants were sent a notice to appear at their refugee hearing on November 28, 2011. On October 31, 2011 the Applicants notified the RPD that they had retained new counsel. New counsel contacted the RPD to request a postponement because he would not be available at the time scheduled for the hearing. The postponement request provided six alternative days in February and March of 2012 when counsel could appear on behalf of the Applicants, the first available date being merely two months away. The RPD refused to postpone the hearing stating that the Applicants had to choose counsel willing and able to proceed on the date scheduled.

## **II. The Refugee Hearing**

[7] On November 28, 2011 the Applicants attended the hearing without their counsel and asked that the hearing be postponed. The Applicant father explained to the Presiding Member that they had to obtain new representation because their previous counsel had lied to them and could not be contacted or located. The Applicant stated that he was not ready for the hearing and that he needed more time: "I have to see somebody who is going to get me ready and tell me how this hearing is going to go ahead and what's going to be questions and what's going to go on here" (Certified Tribunal Record, p. 272). In fact, the Applicant stated a number of times that he did not feel prepared to proceed.

[8] The Presiding Member responded to the Applicants' request by inquiring into the Applicant's need for counsel:

MEMBER: Well sir, why do you need to be prepared to give your testimony? You've already provided to me in your Personal

Information Form that you fear returning to your country because of discrimination due to your ethnicity as a Roma.

(Certified Tribunal Record, p. 273)

[9] The Presiding Member then made what I consider to be a concerted effort to convince the Applicants that they were ready and that she could explain to them the requirements of sections 96 and 97 of the *Act*. In the course of doing so the Applicants revealed that their PIF narrative was translated into English by the Applicants' previous lawyer and that it was never read back to them. This did not dissuade the Presiding Member from proceeding with the hearing. Instead, the Presiding Member explained that the main issue in their claim was state protection in the Slovak Republic. This was put to the Applicants as follows:

Now, the questions – I will be explaining the process as we go along and what I will explain to you is that the onus – the responsibility of showing that state protection is inadequate in a country rests on the claimants, which are you and your wife.

The – I will be asking you questions about what efforts you made to seek state protection in your particular circumstances because there is a presumption that a state is able and willing to provide protection to its citizens.

And, I do not find that you would be prejudiced in any way in proceeding today because there's very simple questions that I need to put to you with regards to state protection because that is a determinative issue.

[Emphasis added]

(Certified Tribunal Record, pp. 275 - 276)

[10] In the end result, upon hearing the RPD's statements, the Applicants did consent to proceed with the hearing. Counsel for the Respondent argues that this consent effectively acts as a bar to the present Application in which the Applicants argue a breach of fairness on the part of the RPD not to

have properly considered the adjournment request. In my opinion, given what I consider to be the RPD's inappropriate inducement for the Applicants to proceed, I find that the consent is irrelevant to the present Application.

### **III. Factors Relevant to Exercise of the RPD's Discretion**

[11] The Federal Court of Appeal's decision in *Siloch v Canada (Minister of Employment & Immigration)* (1993), 151 NR 76 (FCA) is recognized as the lead authority on the factors to be considered with respect to applications of the adjournment of a hearing (see: (*Golbom v Canada (Minister of Citizenship and Immigration)*, 2010 FC 640 (FC); *Ramadani v Canada (Minister of Citizenship & Immigration)* 2005 FC 211 (FC)):

1. whether the applicant has done everything in her power to be represented by counsel;
2. the number of previous adjournments granted;
3. the length of time for which the adjournment is being sought;
4. the effect on the immigration system;
5. would the adjournment needlessly delay, impede or paralyse the conduct of the inquiry;
6. the fault or blame to be placed on the applicant for not being ready;
7. were any previous adjournments granted on a peremptory basis;
8. any other relevant factors.

[12] In support of the argument that it was a breach of fairness on the part of the RPD not to have granted the adjournment, Counsel for the Applicants argues that the *Siloch* factors clearly favoured the Applicants: (1) the intention to be represented was evident from the time the Applicants first

made their refugee claim and retained counsel; (2) the Applicants had not sought prior adjournments; (3) Applicants' counsel had proposed six alternative dates for the hearing, the earliest of which was only two months away; (4) there was nothing to indicate that a two-month adjournment would have a negative effect on the immigration system; (5) the adjournment would not impede the inquiry but could only assist as the Applicants' had identified a serious problem in the way that their PIF was prepared; (6) no fault could be attributed to the Applicants and their conduct had caused no delay and was in no way responsible for the fact that more than two years had passed since the refugee claim was referred to the RPD; and (7) no previous adjournments were granted on a peremptory basis.

#### **IV. The Denial of the Request for the Adjournment**

[13] The RPD's reasons for deciding to proceed with the hearing despite the Applicants' request to postpone are set out in the Decision as follows:

Having reviewed the claimants' request to schedule the hearing to another date, the panel proceeded with the hearing given that the claims had been referred to the Board on June 21, 2009 and the claimants' were not disadvantaged in any way in terms of judicial or natural justice by proceeding. They stated that they needed more time to get ready because they had never been to court before and they needed to prepare because this was a very serious matter to them.

I appreciate that the determination of protection is a very serious matter, however I did not find the claimants' explanation of "not feeling ready to testify" was a reasonable explanation for not proceeding, given that they provided their reasons for fearing a return to the Slovak Republic to their first counsel who prepared their PIF in July 2009 and they were not prejudiced in any way by not having counsel to assist them testify at the hearing.

The claimants were explained the hearing process, the definition of a Convention refugee and the requirements under section 97. All issues were explained, particularly that of state protection and the onus on

providing clear and convincing evidence on state protection rested with them.

(Decision, Certified Tribunal Record, p. 4)

[14] Given that there is no evidence in the transcript of the hearing conducted or in the Decision under review that the factors set out in *Siloch* were considered, I find the denial of the request for the adjournment constitutes a breach of the duty of fairness which renders the Decision as made in reviewable error.

**ORDER**

**THIS COURT ORDERS that** the Decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

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Judge



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

**DOCKET:** IMM-1705-12

**STYLE OF CAUSE:** MARTIN BRYNDZA, JITKA BRYNDZOVA, JITKA BRYNDZOVA, REBECA BRYNDZOVA V THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 17, 2012

**REASONS FOR ORDER AND ORDER BY:** CAMPBELL J.

**DATED:** OCTOBER 29, 2012

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