Federal Court  Cour fédérale

Date: 20130611

Docket: IMM-8361-12

Citation: 2013 FC 640

Ottawa, Ontario, June 11, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

RENATA NAGY, VIOLA ZITA ZDRAVIAK, PETER RICHARD ZDRAVIAK

Applicants

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 10 July 2012 (Decision), which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] Ms. Renata Nagy, the primary applicant (hereinafter, the Applicant) is a 32-year-old woman from Hungary. She fears persecution in Hungary due to her Roma ethnicity. The secondary applicants are her minor children, whose claims are based entirely upon hers. The Applicant's background is set out in her Personal Information Form (PIF) narrative.

PIF Narrative

[3] Growing up as a Roma in Hungary, the Applicant says she faced discrimination, segregation and violence in school due to her ethnicity. As an adult, the Applicant was not allowed to attend local events or go to certain places because she was Roma. She tried to find employment, but could not.

[4] In 1996, the Applicant met the father of her children. In 2004, she found out that he was seeing another woman and had fathered a child in that relationship. The Applicant and her spouse fought a lot over this, and sometimes he would physically hurt her in front of their children. In 2010, the Applicant and her spouse separated.

[5] Recently, racism in Hungary has become worse and there are many reports of racist attacks on Roma. On one occasion when the Applicant was waiting for a bus, she was attacked and molested by two young men. The Applicant decided she could no longer live safely in Hungary, and decided to leave for Canada.

The Applicant's Representation

[6] To assist in her refugee claim, the Applicant hired a lawyer, Jozsef Farkas. The Applicant says in her affidavit that Mr. Farkas advised her to keep her PIF narrative brief, and that she would be able to add details at the hearing. The Applicant's PIF primarily discussed her years of harassment in general terms, and at her oral hearing before the RPD the Applicant provided details about specific events. The Applicant says that her former counsel did not assist her with the PIF, did not file supporting documents and did not prepare her for the hearing.

[7] In addition, the Applicant says that the grounds that Mr. Farkas put forward in support of the request for an extension of time for the filing of the application for leave were not true and accurate. According to the Applicant, after her claim was refused Mr. Farkas assured her that he had filed everything for the judicial review. The Applicant's hearing before the RPD was on 10 July 2012, and when she did not hear anything by August, she grew suspicious. Mr. Farkas provided her with a copy of an application for judicial review dated 27 March 2012, in the name "Renata Nagy." However, the Applicant's hearing was after this date, so she knew it could not be her application.

[8] The Applicant sought out new counsel on 17 August 2012. Her new counsel confirmed by looking at the Federal Court website that Mr. Farkas had filed another application for a "Renata Nagy" on 27 March 2012, but that application was refused on 11 August 2012. The Applicant says she confronted Mr. Farkas, who sought an extension of time from the Federal Court. In it, he cited a delay in Legal Aid funding for the late filing.

[9] The Applicant made a formal complaint against Mr. Farkas to the Law Society of Upper Canada on 13 September 2012. She also notified Mr. Farkas of her allegations.

DECISION UNDER REVIEW

[10] In her refugee claim, the Applicant said that she feared both her ex-spouse and the Hungarian Guard. By Decision dated 10 July 2012, the RPD refused the Applicant's claim for protection for reasons of credibility.

[11] The RPD noted that the Applicant's ex-spouse is currently living in Canada, but the Applicant has not tried to contact him and he has not tried to contact her while living here. When asked if she had problems with him after he left in 2010, the Applicant said that he phoned her. When asked what he wanted when he called, the Applicant said "I don't know." The RPD found that while the Applicant asserted that her ex-spouse continues to harass her and she fears him, her allegations were not supported by her testimony.

[12] The RPD accepted that the Applicant's ex-spouse may have victimized her while they were together, but that the evidence indicated that since they separated in 2010 he no longer threatens her. The RPD thought the Applicant's claim was not internally consistent and, in fact, the Applicant entered Canada with a letter stating that her ex-spouse agreed to her leaving Hungary with their children. The Applicant testified that her ex-spouse's family continues to harass her to reconcile with him, but she provided no explanation as to why or how his family would forcibly make her reconcile with him. The limited evidence on this issue contradicted the Applicant's allegations, and the RPD found her fear of her ex-spouse lacking in credibility.

[13] When asked about her fear of the Hungarian Guard, the Applicant testified that she was attacked when she was waiting for a bus. She said she was punched in the face and as a result has a

scar on her face, but she provided no explanation as to how the punch resulted in a scar. She said she did not receive medical attention.

[14] The Applicant also testified that she and her siblings and aunt were attacked by members of the Hungarian Guard on 20 August 2009. She testified that they were hit with rubber batons and beaten. When the Applicant was asked why she never mentioned this incident in her PIF, she said that she "didn't want to summarize it in four pages" and "I don't know why." When asked how many people attacked her, the Applicant replied that she did not know. When asked what she and her family did after the incident, the Applicant replied that "we didn't do anything."

[15] The RPD reviewed the PIF narrative and told the Applicant that it only included one incident involving the Hungarian Guard. She disputed this, and insisted she did refer to other incidents in her PIF. Some of the Applicant's family members remain in Hungary, but she provided no corroborating documents from those members who were allegedly present at the attacks. The RPD concluded that the Applicant's testimony was embellished and lacking in corroborating documents, and that she was generally lacking in credibility.

[16] For the above reasons, the RPD rejected the Applicant's claim.

ISSUES

[17] The Applicant raises the following issues:

1) Was the Applicant denied natural justice and a fair hearing through the incompetence of her former counsel?
2) Did the RPD err in its assessment of the Applicant's credibility?

3) Did the RPD err by failing to reasonably assess the evidence as a whole and failing to have regard for the totality of the evidence?

STANDARD OF REVIEW

[18] 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.

[19] The first issue goes to the Applicant's right to fully present her 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.

[20] 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.

[21] As to the third issue, the review and consideration of evidence is a factual exercise to which deference is owed (*Dunsmuir*, above). The Applicant's arguments take particular issue with the RPD's analysis of persecution and state protection. The issue of persecution is a matter of mixed fact and law that is reviewable on a reasonableness standard (*Divakaran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 633; *Pararajasingham v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1416). State protection is also reviewable on a reasonableness standard (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94). Thus, this issue shall be evaluated on a reasonableness standard.

[22] 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

[23] 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, membership in a particular social group or political opinion,	**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, 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	**Personne à protéger**
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	**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*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*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*) to a risk to their life or to a	*b*) soit à une menace à sa vie

risk of cruel and unusual treatment or punishment if	ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires 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.

ARGUMENTS

The Applicant

The Incompetence of Counsel

[24] The Applicant submits that her PIF as submitted falls below any acceptable standard that would be expected from counsel. It was brief, lacking in detail, and did not list "all significant incidents." This undermined the Applicant's claim, as the RPD ultimately concluded that the omission of incidents from her PIF undermined her credibility.

[25] Judicial review based on counsel's incompetence should be granted only in exceptional cases and where there is a reasonable probability that the result would have been different but for the incompetence (*Huynh v Canada (Minister of Employment and Immigration)*, (1993) 65 FTR 11 (FCTD)). Counsel must be given notice of the allegations and a chance to respond (*Shirvan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509). A solicitor is required to act with reasonable care, skill and knowledge (*Mathon v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 707 (TD)).

[26] Clear evidence must be presented of the incompetence for the Court to order a new hearing (*Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 173). The Applicant submits that the PIF narrative, along with the post-decision actions of counsel, is clear and unequivocal evidence of incompetence.

[27] The Court said in *Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 (TD) [*Shirwa*], at paragraph 12:

> In other circumstances where a hearing does occur, the decision can only be reviewed in "extraordinary circumstances", where there is sufficient evidence to establish the "exact dimensions of the problem" and where the review is based on a "precise factual foundation." These latter limitations are necessary, in my opinion, to heed the concerns expressed by Justices MacGuigan and Rothstein that general dissatisfaction with the quality of representation freely chosen by the applicant should not provide grounds for judicial review of a negative decision. However, where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.

[28] The Applicant submits, that but for the incompetence of counsel, there is a reasonable probability that the result of the refugee hearing would have been different (*Yang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 269 at paragraph 24). The RPD would not have stopped its assessment at the issue of credibility, and would have gone on to analyse country conditions. In *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196 [*Memari*], counsel was found to be incompetent based on the cumulative effect of her incompetent representation.

[29] Justice David Near held in *El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234 at paragraphs 21 and 33:

> 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.
>
> […]
>
> The incompetence of counsel resulted in a breach of procedural fairness. Despite the reasonableness of the remainder of the decision regarding subjective fear and re-availment, the negative credibility finding based on the failure to produce a document and establish objective fear at the outset prejudiced the Principal Applicant's claim. In my opinion, it is far from certain that a reconstituted Board would necessarily reach the same overall results. This is sufficient to warrant reconsideration by a reconstituted panel of the Board.

[30] In *Galyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 250 it was held at paragraphs 86-89:

> 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.
>
> 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.
>
> 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.
>
> 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.

[31] The Applicant submits that the negative credibility finding made against her was because she did not know what to write in her PIF, and it is counsel's role to advise her on this. The Applicant says she was also prejudiced by counsel's failure to obtain corroborative documents. The Applicant submits that the cumulative impact of this incompetence was a miscarriage of justice (*Memari*, above).

Credibility

[32] The Applicant submits that the RPD erred by failing to assess her general allegations of discrimination, and by focusing only on specific incidents. When the Applicant was asked why incidents were omitted she replied "I do not know why," which is reasonable under the circumstances. The Applicant states that a person would not know why something was omitted when she is unaware that she should have mentioned it.

[33] The Applicant states that unless testimony is contradicted or undermined it should be accepted as fact (*Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 [*Feradov*]). As was said in *Pinzon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1138 [*Pinzon*], there is a presumption of truth, and the RPD is under "a very clear duty to justify its credibility findings with specific and clear reference to the evidence."

[34] The RPD should not focus on a few points of error and engage in a microscopic review of the evidence (*Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55). As the Court said at paragraphs 18-19 of *Feradov*, above:

> The Board's concern about supposed omissions from Mr. Feradov's PIF is similarly unjustified. While the failure to mention material or key allegations of persecution in one's PIF is a reasonable basis for concern, the omission of peripheral detail is not. This Court has frequently held that the Board should not be concerned about minor or collateral omissions from an applicant's PIF: for example see *Perera v. Canada (Minister of Citizenship and Immigration)*, above; *Singh v. Canada (Minister of Employment and Immigration)* (1993), 69 F.T.R. 142, [1993] F.C.J. No. 1034 and *Akhigbe v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 332, 2002 FCT 249. It is well understood that these documents are often prepared by representatives or on the advice of representatives with different views of materiality. In this case, Mr. Feradov testified that "we did not write [the "PIF"]". Surprisingly, the Board found this response to be troubling when, at most, it was an ambiguous reply to

> the Board's question about the failure to provide dates in the PIF. The Board's additional concern about Mr. Feradov's failure to mention in his PIF that he could not drive home after the police beating is an example of the Board analysing minutia with little more significance than Mr. Feradov's failure to state in the PIF how he got to the police station in the first instance.
>
> Mr. Feradov' PIF was clearly not intended to be an encyclopaedic recitation of the evidence. To the contrary, it was obviously written as a very general summary of the central aspects of his claim and the absence of collateral detail ought not to have concerned the Board.

[35] The Applicant further submits that the RPD erred by requiring corroboration of the Applicant's testimony as a precondition to finding the claim credible (*Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571; *Buri v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1538 at paragraph 6; *Pinzon*, above at paragraph 5).

Persecution

[36] The Applicant submits that the RPD also erred by failing to conduct a full assessment of whether she would face persecution if returned to Hungary. The RPD did not assess the documentary evidence that speaks to the discrimination, segregation and persecution of Roma in Hungary. The RPD had an obligation to assess whether cumulative acts amount to persecution (*Hegedüs v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1366; *Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84 at paragraph 42). The RPD must give a "real explanation as to why the cumulative impact does not amount to persecution" (*JB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210).

[37] The Applicant says she submitted ample documentary evidence on country conditions, and it was an error for the RPD to simply ignore it (*Mhando v Canada (Minister of Citizenship and*

Immigration), 2005 FC 422). The RPD must do more than simply state that it considered the cumulative nature of discriminatory acts (*Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840).

State Protection

[38] The Applicant points out that the issue of state protection was completely ignored by the RPD due to its negative credibility finding. Many cases of this Court have found that adequate state protection is not provided for Roma in Hungary. See, for example, *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250; *Rezmuves v Canada (Minister of Citizenship and Immigration)*, 2012 FC 334; *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438).

[39] The RPD must consider the operational adequacy of state protection (*E.Y.M.V. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364), and the Applicant need not exhaust all potential avenues of protection (*Malik v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 453). The Applicant need not put herself in danger seeking state protection (*Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491). Not all organizations in Hungary can actually provide protection to Roma (*Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326).

[40] The Applicant submits that the issue of state protection should have been considered.

The Respondent

The Incompetence of Counsel

[41] As a preliminary matter, the Respondent points out that the Applicant has filed a complaint with the Law Society of Upper Canada (LSUC). Although a finding by the LSUC would not be binding on the Court, it would be helpful in determining whether there was a breach of natural justice in this case (*Moryakina v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1455 at paragraph 11). The Respondent would not oppose an extension of time to allow the Applicant to file a further affidavit including the LSUC's or counsel's response to the allegations.

[42] In order to establish a breach of natural justice, the Applicant must demonstrate that: (1) counsel's acts or omissions constituted incompetence; and (2) a miscarriage of justice resulted (*R. v G.D.B.*, 2000 SCC 22 at paragraphs 26-27 [*G.B.D.*]). It is a high threshold for the circumstances and evidence that are required to meet a finding of incompetence (*Odafe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1429 at paragraph 8). With respect to the performance component, the incompetence or negligence of counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa*, above). The Court is reluctant to accept allegations of misconduct without proof (*Nunez v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 555 (TD)).

[43] The incompetence of counsel will constitute a breach of natural justice only in exceptional circumstances, and the Court must be satisfied that a miscarriage of justice has resulted (*Memari*, above). The Applicant must establish that there is a reasonable probability that the result would have been different but for the incompetence of counsel (*Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paragraph 9).

[44] Where the Applicant cannot meet the prejudice component of the test, it is undesirable for the Court to consider the performance component of the analysis (*G.B.D.*, above). The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct; the latter is best left to the profession's regulating body.

[45] The Respondent points out that although the Applicant has access to the outcome of the LSUC's investigation and her former counsel's response, she has not provided this evidence. Therefore, a negative inference should be drawn by her decision not to provide this evidence to the Court.

[46] Furthermore, the Respondent says there is no indication in the Applicant's affidavit as to how counsel's actions resulted in a miscarriage of justice. The Applicant does not explain what further information she would have included in her narrative, what further preparation she expected from her counsel, or how it would have affected the RPD's credibility finding.

[47] The Applicant also does not explain what further documentary evidence she expected her counsel to file at her refugee hearing. At the hearing, the following documentary evidence was filed: a psychological report for the Applicant; a hospital record for the Applicant's son; a letter from the Applicant's ex-husband giving permission for the children to leave Hungary indefinitely; and country condition documentation. The Respondent submits that in order for the Applicant to be successful in her argument that there was a breach of procedural fairness arising from the incompetence of her counsel, it was necessary for her to provide the Court with this missing information (*Gomez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 568 at paragraphs 21-25).

Credibility

[48] Contrary to the Applicant's allegations, the Respondent submits that the RPD can draw a negative inference from the Applicant's failure to provide corroborating documentary evidence that was readily available to her (*Dundar v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1026 at paragraph 19; *Samseen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 542 at paragraph 30).

[49] There is a presumption of truth of an applicant's testimony, but this presumption is always rebuttable (*Bustamante v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 499). Thus, it was not unreasonable for the RPD to draw a negative inference from the fact that the Applicant failed to provide any corroborating documents from family members who were allegedly present when she was attacked by the Hungarian Guard in 2006.

Persecution

[50] The Applicant alleges that the RPD erred by failing to consider cumulative persecution, and only considered two of the Applicant's allegations of persecution. However, the Applicant did not elaborate on other incidents in her PIF or in her testimony when she was specifically asked what prompted her to leave Hungary. The Respondent submits that the RPD should not be faulted for not mentioning vague allegations, especially when the Applicant chose not to testify about them.

State Protection

[51] The Respondent submits there is no error in the RPD's decision not to make a finding on state protection. The credibility finding was determinative, so state protection did not need to be assessed (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94).

ANALYSIS

Incompetence of Former Counsel

[52] The Applicant says that the incompetent representation by former counsel rendered her refugee hearing — and the subsequent Decision — procedurally unfair, but she has not provided a sufficient evidentiary basis for these assertions.

[53] She says that former counsel did not assist her to prepare a proper PIF narrative. Her PIF lacked detail so that the RPD did not assess the full situation. There is no evidence before me which sets out what the Applicant thinks was missing from her PIF that could have changed the Decision.

[54] In addition, the Applicant was given the opportunity to explain at the hearing what she feared in Hungary and why she required refugee status. She said she feared her ex-common-law spouse and his family, and the Hungarian Guard. These are the risks that are dealt with by the RPD.

[55] This is not a situation where the RPD found the Applicant not to be credible exclusively on the basis of discrepancies between an inadequate PIF and details put forward at the hearing. Some of the credibility findings of the RPD are based solely upon the Applicant's testimony at the hearing.

[56] The Applicant says that her former counsel was incompetent because he failed to file supporting documents. Once again, however, this remains a bald allegation because she has failed to say what supporting documents should, or could, have been filed that were not filed.

[57] She also says that former counsel failed to prepare her properly for the refugee hearing, but there is no evidence for this other than the Applicant's bald assertion. The same problem arises over the Applicant's assertion that her former counsel was incompetent at the hearing. She fails to explain the nature and scope of this alleged incompetence and how it affected her right to a fair hearing, and simply expects the Court to accept her unsubstantiated assertions.

[58] As the Decision shows, the one area where the PIF was used to question the Applicant's credibility was in relation to her fear of the Hungarian Guard and the past incidents upon which that fear was based. Even here, the discrepancy plays a minimal role — if any — in the RPD's overall credibility finding. At the hearing, the Applicant did not say that her former counsel had failed to advise her not to put all details in her PIF. She simply disagreed with the RPD and said that she did not refer to the other incident in her PIF.

[59] As the Respondent points out, in order to establish that the incompetence of one's counsel resulted in a breach of procedural fairness, the onus is on an applicant to establish that:

1. Counsel's acts or omissions constituted incompetence; and
2. A miscarriage of justice resulted.

See *G.D.B.*, above, at paragraphs 26 and 27; and *Yang*, above, at paragraphs 15 – 18.

[60] There is a high threshold governing the circumstances and evidentiary criteria that must be met before the Court will grant relief under section 18.1 of the *Federal Courts Act* on the basis of the negligence of counsel. See *Odafe*, above, at paragraph 8.

[61] With respect to the performance component, the incompetence or negligence of the representative must be sufficiently specific and clearly supported by the evidence. See *Shirwa*, above, at paragraph 12; and *Memari*, above, at paragraph 36.

[62] This Court has been reluctant to accept allegations of professional misconduct in the absence of proof. *Nunez v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15156 (FC), at paragraph 19 states that:

> I am not prepared to accept an allegation of serious professional misconduct against a member of the bar and an officer of this court without having the member's explanation for the conduct in question or evidence that the matter has been referred to the governing body for investigation. In this case, there was ample opportunity to do one or the other but neither was done. The failure to do so is inconsistent with the gravity of the allegations made. This is not a question of being solicitous of lawyers' interests at the expense of their clients. It is a question of recognizing that allegations of professional negligence are easily made and, if accepted, generally result in the relief sought being granted. The proof offered in support of such an allegation should be commensurate with the serious nature of the consequences for all concerned.

[63] It is clear then, that the incompetence of counsel will constitute a breach of natural justice only in extraordinary circumstances. See *Huhnh*, above, at paragraph 23; *Gogol v Canada*, 1999 CanLII 9262 (FCA), at paragraph 3; and *Memari*, above, at paragraph 36.

[64] In the present case, there is insufficient evidence to support the allegations of incompetence and insufficient explanation as to how former counsel's conduct has led to procedural unfairness in this case.

Other Grounds

[65] The Applicant alleges a variety of other grounds for review:

a. The RPD failed to assess general allegations of discrimination and persecution in full;

b. The RPD erred by requiring corroboration;

c. The RPD failed to assess the general situation of Roma in Hungary;

d. The RPD failed to consider cumulative persecution;

e. The RPD ignored documentary evidence;

f. The RPD failed to conduct a state protection analysis.

[66] None of these allegations stands up to scrutiny. The jurisprudence, related to Rule 7 of the *Refugee Protection Division Rules*, makes it clear that the RPD can take into account an applicant's lack of efforts to obtain corroborative evidence where it should be available and that the presumption of truth is always reviewable. See *Akhtar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1319 at paragraph 5; *Samseen*, above, at paragraph 30; *Dunbar*, above, at paragraph 19; and *Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114 (FCA), at paragraph 1. In the present case, the RPD was not unreasonable in drawing a negative inference from the Applicant's failure to provide corroborative evidence from family members who she alleged were present when she was attacked by the Hungarian Guard in August 2009.

[67] The Applicant was specifically asked by the RPD why she left Hungary and she said nothing about the references in her PIF to being teased at school, refused entry to an amusement park, excluded from events held on the premises of her residence, and the trouble she had finding a job. The RPD was entitled to identify the specifics of her concerns and did so at the hearing where she did not say she feared general discrimination and persecution. She said she was afraid of her former common-law spouse and his family, and the Hungarian Guard. See *Escorcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 993 at paragraph 15.

[68] Nor was the RPD obliged to assess the general situation of Roma in Hungary. As the Court has pointed out on past occasions, it is not sufficient for an applicant to point to a country's general negative human rights record. See *Masanganise v Canada (Minister of Citizenship and Immigration)*, 2004 FC 993 at paragraph 15.

[69] In this case, the Applicant's account of personal risk (even as a Roma) was just not credible. General documentary evidence of Roma in general is not enough.

[70] Because the Decision was based upon a lack of credibility — the Applicant could not establish that she faced section 96 persecution or section 97 risk if returned to Hungary — there was no need for the RPD to conduct a state protection analysis.

Issues Raised at the Judicial Hearing

[71] At the oral hearing of this application before me in Toronto on 10 April 2013, the Applicant raised additional grounds for saying that the Decision is unreasonable. Without withdrawing any of the written submissions, counsel for the Applicant focused upon:

a. Inappropriate implausibility findings;

b. The presumption of truthfulness; and

c. The failure of the RPD to provide adequate reasons for its credibility findings.

[72] In essence, the Applicant says that the RPD, in making its negative credibility findings:

a. Confused incredibility with implausibility;

b. Ignored cultural considerations;

c. Alleged inconsistencies and contradictions where none existed;

d. Misstated the evidence;

e. Made findings not supported by the Applicant's actual testimony and other evidence;

f. Relied upon a lack of corroborating documents where none were required because there were no contradictions in the Applicant's testimony.

[73] As regards paragraph 7 of the Decision and the fear of her ex-common-law spouse, the RPD found the Applicant's claims were not internally consistent and that the limited evidence on this issue from the Applicant herself contradicted her allegations.

[74] The Applicant's evidence is internally inconsistent because her ex-spouse is in Canada and has done nothing but phone her once. This does not sound like someone who is continuing to harass her.

[75] In her testimony (CTR, pages 148 – 149), she said that her ex-spouse's parents wanted them to reconcile because "while he was with me his drug addiction was controlled" and that the parents are

> … going to want to force me to make up with him, to get back together with him because he's going to come home. He never tried it here because he knows that I can count on the Canadian police here, so he's not daring to. But back in Hungary there are no such laws to protect me from these things.

[76] Clearly, then, the RPD is correct to say that her ex-spouse has not made contact with her, or threatened to insist they reconcile. The Applicant appears to be suggesting in her testimony that if she goes back to Hungary, all of this will change, and he will return and harass her in a context where she has no protection. The RPD does not accept this because it is inconsistent with the ex-spouse providing a letter so that she could enter Canada with her children "for an unlimited period of time." The Applicant says it is not inconsistent but, although it is possible to disagree, I do not think it is unreasonable for the RPD to find it so. The fact of the ex-spouse's parents wanting the couple to reconcile because he deals with his drug problems better when he is with her, does not mean that the ex-spouse wants to get together and will harass her if she resists. Since they came to Canada, he has made no real attempt to reconcile. She said she did not know what he wanted, even on the one occasion when he called her. I see nothing unreasonable in a conclusion that the "limited evidence on this issue from the claimant contradicts the claimant allegation" that she fears her ex-spouse because he will harass her to get back together. I do not think the RPD is confusing plausibility within credibility. The RPD is simply saying that the Applicant has not provided sufficient evidence to support the allegation that the ex-spouse will harass her or, if she goes back to Hungary, that he is interested in following her back there to harass her.

[77] As regards paragraph 8 of the Decision, even if the Applicant did provide an explanation for her ex-spouse's parents wanting the couple to get back together, (i.e. her influence on his drug dependency) there is no explanation as to "how" his family could make them reconcile.

[78] In paragraph 7 of the Decision, the RPD acknowledges that the husband did try to contact her in Canada in 2010, but provides reasons as to why this does not mean he will follow her back to Hungary to harass her there.

[79] In her testimony, the Applicant did say that he phoned because he wanted to get back together, but she also said (CTR, page 135, lines 14 – 16):

Member: So what did he want exactly if he married somebody else?

Claimant: I don't know. Regardless of the fact he was living with me. He married that other woman.

[80] The Applicant also argues that the fact that the ex-spouse provided a permission letter for her to leave Hungary does not mean she does not fear him. This is undoubtedly so, but the RPD found that the permission letter, when taken together with the other factors cited in paragraph 7 of the Decision, showed that she lacked subjective fear. The fact that it is possible she may still fear him does not render the RPD's conclusion on this point unreasonable.

[81] As regards paragraph 8 of the Decision and the Applicant's fear of the Hungarian Guard, the Applicant did explain how she came by the scar on her face (CTR, page 137, line 19): "They punched me with their hand." She also testified with regard to the second alleged attack that there

were "many, many" rather than that she did not know. However, these are peripheral to the overall finding on credibility and the RPD was entitled to take into account that there was no other evidence to corroborate the second incident which had not been mentioned in her PIF. The RPD concludes, correctly, that her "testimony regarding the incident was limited regarding the number of people who attacked her and what she and her family did afterwards."

[82] The Applicant also argues that the lack of corroborating documents was insufficient to find she was not credible, but this is only one of the factors taken into account. The Applicant complains that she was not asked to provide further details by the RPD, but it seems to me that the RPD is referring to "what she and her family did afterwards" and the fact that she did not mention her failure to seek medical attention in her PIF.

[83] Taking into account the new points raised by the Applicant, I cannot say that they impact the Decision in a way that renders it unreasonable. When I read through the CTR, it seems to me that the Applicant provided very little to support her stated fears.

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

JUDGMENT

THIS COURT'S JUDGMENT is that

i. The application is dismissed.

ii. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-8361-12
STYLE OF CAUSE:	**RENATA NAGY, VIOLA ZITA ZDRAVIAK, PETER RICHARD ZDRAVIAK** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	April 10, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	June 11, 2013

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