Federal Court Cour fédérale

Date: 20170922

Docket: IMM-575-17

Citation: 2017 FC 850

Vancouver, British Columbia, September 22, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GYORGY GOMBOS
ZITA LAKATOS
ZITA VIRAG GOMBOS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer of Citizenship and Immigration Canada ("Officer") dated January 3, 2017, denying the Applicants' Pre-Removal Risk Assessment ("PRRA").

Background

[2] The Applicants are a family comprised of the Principal Applicant, his common-law spouse (“Female Applicant”) and their eleven year old daughter, they are all citizens of Hungary. The Applicants entered Canada in April 2011 and made claims for refugee protection on the basis of their Roma ethnicity. Their claims were rejected by the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada on June 18, 2013. The Applicants were removed from Canada in August 2014. On January 29, 2015, this Court dismissed the Applicants’ application for judicial review of the RPD’s decision (*Gombos et al v The Minister of Citizenship and Immigration*, IMM-4776-13). In January 2016, the Principal Applicant travelled to the United States, his family followed shortly thereafter. The Applicants sought to re-enter Canada in July 2016 and, although they remained subject to removal orders, they were eligible to and did apply for a PRRA.

Decision Under Review

[3] The Officer described the findings of the RPD, the purpose of the PRRA, and the supporting documentation the Applicants filed in support of their PRRA. The Officer found there was insufficient new evidence to resolve the credibility issues identified by the RPD or to persuade her that country conditions had changed to a degree that the Applicants were now at risk within the meaning of s 96 and s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[4] The Officer also found the Applicants were relying on evidence that did not qualify as new evidence as it was reasonable to have expected them to have raised it at the time of the RPD's consideration. Specifically, the Applicants referenced their membership in a family that includes high profile Roma advocates and indicated they were personally involved in such advocacy. The Officer noted the Principal Applicant's PRRA narrative which stated his father had been a famous Roma representative in the Roma Parliament and advocate, resulting in harm, and that the Principal Applicant and his siblings assisted the Roma through organizations established by his father, and other Roma leaders, and faced threats as well. The Officer noted the Principal Applicant's father died in 2009, which was two years prior to the Applicants' first arrival in Canada. Further, the Applicants failed to mention their involvement with those activities at the port-of-entry in 2011, in the Applicants' Personal Information Forms ("PIF"), during their testimony before the RPD or in post-RPD hearing submissions. The Officer found this evidence pre-dated the RPD decision and could have reasonably been brought up by the Applicants when they were before the RPD. Further, at the port-of-entry in July 2016, when asked why they were fleeing Hungary, the Principal Applicant stated his father was a gypsy politician and that their lives were in danger, but there was no mention of the Applicants' own involvement. As well, they did not list in their Background Declaration any organizations or associations of which they were members.

[5] The Officer stated she accorded high weight to the RPD's written reasons which recorded an exchange involving both the Female Applicant and the Principal Applicant about the possibility of moving to Budapest. They were asked directly if they could provide information about problems other family members in Hungary were experiencing and neither of them could

volunteer information specific to their families. The Officer stated that this persuaded her, even if their counsel of record at the RPD hearing failed to delve deeply into their personal situation while preparing a PIF, that the Applicants were asked directly at the RPD about any specific family problems and could have reasonably provided the information. Therefore, the Officer was not persuaded that this was a new risk development.

[6] As to the Applicants' reliance on the positive RPD decisions of some of the Principal Applicant's siblings, the Officer first noted that each case must be assessed on its own evidence and merits. Further, the Applicants must provide reliable evidence that they are similarly situated individuals. In this case, the Principal Applicant's sister differentiated herself from other siblings by testifying that she did similar work as did one of her brothers, Emond, but she did not mention other family members as participating in advocacy work for the Roma. The Officer found this to be consistent with the Applicants' failure to raise this themselves and that they were now making reference to it based on a sibling's successful refugee claim.

[7] The Officer found the evidence of Aladar Horvath was also not new evidence as it pre-dated the Applicants' RPD rejection. In any event, the RPD would have reasonably had knowledge of the documents as Mr. Horvath provided this information to various audiences in Canada including the Immigration and Refugee Board. The Officer also noted that even taking into account Mr. Horvath's evidence, more recent and reliable documentary evidence showed that the Jobbik Party was beginning to disassociate itself from extremist elements, the Officer cited specific evidence in that regard.

[8] The Applicants also submitted a document entitled “Accelerating Patterns of Anti-Roma Violence in Hungary”, published by the Harvard School of Public Health. The Officer noted that while the document was dated 2014, it referenced older data spanning 2004 to 2009. Accordingly, it did not reflect conditions which post-date the RPD decision or demonstrate a change in country conditions. The Officer also noted the Applicants’ evidence concerning Hungary’s policy for Roma integration for 2011-2010, which the RPD also cited in its decision. However, she found that current information, dated 2016, indicated mixed reviews with respect to the government’s progress in implementing the policy, referencing that documentary evidence. The Officer concluded the evidence showed the policy adopted by the government is showing positive but modest impacts but acknowledged that conditions for non-Roma are significantly better than the Roma minority.

[9] The Officer also noted the RPD’s finding that the Applicants had a viable internal flight alternative (“IFA”) in Budapest and that the Applicants did not sufficiently rebut the RPD’s finding that, for this family, Budapest offered a reasonable IFA.

[10] The Officer concluded that while the evidence was mixed with respect to the treatment of Roma and the perception by various parties, both governmental and otherwise, of the challenges they face and the progress being made to improve conditions, she was not persuaded that it demonstrated a change in country conditions that would pose a new risk development for the Applicants. The evidence in whole did not persuade her to arrive at a different conclusion than the RPD. Further, the Applicants had not provided sufficient new evidence to resolve the RPD’s credibility concerns and the Applicants provided insufficient evidence that Budapest was not a

viable IFA. Accordingly, there was insufficient new evidence showing a serious possibility of risk within ss 96 and 97 of the IRPA.

[11] Finally, the Officer remarked on the Applicants' submission concerning the incompetence of their former counsel, Mr. Farkas. In that regard, the Officer acknowledged Mr. Farkas was then subject to a disciplinary process but she was not persuaded this impeded the Applicants from providing the details of the Principal Applicant's father's Roma advocacy activities or their own or any other family members' problems associated with their family ties. She accorded high weight to the fact the Applicants failed to mention problems family members experienced when specifically prompted to do so when testifying before the RPD.

Issues

[12] The Applicants identify the following three issues:

- Did the Officer err by making veiled credibility assessments without scheduling an interview if credibility was at issue and as such did the Officer err in the assessment of credibility? In so doing, did the Officer err by failing to properly consider the role of counsel who was later disciplined for misconduct in the hearing?
- Did the Officer fail to analyze the personal circumstances of the Applicants and rely too heavily on the earlier RPD decision thus fettering its jurisdiction?
- Did the Officer err in setting out the test of state protection and in its assessment?

[13] I would note, although not explicitly identified as an issue, the Applicants also alleged incompetent representation against Mr. Farkas within their written submissions.

[14] The Respondent submits the following matters are at issue:

- As a preliminary issue, allegations against former counsel require notice;
- The Officer's application of the s 113 test for new evidence was reasonable; and
- The Officer's assessment of the evidence was reasonable.

[15] In my view, this application raises the following preliminary and two main issues:

- Preliminary Issue: Can this Court address the issue of whether Mr. Farkas was incompetent in his representation of the Applicants?
- Did the Officer err in failing to hold an oral hearing?
- Was the Officer's assessment of the evidence reasonable?

Preliminary Issue: Can this Court address the issue of whether Mr. Farkas was incompetent in his representation of the Applicants?

[16] The Applicants alleged in a variety of contexts throughout their written submissions that Mr. Farkas incompetently represented them. While not clearly stated, the Applicants appear to assert or directly claim incompetent representation in addition to the issue of the Officer's reliance on a prior decision that was potentially tainted by the incompetence of counsel. However, the Applicants' allegations against Mr. Farkas lack any particulars.

[17] The test for addressing allegations of ineffective or incompetent assistance of counsel has been well defined by the jurisprudence (*Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at paras 39-43). First, the applicant must establish that the impugned counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*R v GDB,* 2000 SCC 22 at para 26 ("*GDB*")). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a

breach of procedural fairness (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 at para 12 (FCA) ("*Shirwa*"); *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 ("*Memari*")). There is also a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at paras 16, 18). Incompetence will only result in procedural unfairness in "extraordinary circumstances" (*Shirwa* at para 13; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 24). Further, a procedural protocol of this Court, *Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* ("Procedural Protocol"), sets out the procedure applicants must follow when alleging counsel incompetence, which includes giving notice to former counsel.

[18] In my view, in these circumstances, any direct allegations against Mr. Farkas concerning his representation of the Applicants cannot be addressed by the Court. This is because, as pointed out by the Respondent and confirmed by the record, the Applicants did not, as they were required to do, comply with the Procedural Protocol. Thus, Mr. Farkas has not been given notice of the allegation or the opportunity to respond.

[19] However, the Applicants submit and it is not disputed that, subsequent to representing the Applicants before the RPD, the Law Society of Upper Canada ("Law Society") disciplined Mr. Farkas.

[20] I note the Applicants were represented by their current counsel for the PRRA. The documentary evidence before the PRRA Officer concerning the competence of Mr. Farkas comprised only of the Law Society Notice of Application, dated July 10, 2013, which provided a very brief description of the allegations. The Notice alleged that between February 2011 and November 2012, Mr. Farkas breached the Rules of Professional Conduct in the manner in which he ran his law practice and in failing to directly and effectively supervise the non-lawyer staff of his office to whom he delegated the preparation of refugee claims, and, failed to serve multiple clients with respect to their refugee claims. In addition, portions of an article entitled "No Refuge: Hungarian Romani Refugee Claimants in Canada", (Julianna Beaudoin, Jennifer Danch & Sean Rehaag, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) *Osgoode Legal Studies Research Paper Series*, Paper 94) were also filed, which described the allegations against Mr. Farkas and notes the brevity of narratives he filed. However, the Applicants' PRRA narrative to the PRRA Officer did not elaborate on alleged ineffective acts and omissions of Mr. Farkas in representing them, but appears to rely only on the fact that certain other family members, who were not represented by Mr. Farkas, did receive positive RPD determinations.

[21] The Law Society issued its decision on September 8, 2016, prior to the PRRA decision and prior to two further submissions by the Applicants made in support of their PRRA, however,

a copy of the decision does not appear in the record. Nor did the Applicants file the decision in support of this application for judicial review. Upon the request of this Court at the hearing, Applicants' counsel subsequently provided a copy of the Law Society decision. This indicates that during the period at issue Mr. Farkas' firm represented a significant number of Roma refugee claimants and the Law Society found he engaged in professional misconduct as set out in the Notice of Application. Further, the allegations were based on complaints from ten of Mr. Farkas' Roma clients, principally in relation to his office assisting with preparing their PIFs. The Applicants do not allege they were one of the ten complainants upon which the Law Society's allegations were based.

[22] While the decision of the Law Society is very significant, in my view, this alone does not establish Mr. Farkas provided ineffective or incompetent assistance to the Applicants before the RPD.

[23] The Female Applicant's affidavit made in support of this application states the Officer mentioned that counsel at the RPD hearing was subject to a disciplinary process but asserts that, in fact, Mr. Farkas was disciplined, and that the Officer ignored "that the failure of counsel to properly represent us, and file documents, led to the negative credibility findings". Putting aside the question of whether this is actually argument, as noted above, at the time of the PRRA Officer's decision, the evidence before her was only the Law Society Notice of Application containing allegations of professional misconduct, no finding by the Law Society had then been made. Further, the affidavit evidence of the Female Applicant is general in nature and provides no specifics of how Mr. Farkas was negligent, in particular, it does not identify any documents

which were available but not filed nor is their significance explained. In their written representations made with respect to this judicial review, the Applicants say only that Mr. Farkas' acts or omissions in the presentation of their refugee claim "may have not been profession [*sic*], and may have led to the credibility finding".

[24] Thus, to the extent that the Applicants are suggesting incompetence of counsel in and of itself as a basis for their judicial review, this is not properly before the Court or particularized and shall not be addressed (see *Chetry v Canada (Citizenship and Immigration)*, 2016 FC 513 at para 17). Nor can the Law Society decision alone establish incompetent representation before the RPD in this matter. It was open to the Applicants to more fully address that issue in the PRRA, however, they failed to do so.

Standard of Review

[25] While the jurisprudence is divided on the standard of review applicable to a PRRA officer's decision respecting an oral hearing (*Khatibi v Canada* (*Citizenship and Immigration*), 2016 FC 1147 at para 13), I have previously found that this is reviewable on the reasonableness standard as a PRRA officer decides whether to hold an oral hearing by considering the PRRA application against the requirements of s 113(b) of the IRPA and the factors in s 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regulations") which is a question of mixed fact and law (*Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 40 ("*Chekroun*"); *Seyoboka v Canada (Citizenship and Immigration)*, 2016 FC 514 at para 29; *Ibrahim v Minister of Citizenship and Immigration*, 2014 FC 837 at para 6; also see *Hurtado v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 768 at para 8

("*Hurtado*")). Reasonableness is also the standard of review for questions of veiled credibility findings (*Chekroun* at para 40; *Angulo Lopez v Canada (Citizenship and Immigration)*, 2012 FC 1022 at paras 20 and 24; *Zeng v Canada (Citizenship and Immigration)*, 2015 FC 49 at paras 14 and 16).

[26] The standard of review that applies to the decisions of PRRA officers as a whole is reasonableness (*Wang v Canada (Citizenship and Immigration)*, 2010 FC 799 at para 11; *Chen v Canada (Citizenship and Immigration)*, 2016 FC 702 at para 13) and deference is owed to a PRRA officer's assessment of the evidence (*Belaroui v Canada (Citizenship and Immigration)*, 2015 FC 863 at paras 9-10).

[27] The effect of incompetent counsel in a prior hearing has been found to raise an issue of fairness to which the standard of correctness applies (*Olah v Canada (Citizenship and Immigration)*, 2016 FC 316 at para 25 ("*Olah*"); *Pusuma v Canada (Citizenship and Immigration)*, 2015 FC 658 at paras 47, 79-81 ("*Pusuma #2*"); *Mcintyre v Canada (Citizenship and Immigration)*, 2016 FC 1351 at para 16).

ISSUE 1: Did the Officer err in failing to hold an oral hearing?

Applicants' Position

[28] The Applicants submit the Officer's conclusion that they failed to provide sufficient new evidence to resolve the credibility issues identified by the RPD demonstrates the Officer relied

too heavily on the RPD's credibility assessment and that the Officer failed to consider the issue of the competence of former counsel and, therefore, erred in failing to conduct an oral interview.

[29] More specifically, unless the Officer was prepared to accept the narrative and supporting documents of the Applicants as credible, a hearing ought to have been convened, as requested in their written PRRA submissions. While an interview is generally not required to ensure procedural fairness, in this matter the Officer's insufficiency of evidence finding concerning the Applicants' failure to rebut the findings of the RPD are, in fact, veiled credibility findings. Therefore, a proper assessment of credibility would have required an oral hearing. In this case, the Officer did not point to any evidence that contradicted the Applicants' evidence and dismissed general and specific corroboration, which raises a reviewable error. The Officer also failed to provide adequate reasons for her negative credibility findings.

Respondent's Position

[30] The Respondent submits that what the Applicants characterize as a credibility finding actually relates to the Officer's determination of whether evidence was "new" under s 113 of the IRPA.

[31] Given their allegations that, due to the conduct of their former counsel they were denied an opportunity to present evidence of their political involvement, which involvement put them at risk, the Officer was required to consider if the Applicants had a reasonable opportunity to put forward their claim for protection (*Botragyi v Canada (Citizenship and Immigration)*, 2017 FC 79 at paras 11-12; *Mbaraga v Canada (Citizenship and Immigration)*, 2015 FC 580 at paras 25-

27). In that regard, the Officer expressly considered their allegations and found that they were given multiple opportunities to present their case, both as to the grounds of risk at the port-of-entry in 2011 and again in 2016 and before the RPD. Further, the Officer noted that even if former counsel failed to "delve deeply into their personal situation when preparing the PIF", the Applicants were asked direct questions by the RPD at the hearing about specific family problems and did not respond. As they failed to take this opportunity, it was open to the Officer to conclude that their evidence was reasonably available at the time of the RPD hearing. Accordingly, the Officer reasonably concluded the Applicants' new evidence did not meet the admissibility requirement of s 113. In this sense, there was no new evidence requiring a hearing under s 113 of the IRPA. Nor was any incompetence of counsel determinative in assessing whether the Applicants had a reasonable opportunity to present their case.

Analysis

[32] Subsection 113(a) of the IRPA states that an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. Subsection 113(b) states that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

[33] The prescribed factors are set out in s 167 of the IRP Regulations:

167. For the purpose of determining whether a hearing is required under paragraph	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à

113(b) of the Act, the factors are the following:	décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[34] This Court examined s 113(b) of the IRPA and s 167 of the IRP Regulations in *Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984 and held:

> [34] This has been interpreted to be a conjunctive test: therefore, an oral hearing is generally required if there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application: *Ullah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 221. While the Court has acknowledged that there is a difference between an adverse credibility finding and a finding of insufficient evidence, the Court has sometimes found an officer to have improperly framed true credibility findings as findings regarding sufficiency of evidence and therefore an oral hearing should have been granted: *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at para 12; *Liban v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 at para 14; and *Haji v Canada (Minister of Citizenship and Immigration)*, 2009 FC 889 at paras 14-16.

[35] In this matter the Applicants allege they were entitled to an oral hearing because the Officer made veiled credibility findings while the Respondent asserts that the Officer was assessing whether the evidence was new evidence in the context of s 113(a) of the IRPA. Accordingly, the Court must first determine whether a credibility finding was made, explicitly or implicitly. If so, then it must determine if the issue of credibility was central to or determinative of the decision (*Adeoye v Canada (Citizenship and Immigration)*, 2012 FC 680 at para 7; *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 30 ("*Matute Andrade*")). When considering an allegation of veiled credibility findings, the Court must look beyond the words that have been used by the Officer in the decision and must identify the true basis for the decision (*Matute Andrade* at paras 31-32).

[36] As the Officer noted, the RPD found inconsistencies between the Principal Applicant's PIF and his oral testimony concerning his seeking of police assistance after a December 17, 2010 incident for which he was unable to provide a reasonable explanation. The RPD concluded the Applicants were attempting to embellish their oral testimony in an effort to enhance their claim and drew a negative credibility finding. Further, there were inadequately explained inconsistencies between the Principal Applicant's PIF and a statement to the police concerning a second incident on March 23, 2011. The Applicants' departure from Hungary shortly after the latter incident and before the Principal Applicant's police complaint was investigated also detracted from his allegations. The RPD also stated that, if it were to find the testimony credible, it still determined that all reasonable efforts were not taken to seek state protection.

[37] Significantly, in their PRRA application the Applicants did not challenge these credibility findings and did not seek to present new evidence to rebut them. Rather, the Applicants sought to submit new evidence as to their membership in a family that includes high profile Roma advocates and that they personally were involved for advocating for Roma rights.

[38] The Officer noted the Applicants failed to mention their advocacy involvement at the port-of-entry in 2011, in their PIFs, in oral testimony before the RPD or in post-RPD submissions. She found this evidence pre-dated the RPD decision and could reasonably have been brought up by the Applicants when they were before the RPD. Further, at the port-of-entry in 2016 they stated that the Principal Applicant’s father, who had been deceased since 2009, was a gypsy politician and because of that their lives were in danger but did not mention their own involvement or list in their Background Declaration that they were members of any organization as asserted in the PIF. The Officer stated she accorded high weight to the RPD reasons which referenced an exchange involving both adult Applicants when they were asked directly if they could provide specific information about problems other family members in Hungary were experiencing but could not. This persuaded her that, even if their counsel of record at the RPD failed to delve deeply into their personal situation when preparing the PIF, the Applicants were asked directly about any specific family problems and could reasonably have provided the information. Based on this, the Officer found that this was not a new risk development.

[39] While the Officer’s wording could have been clearer, having considered the reasons in whole I am of the view that the Officer did not make any credibility findings, veiled or otherwise. Rather, her decision was based on her finding that there was insufficient admissible

evidence provided by the Applicants in the PRRA application to rebut the RPD's findings, including its credibility findings.

[40] As the Officer found that: the proposed new evidence as to the Principal Applicant's family did not arise after the rejection of the Applicants' claim; it was reasonably available to them prior to the RPD's decision; and, they were provided with opportunities to present that evidence, which opportunities were not negatively impacted by their counsel's alleged incompetence, it was open to her to find the new evidence was not admissible. Because the new evidence was not admissible, it did not raise a serious issue of the Applicants' credibility. Given this, s 113(b) was not engaged and an oral hearing was not required (*Ponniah v Canada (Citizenship and Immigration)*, 2013 FC 386 at para 38).

[41] Nor did the Officer err in finding the new evidence concerning the Principal Applicant's family did not rebut the RPD's credibility findings, as those findings were unrelated to the family's status. I would also note, upon reading the decision of the RPD, that it is apparent that the decision turned not on credibility but on the availability of adequate state protection and a viable IFA. The judicial review of that decision was also based on those issues. The PRRA decision was primarily concerned with the failure of the Applicants' evidence to persuade the Officer that there had been a change of country conditions such that a new or change of risk arose.

[42] It is true that the Applicants did request a hearing. In their narrative, they stated "we ask for an interview with the PRRA officer to explain the reasons we returned to Canada, which I

detail in general below". While this Court held in *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at para 11 ("*Zokai*") that, where a request for an oral hearing has been made the officer is required to at least consider the request in his or her reasons, in that case the applicant had provided a detailed request in his PRRA application for an oral hearing, with specific reference to the factors set out in s 167 of the IRP Regulations. Further, credibility concerns were central to the officer's findings.

[43] In *Ghavidel v Canada (Citizenship and Immigration)*, 2007 FC 939 at para 24 ("*Ghavidel*"), Justice de Montigny distinguished *Zokai* on this basis. He went on to state that while it would undoubtedly have been preferable for the officer to have explained why an oral hearing was not provided, he was hesitant to make this compulsory and to therefore add to the already heavy burden of PRRA officers (*Ghavidel* at para 25). More recently, in *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 653 at para 14, Justice Forthergill adopted the reasons in *Ghavidel* and held an officer is not obliged to explain why an oral hearing has not been provided if credibility is not in issue, but where credibility is a determinative factor, a failure to convene a hearing without adequate reasons may amount to a reviewable error. And, in *Hurtado* at para 10, this Court held that making credibility findings does not require a hearing under s 113 of the IRPA when the officer's decision was also based on the applicant providing insufficient evidence.

[44] As credibility was not determinative in this case, and given the limited basis for the request as made by the Applicants, I am satisfied that no breach of procedural fairness arises from the Officer's failure to explain why an oral hearing was not granted.

ISSUE 2: Is the Officer's assessment of the evidence reasonable?

Applicants' Position

[45] The Applicants submit the Officer relied too heavily on the findings of the RPD, especially with respect to credibility and state protection, and erred by failing to conduct an independent assessment of the new evidence.

[46] The Officer had evidence that the Law Society disciplined Mr. Farkas but found, without evidence, that the counsel issue did not impede the Applicants from providing details of the family's Roma advocacy activities. However, there was clear evidence in the PRRA application, even if not in the refugee claims, of the family's activities. Failure to properly consider that Mr. Farkas was found guilty of professional misconduct by the Law Society may also be a breach of procedural fairness. The Applicants submit the Officer's assessment of the new evidence also ignored the negligence of former counsel when the Officer discounted this evidence for pre-dating the RPD's decision.

[47] Further, Mr. Farkas' representation of the Applicants before the RPD may have led to its negative credibility findings. Therefore, the Officer was bound to consider the issue in a more substantial way and should not have stopped her assessment at the issue of credibility and should have properly assessed country conditions and the fact that the Principal Applicant's family members' claims have been granted by the RPD. The Applicants also say that this case is analogous to this Court's decision in *Olah* yet here the Officer paid only lip service to Mr. Farkas

being subject to a disciplinary process (also see *Pusuma v Canada (Citizenship and Immigration)*, 2012 FC 1025 ("*Pusuma #1*") and *Pusuma #2*).

[48] The Applicants submit the Officer's heavy reliance on the RPD's decision suggests the Officer fettered her discretion, she also ignored submissions on the issue of the IFA. Further, with respect to state protection, the RPD only considered two incidents and by relying on the RPD's decision, the Officer ignored or failed to consider any other incidents in their 43 paragraph PRRA narrative. Accordingly, it is not known why the new evidence did not persuade the Officer.

[49] The Applicants also submit the Officer erred in failing to analyze the evidence of similarly situated persons. Here the Principal Applicant's two brothers and one sister were accepted as refugees on largely the same evidence as was before the Officer.

[50] The Applicants submit the Officer made selective use of documents in support of the conclusion that they do not have a well-founded fear of persecution and ignored evidence on housing, education, healthcare, and discrimination. The Officer wholly failed to consider the totality of the evidence and failed to analyze the documentary evidence in the context of their circumstances.

[51] Finally, the Applicants submit that by adopting the findings of the RPD on state protection, the Officer erred. A PRRA is a *de novo* assessment of the new evidence and if the Officer erred in relying too heavily on the RPD's decision or finding the incidents to not be

credible, then the Officer treated those as untrue, and therefore did not properly consider state protection. Since the Officer erroneously relied on the RPD's negative credibility findings, it was submitted the state protection analysis itself was flawed. That was also the extent of the Officer's state protection analysis.

Respondent's Position

[52] The Respondent submits, as described above, that the Officer did not fail to consider the issue of incompetent counsel and reasonably concluded the Applicants' new evidence did not meet the admissibility requirement of s 113 of the IRPA. In any event, even if it is accepted that Mr. Farkas acted incompetently in this case, the Officer's findings are based on evidentiary omissions that are attributable to the Applicants themselves in failing to provide evidence as to the Principal Applicant and his family's political activism when specifically prompted to do so.

[53] The Respondent submits the Applicants' position that the Officer should not have given weight to the RPD decision ignores that the weighing of evidence is not a ground for judicial review and fails to appreciate the nature of the PRRA regime. The PRRA is not an appeal or reconsideration of the decision of the RPD. Nonetheless, it may require consideration of some or all of the same factual and legal issues as a claim for protection. For that reason the IRPA mitigates the concern of re-litigation by limiting the evidence that may be presented to the PRRA officer (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 12-13 ("*Raza*")). Accordingly, absent a material change in circumstances, the Officer was required to respect the decision of the RPD and this is not a fettering of discretion.

[54] The Applicants did provide some submissions on the issue of IFA, but failed to establish any material change as contemplated by *Raza*. Aside from a judicial review decision rendered in 2015, the Applicants' evidence related to country condition documents from 2012. The minimal evidence provided by the Applicants did not address any new developments in country conditions which could rebut the RPD's findings. The Officer therefore reasonably concurred with them. The Applicants challenge of the Officer's analysis of state protection fails for the same reason. Absent evidence of a material change, the Officer was required to respect the RPD finding that the presumption of state protection had not been rebutted. This was particularly so as the RPD's conclusions on IFA and state protection were upheld as reasonable on judicial review.

[55] As to the Applicants' argument concerning the treatment of the evidence of the Principal Applicant's siblings and their positive RPD determinations, the Officer noted that each case is assessed on its own merits. The weighing of that evidence was within the Officer's discretion.

[56] Finally, as to the Applicants' submissions concerning the Officer's weighing of the country condition documentary evidence, a PRRA officer is presumed to have considered all of the evidence and need not mention each and every piece of evidence (*Matute Andrade* at para 64). Here the Officer provided a carefully reasoned 10-page decision with references to the evidence provided in support; the Applicants have not established a failure to consider relevant evidence.

Analysis

[57] As noted above, s 113 (a) of the IRPA states that an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. The Federal Court of Appeal in *Raza* explained that a PRRA application is not an appeal or reconsideration of the decision of the RPD and that a negative refugee determination by the RPD must be respected by a PRRA officer unless there is admissible new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD (*Raza* at para 13).

[58] In this case, the Applicants do not dispute that the evidence as to the Principal Applicant's family's advocacy for Roma was available in 2013, but submit the Officer failed to consider whether this evidence was not presented to the RPD because of former counsel's incompetence. Accordingly, they submit it was an error for the Officer to have rejected the evidence on the basis that it was not new evidence.

[59] I am satisfied that the Officer turned her mind to the issue of former counsel's incompetence. As discussed above, the Applicants did not lead any evidence before the Officer to show how Mr. Farkas' representation impeded their ability to make a proper case before the RPD. Further, I agree with the Respondent that the Officer reasonably concluded the new evidence was not admissible even if it were taken as true that former counsel's representation was incompetent. The Applicants did not establish that this evidence was not reasonably

available to them and they were directly asked about problems of family members by the RPD (*Raza* at para 13).

[60] As to the Applicants' submission that the Officer did not conduct an independent assessment of the evidence, but instead relied on the RPD's findings, I do not agree. First, it was open to the Officer to have relied on the RPD's findings in these circumstances. Further, as discussed above, the Officer did not make credibility findings and did not err in finding that the Applicants had provided insufficient evidence to rebut the RPD's credibility concerns. Thus, contrary to the Applicants' submissions, the Officer's reference to those credibility findings, as regards to state protection, was not in error and was reasonable.

[61] Further, the Officer did not ignore the documentary evidence on country conditions. She acknowledged that the current information indicates "mixed reviews" with respect to the government's progress in implementing policy, that the evidence indicates that conditions for non-Roma is significantly better than the Roma minority, and that the evidence is mixed with respect to the treatment of Roma. The Officer's weighing of the country conditions documentation is owed deference. The more salient point is that the recent evidence upon which the Officer relied does not demonstrate a change of country conditions which were described by the RPD. Thus, the Officer reasonably concluded the Applicants had not provided sufficient evidence that country conditions have changed to a degree that they create new risk development (*Conka v Canada (Citizenship and Immigration)*, 2014 FC 984 at para 9; *Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 at paras 36-37).

[62] The Applicants also submit the Officer's reliance on the RPD's decision is problematic because the RPD only considered two incidents and, by relying on the RPD's decision, the Officer ignored or failed to consider any other incidents in their 43 paragraph PRRA narrative. I agree the Officer did not explicitly address the Applicants' submission in that regard. However, the Officer is presumed to have reviewed all of the evidence in the absence of indications to the contrary (*Tapambwa v Canada (Citizenship and Immigration)*, 2017 FC 522 at para 85; *Traoré v Canada (Citizenship and Immigration)*, 2011 FC 1022 at para 48). Moreover, other than stating that on November 29, 2015, racists killed their dog on the way to setting their home on fire but that the racists were interrupted and they were not killed (they do not indicate whether their home was burned) the Applicants' submissions primarily describe a general climate of anti-Roma sentiment which they allege being subjected to on a regular basis. A similar statement was contained in the Principal Applicant's PIF. The Officer also noted that new details of their persecution in Hungary for the purposes of the PRRA were connected to the Principal Applicant's father's advocacy activities and the Applicants' evidence claiming their own involvement with Roma rights. Having found that this evidence was not new evidence, in my view, no error arises from the Officer's failure to further canvass the Applicants' allegations of resultant persecution in Hungary.

[63] The Applicants' submissions on judicial review do not address in any substantive way the Officer's treatment of the availability of an IFA in Budapest. The Officer found the Applicants did not sufficiently rebut the RPD's finding that, for that family, Budapest offered a reasonable IFA. The Applicants submit the Officer relied exclusively on the RPD decision and ignored their submissions concerning the issue of IFA. They quote *Kohazi v Canada (Citizenship and*

Immigration), 2015 FC 705 at para 16 and a 2012 Response to Information Request (HUN104111.E) ("RIR"), as well as *Katinszki v Canada (Citizenship and Immigration)*, 2012 FC 1326 at para 19. These were the same submissions that were made in the PRRA. The referenced RIR, being the only actual evidence cited, pre-dates the RPD's decision therefore it was not new evidence and cannot demonstrate a material change of circumstances. The RIR itself does not appear in the record and, in any event, the quote relied upon by the Applicants references a source that states vigilantism had waned and that there was not a single area in Hungary where the Roma community lived in fear of it. The extract also stated that acts of violence by extremist groups against Roma since 2009 included a number of counties including Budapest. In my view, given the limited nature of these submissions, the Officer reasonably found that the evidence did not rebut the RPD's finding.

[64] This is significant because a finding that a viable IFA exists is determinative. The question of IFA is integral to both the definition of a Convention refugee and that of a person in need of protection. When a viable IFA is available, claimants do not require Canada's protection. An IFA finding by the RPD precludes a positive PRRA finding unless new evidence shows that a material change in circumstance has occurred since the RPD's determination (*Silva v Canada (Citizenship and Immigration)*, 2012 FC 1294 at para 22; *Ikechi v Canada (Citizenship and Immigration)*, 2013 FC 361 at para 28; *Siliya v Canada (Citizenship and Immigration)*, 2015 FC 120 at para 25; and *Oluwole v Canada (Citizenship and Immigration)*, 2015 FC 953 at para 25).

[65] Nor does any error arise from the manner in which the Officer considered the evidence of similarly situated persons, in particular, the positive RPD claims of the Principal Applicant's siblings. The Applicants attached the positive RPD findings of three of the Principal Applicant's siblings, Zsolt Gombos, Belane Horvath, and Edmond Gombos. The Officer noted that the Principal Applicant's sister (Belane Horvath), who was found to be credible, stated in testimony that she did similar work as her father, as did one of her brothers, Edmond, but she did not mention other family members participating in advocacy work for the Roma. I note that there was also documentary evidence supporting activities of the Principal Applicant's sister as well as her father. The portion of the PIF for Edmond in the record speaks to the Principal Applicant's father's and Edmond's involvement in Roma rights advocacy. Edmond's refugee claim also mentioned his involvement in the Roma Coordination Program and persistent efforts to seek state protection and does not suggest any involvement of the Principal Applicant in such activities. The RPD found him to be credible in its decision of January 14, 2013.

[66] Thus, the Officer did not ignore the evidence but found it did not establish the Applicants were involved in political activism and, therefore, that they were similarly situated persons. Nor was the Officer bound to follow those decisions (*Mengesha v Canada (Citizenship and Immigration)*, 2009 FC 431 at para 5) and she explained why she did not (*Mendoza v Canada (Citizenship and Immigration)*, 2015 FC 251 at para 25). It is true that the RPD decision concerning Zsult Gombos, dated November 6, 2013, does not rest on any involvement on his part as an activist. However, unlike this matter, the RPD found him to be credible. It also found that his father's role would be known in Budapest and that he had established that he had sought state

protection without success. The determinative issue was an IFA given the large size of his family and associated costs of relocating them.

[67] There is also no merit to the Applicants' argument that the Officer fettered her discretion or erred in setting out the test for state protection by her reliance on the RPD's decision.

[68] To my mind, although the Applicants have made many submissions, the true issue in this matter was whether the Officer's reliance on the RPD's decision, which was potentially tainted by the incompetence of their former counsel, rendered the PRRA decision unreasonable or procedurally unfair. The difficulty is that, before the PRRA Officer, the Applicants failed to effectively engage with the issue of competent representation. While the Law Society allegations were known, the Applicants did not tie the preparation of their PIF to any allegation of misconduct or identify what acts or omissions of Mr. Farkas negatively impacted the RPD's decision. They did not explain why they had not previously raised their family's advocacy, let alone attribute this omission to the incompetence of counsel. There was simply no evidence to particularize that position. And, when the Law Society decision was rendered, which preceded the PRRA decision being issued, the PRRA Officer was not advised of the outcome. Even in their submission on judicial review, the Applicants do not particularize their allegations and explain what the alleged misconduct was and how it affected the PRRA decision, other than asserting that the Officer was in error to rely on the RPD decision because of the potential incompetence.

[69] Given the Law Society's subsequent finding, it is very appealing to simply accept that the RPD's decision was potentially tainted by the incompetence of their former counsel and, because the Officer relied on that decision, her decision was unreasonable or procedurally unfair. However, this would mean that every applicant who is represented by counsel who is later found to have failed to provide competent or effective representation need not address the specific circumstances of counsel's representation of them when seeking a PRRA. Further, in this case the Officer did not rely on the RPD's credibility findings in reaching her decision nor does the new evidence as to the Principal Applicant's family address or rebut those findings. Nor did the Officer otherwise rely on the RPD's decision to the exclusion of a consideration of the admissible new evidence.

[70] The Applicants also say that this case is analogous to this Court's decision in *Olah*, *Pusuma #1* and *Pusuma #2*. In my view, *Olah* is distinguishable from the present matter. There, the Court stated that the applicants were among those who had received incompetent representation before the RPD by their former counsel, Mr. Viktor Hohots. It also found that the PRRA officer erroneously concluded that a lawyer working for Mr. Hohots was not in fact affiliated with him and, therefore, her representation did not being the RPD's finding into question. However, the key issue was whether the officer's reliance on the RPD's credibility findings irreparably tainted the decision, that is, the effect of the incompetent counsel on the prior proceeding before the RPD. Here, the Officer did not make a fatal error of this kind, did not rely on the RPD's credibility findings, and turned her mind to the limited submissions made by the Applicants as to the alleged incompetence of counsel. Most significantly, and unlike this

matter, in *Olah*, a supporting affidavit submitted in support of the PRRA application outlined the significant problems in the applicants' representation by Mr. Hohots.

[71] Similarly, *Pusuma #2* is distinguishable on the basis that there the applicants brought a complaint against their counsel who later admitted that he had failed to properly serve the applicants and failed to have important documents translated. Based on those admissions, this Court found that the applicants were not afforded a fair hearing before the RAD. In this matter, the Applicants have not established that they received an unfair hearing because of the incompetence of counsel and, therefore, that the PRRA Officer's decision was tainted by that unfairness. And, unlike *Pusuma #2*, the PRRA Officer was not heavily influenced by the RPD's credibility findings. There, a critical letter that was not translated as a result of the negligence of the applicants' former counsel was rejected by the PRRA officer as it was not new evidence. This Court found that the misconduct of the applicants' counsel in the refugee proceeding therefore had a direct impact on the assessment of the PRRA. In this matter, the Applicants did not identify documents which were not filed due to misconduct and did not particularize their claim of incompetent counsel. And, as discussed above, the Officer addressed their limited submissions as to the former counsel's representation of them before the RPD. Nor does *Pusuma #1* assist the Applicants.

[72] Given the above, in my view, the decision falls within the range of reasonable outcomes. The Officer rendered a sufficiently detailed decision and reasonably concluded that there was insufficient admissible new evidence that could support a positive PRRA decision.

JUDGMENT IN IMM-575-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-575-17
STYLE OF CAUSE:	GYORGY GOMBOS, ZITA LAKATOS, ZITA VIRAG GOMBOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 30, 2017
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	SEPTEMBER 22, 2017

APPEARANCES:

Peter G. Ivanyi	FOR THE APPLICANTS
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rochon Genova LLP Barristers and Avocats Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT