Federal Court  Cour fédérale

Date: 20220207

Docket: IMM-1101-20

Citation: 2022 FC 150

Toronto, Ontario, February 7, 2022

PRESENT: Madam Justice Go

BETWEEN:

GYITA GABOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 1998, Canada accepted the refugee claim made by Ms. Gyita Gabor [Applicant], a citizen of Romania, against her home country. By a decision dated January 10, 2020, the Refugee Protection Division [RPD] granted an application by the Minister of Public Safety and Emergency Preparedness [Minister] for cessation of the Applicant's refugee status in Canada [the Decision]. The RPD found that the Applicant voluntarily reavailed herself of Romania's

protection, as she had returned there several times since receiving refugee status in 1998 and had travelled on a Romanian passport.

[2] The Applicant, who was self-represented at the cessation hearing, argues that the RPD breached procedural fairness by refusing her request to adjourn the hearing so she could be represented by counsel, particularly as she is illiterate and suffers from an acquired brain injury. The Applicant also argues that procedural fairness was breached because she did not understand the nature of the proceedings and because she was not given an opportunity to make submissions at the hearing. The Respondent concedes that the RPD breached procedural fairness by failing to allow the Applicant an opportunity to make submissions, but argues that the outcome would not have changed notwithstanding the breach and that the application should be dismissed.

[3] I find that the RPD breached procedural fairness and that the outcome of the cessation proceeding is not inevitable. I therefore grant the application and refer the matter back for redetermination.

II. Background

A. *Factual Context*

Circumstances Leading to the Cessation Application

[4] The Applicant first came to the Minister's attention when she returned to Canada from a trip abroad on May 4, 2014. When questioned by a Canada Border Services Agency [CBSA]

officer the Applicant advised she had been to Romania for her son's wedding and had left Canada about two months ago.

[5] In October 2015, the Minister submitted a cessation application pursuant to s 108(2) of the *Immigration and Refugee Protection Act* [*IRPA*], as well as an application to have the Applicant's refugee claim deemed as rejected in accordance with s 108(3) of the *IRPA*. The Minister relied on the 2014 trip to Romania, as well as data from the Integrated Customs Enforcement System showing that the Applicant had travelled nine times between 2005 and 2015. The Minister also relied on evidence that on December 8, 2014, the Applicant was issued a temporary Romanian passport.

[6] On June 18, 2019, the RPD notified the parties that the hearing was scheduled for September 3, 2019.

[7] On August 14, 2019, the Minister provided additional disclosure materials, including details of two further return trips to Canada in 2016 and 2018, as well as a copy of another temporary Romanian passport issued on December 4, 2015.

Adjournment Requests by Applicant's Counsel Prior to the RPD Hearing

[8] On August 23, 2019, Cheryl Robinson, a lawyer from the Refugee Law Office, advised the RPD that she had recently been retained by the Applicant and would be receiving records from the Applicant's former counsel, Peter Ivanyi. Ms. Robinson requested a postponement of the hearing scheduled for September 3, 2019. Ms. Robinson submitted that the Applicant was a

vulnerable person who would be unable to represent herself, as she suffers from an acquired brain injury and a learning disability, and she cannot read or write. Ms. Robinson provided medical documentation dated 2011 and 2013, and indicated that she would be seeking updated medical information. She further submitted that the Applicant suffered from post-traumatic stress disorder and major depressive disorder, which had impacted her ability to form a strong solicitor-client relationship, meaning that additional time was required to build a relationship of trust.

[9] On August 26, 2019, Mr. Ivanyi advised the RPD that the Applicant had decided not to retain him for the hearing and removed himself as counsel of record.

[10] The hearing was then rescheduled for November 25, 2019, but did not proceed because the RPD miscommunicated the date to the Applicant. The hearing was again rescheduled to December 17, 2019.

[11] On November 26, 2019, the Minister provided additional disclosure. This included information about the Applicant's application for Canadian citizenship, which was withdrawn in 2015 due to her criminal convictions in Canada, as well as additional details about her criminal convictions. The Minister also provided information that the Applicant had obtained a Romanian passport in 2005, in the name of **Gita** Gabor, and that she had traveled to Romania in May 2009 in order to attend her brother's funeral.

[12] On December 5, 2019, Ms. Robinson requested that the Board remove her as counsel of record, as there had been a breakdown of the solicitor-client relationship. Ms. Robinson also

requested a further adjournment of the hearing to give the Applicant time to find another counsel, given the concerns raised in her earlier letter about the Applicant's ability to represent herself.

[13] On December 11, 2019, Mr. Ivanyi notified the RPD that the Applicant had requested his representation at the hearing, but he was not available on December 17. As such, he requested that the hearing be postponed. He noted that his retainer was limited for the time being, and that he had agreed to make an application on her behalf to change the time of the hearing because "she is simply not able to make a formal application." The Minister opposed changing the hearing date on the grounds that a postponement had already been granted and the delay had been caused by the Applicant's lack of diligence in retaining counsel. The Respondent stated that if the Applicant wanted new counsel, she should find someone who is available on the hearing date.

[14] On December 12, 2019, the RPD dismissed Mr. Ivanyi's postponement request. The hearing was conducted on December 17, 2019, in the absence of counsel for the Applicant. During the hearing, the Applicant agreed to proceed, but also asked for an adjournment immediately thereafter and several other times during the hearing.

[15] On January 10, 2020, the RPD granted the cessation application, with the result that the Applicant lost her protected status and permanent residence status in Canada.

Events Subsequent to the RPD Decision

[16] The Applicant was scheduled to be removed from Canada on February 8, 2021. On February 5, 2021, Justice Ahmed granted the Applicant's motion for a stay of removal: *Gabor v Canada (Citizenship and Immigration)*, 2021 CanLII 7249 (FC) [*Gabor*].

B. *Decision under Review*

[17] The RPD found that the Applicant applied for, acquired and travelled on three different Romanian passports to return to Romania. Reliance upon the diplomatic protection accorded to her through the use of these passports to return to her country of nationality demonstrates the Applicant's wilful and actual reavailment of national protection, the RPD found. The RPD concluded that the Applicant has not rebutted the presumption of reavailment to Romania.

III. Issues and Standard of Review

[18] The central issues in this application are whether the RPD breached procedural fairness and if so, what the remedy ought to be. The Applicant argues that the RPD breached procedural fairness by: (1) failing to adjourn the hearing so that her counsel could be present, (2) failing to ensure the Applicant could appreciate the nature of proceedings, and (3) failing to provide the Applicant with an opportunity to make submissions. At the hearing before the Court, the Respondent conceded issue (3).

[19] The Respondent raises a further issue: (4) whether a new hearing is warranted if the Applicant has not challenged the merits of the Decision.

[20] The parties agree that correctness is the standard of review for questions of procedural fairness, given that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 23, states that it only applies to the *merits* of administrative decisions.

[21] In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at para 54, the Federal Court of Appeal noted that judicial review for procedural fairness is "'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied." This case turns on the issue of procedural fairness, which I will review on a correctness standard.

IV. Analysis

A. *Did the RPD breach procedural fairness by failing to adjourn the hearing?*

What happened at the RPD hearing?

[22] According to the Applicant, her illiteracy and mental health issues rendered her unable to participate meaningfully in the adjudicative process without counsel, and the RPD breached procedural fairness by failing to grant the request to adjourn the hearing.

[23] Before addressing the parties' submissions and my finding on this issue, it is necessary to set out the exchange between the Applicant (speaking mostly through an interpreter) and the

RPD Member regarding the former's request for an adjournment. Starting at page 1 of the Transcript of the RPD hearing [Transcript], as provided in the Respondent's further affidavit, the exchange began as follow:

> **BOARD MEMBER**: …All right, well, we have everybody here, there's a bit of a, a history to the case, Ms. Gabor. So what I see is a number of things, okay, on file. Originally this hearing was scheduled, and it's been delayed several times. So I have some correspondence, do you remember the days when you were working with Mr. Ivanyi? Way back.
>
> **A**: Yes, of course.
>
> **BOARD MEMBER**: Yeah.
>
> **A**: With him I obtained the documents.
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> **BOARD MEMBER**: Yeah, good. And then, then you changed counsels, right?
>
> **A**: I changed because I didn't have enough money to pay him.
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> **BOARD MEMBER**: I understand.

[24] Here, I should pause and note that according to the August 23, 2019 letter from Ms. Robinson, provincial legal aid funding for refugee matters had been terminated until a week prior, when the federal government had reinstated it, which had left the Applicant without funding for representation until recently. As the above exchange confirms, a lack of funds to pay Mr. Ivanyi could well explain why the Applicant contacted the Refugee Law Office. In any event, the exchange between the RPD Member and the Applicant continued at page 2 of the Transcript:

> **A**: And now I returned to him because he's my lawyer, he's my lawyer for 20 years now.
>
> **BOARD MEMBER**: Oh, is that right, you've had him 20 years? Yeah, yeah, okay.
>
> **A**: Ever since I came here I obtained the documents we, we go through him.

BOARD MEMBER: Right.

A: And this is his business partner.

BOARD MEMBER: Okay, So Just, just listen. I know Mr. Ivanyi, okay? I'm just giving you a little history, so we know where we are. And then, then in August you went to see Counsel Robinson, Cheryl Robinson. And Ms. Robinson was going to represent you.

A: It's a male or female?

BOARD MEMBER: It's a female, Cheryl Robinson. Right, but she didn't stay with you, and we have a letter from her saying she's not your counsel. But today you are here without any counsel, which is good because you know today we had a hearing.

INTERPRETER: Which is good?

BOARD MEMBER: You know which is good, because today we have a hearing and you're required to attend.

A: And I am asking you to please postpone this case for Mr. Ivanyi.

BOARD MEMBER: Well, that's interesting. I hear your request, but Mr. Ivanyi has told the Board that he does not represent you. Just let me finish, all right? So unless I get a request from your counsel of record, and you have no counsel of record, I am unable to postpone the hearing again. I could postpone for your own personal circumstances but the only information I have is that A you're here, the Minister here to prosecute her case, and we have no counsel of record. So let me explain something to you, in this matter one thing is important, Ms. Gabor. The Minister has some information about your travels, okay? What she's going to do is just explain what it is. I can even do that, I have the information, I've read the file. What you do is answer the questions of Ms. Clark and any if I have them, not about being Roma, not about your problems in Romania, it's only about why you returned to Romania. So if we do this we can be out of here very quickly, okay? It does not require a lawyer to help you answer, the important part is your testimony and your answer, okay? So it's a different hearing than before, short, very short, And I won't make any decision today. We'll wait until after Christmas, okay? Would that be okay with you?

A: It's okay, thank you. I am asking him, please, and I am apologizing.

BOARD MEMBER: No, no, that's fine.

A: Because I went quite late to see Peter and today he is in court.

BOARD MEMBER: Yeah, it was ….

A: And he has no time for me.

BOARD MEMBER: That's okay.

A: But from today on, Peter is my lawyer.

BOARD MEMBER: Okay, well, that's okay, that's okay, for sure, certainly. We know Mr. Ivanyi very well. Okay, so you don't have any documents today you have to give us, do you?

A: In what sense?

BOARD MEMBER: Yeah, well, anything written down. You're going to respond to Ms. Clark's questions that she has about your trip, but you don't have any documents you have to give us about your trips or – that's yes or no, yes or no.

A: I don't have any but later I can submit some documents.

BOARD MEMBER: Yeah.

A: And that's why I am asking for a postponement.

BOARD MEMBER: Right, well, I can't do that because you're supposed to have your documents all ready for us today at the hearing. And this hearing – this hearing's been, been postponed a couple of times, okay? So, so in that regard, in that regard let me, let me begin the process by asking you what's your current address?

[25] With that, the RPD Member proceeded to confirm the Applicant's identity and hear the evidence.

[26] From the above exchange, I observe that the RPD Member essentially gives three reasons for refusing to adjourn the hearing at the outset. First, the Applicant did not have counsel on record. Second, the RPD Member advised the Applicant that he could postpone the hearing for the Applicant's "own personal circumstances" but because the Applicant was present, he decided not to. Third, the RPD Member advised the Applicant that she did not require a lawyer because

the hearing was ***only*** about why the Applicant returned to Romania, and nothing else, and that the hearing would be "short, very short."

[27] The Applicant's arguments focused on the second and third grounds, which will be the focus of my analysis and form the basis for my finding.

[28] In the Decision, the RPD gave the following as the reason for not adjourning the hearing as requested by the Applicant (who was referred to as the Respondent before the RPD):

> [15] …The hearing proceeded in the absence of counsel, as no counsel has been formally retained and the Respondent has had more than three years to obtain and settle on a counsel to represent her, which the Board determined to be more than sufficient time to prepare for the hearing, having worked with two counsels. Further, by her admission at the hearing, the counsel noted that P. Ivanyi had been her counsel for 20 years, but to reiterate, he has not been formally retained by the Respondent.
>
> [16] The panel was aware of the previous counsel Robinson's letter, in which she wrote that the Respondent has all of the issues noted in paragraph 12 of these reasons. However, other than being uneducated and unable to read and write, the Respondent demonstrated none of the issues alleged by the previous counsel, both through her comportment and her responses. The Respondent presented herself as confident and aware. Both the panel and the Minister's counsel noted how the Respondent listened carefully to all of the questions put to her, and she answered all of the questions to the best of her ability. The Respondent appreciated the nature of the proceedings as explained by the panel, and she answered all of the questions put to her by the Minister's counsel. She also indicated on the record that she would proceed with the hearing.

[29] The Applicant raised a technical issue regarding the hearing procedure, namely that the RPD Member justified refusing the adjournment based on documents not disclosed during the hearing. According to the Applicant, the RPD claims that the Board dismissed counsel's

application to postpone the matter, which cites to an endnote “Exhibit R-11, Board’s Decision for Postponement Application, dated December 12, 2019.” The Applicant submits that the document was not entered as an exhibit at the hearing, which only ran until exhibit 10.

[30] As I remarked at the outset of the hearing before me, both the Transcript and the audio recording of the RPD hearing seems to have been cut off towards the end. I asked the parties for their submission on this issue, but received none. It is possible that the Board’s letter dated December 12, 2019 refusing the postponement request may have been entered as an exhibit at the hearing, but was not captured by the recording as it has been cut off.

[31] In any event, whether or not the RPD Member has entered the Board letter as an exhibit is not determinative of the issue. What disturbs me more is that the Member appeared to have decided there was no counsel on record without knowing about Mr. Ivanyi’s letter to the RPD, dated December 11, 2019, asking for the hearing to be postponed. While Mr. Ivanyi noted that his retainer was limited at the time, his letter did include a Use of Representative Form. He indicated he was willing to represent the Applicant and asked to be contacted in advance for rescheduling to ensure that he would be available.

[32] That the RPD Member was unaware of Mr. Ivanyi’s request was made clear in the exchange towards the end of the hearing, when the Member advised the Applicant to talk to Mr. Ivanyi ***after*** he issued the decision in her case. It was then that the Applicant advised the Member that Mr. Ivanyi had sent a fax to the “immigration office.” The Member then took a break from the hearing to find the fax, which was eventually supplied by the Minister’s Counsel, along with

the RPD's decision to refuse counsel's adjournment request. It was only then that the Member entered Mr. Ivanyi's letter as an exhibit, before concluding that he did not have to adjourn the hearing because Mr. Ivanyi was not "formally retained" and that the Board had been "exceptionally generous" in outlining the process to the Applicant who "expressed her indication in intent and willingness to proceed."

[33] In short, the Decision stating that the hearing proceeded "as no counsel has been formally retained" was a rationale provided after the fact, as by the time the Member knew about Mr. Ivanyi's involvement, the hearing has already been completed.

[34] Leaving aside my view of the Member's self-declared "exceptional generosity" towards the Applicant, it is also hard to see how the Member could have arrived at his conclusion about the Applicant's "intent and willingness" to proceed in light of the Applicant's repeated requests for an adjournment.

[35] Since the parties did not make submissions on these various points I laid out above, I will not decide whether they amounted to a breach of procedural fairness. Rather, the above comments serve to paint a more fulsome picture of the disordered fashion in which the RPD Member conducted the proceeding.

[36] I will now turn to the parties' arguments on the issue of adjournment.

There were personal circumstances that warranted adjournment

[37] The RPD Member said he could only adjourn the hearing for the Applicant's "own personal circumstances" before quickly concluding he would not adjourn because the Applicant was present. However, there was nothing in the Transcript indicating that the RPD Member had canvassed the Applicant's personal circumstances before deciding not to adjourn the hearing.

[38] Importantly, I agree with the Applicant that there were particular circumstances in this case that, had the RPD Member considered them, would have justified the granting of an adjournment.

[39] The Applicant argues that the right to procedural fairness includes the ability to meaningfully participate in the adjudicative process: *Etik v Canada (Citizenship and Immigration)*, 2019 FC 762 at para 7; *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 [*Ha*] at para 51. Further, the Applicant argues that the right to procedural fairness includes the right to make a "free, informed, and independent decision": *Kaur v Canada (Minister of Employment and Immigration) (CA)*, 1989 CanLII 5272 (FCA), [1990] 2 FC 209 at para 8.

[40] While the right to counsel is not absolute, as this Court has confirmed: "[w]hat is absolute, however, is the right to a fair hearing. To ensure that a hearing proceeds fairly, an applicant must be able to 'participate meaningfully'": *Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423 [*Austria*] at para 6.

[41] In my view, there was sufficient evidence before the RPD demonstrating that the Applicant was not able to participate meaningfully. As noted by the Applicant, the following incidents at the hearing should have alerted the RPD Member that something was amiss:

A. When asked for her home address, the Applicant was unable to read it off of a piece of paper that she had with her and instead gave it to the Minister's representative to read into the record, saying "I don't read in English, I'm so sorry."

B. When asked how she would read a sign or a bus schedule in Canada, the Applicant explained that she would ask someone in the street to help her.

C. When the RPD Member called her a "polyglot" for speaking English, Hungarian, and Romani, she responded "but I don't know how to, how to read. And that, that kills me."

D. When asked for her date of birth, she responded "Oh, God. Even that I don't know. Because I never been educated, so."

E. The Applicant also explained that she attempted to fly to Romania at the request of her dying mother, but was not allowed to travel as she was informed her passport expired. She explained: "I didn't know that it was expired. Because I was looking at it and I couldn't read it. And that's why I couldn't see my mother['s] death. Couldn't go home. Many, many bad things happened to me, happened to me in my life because I am not educated. I feel like I have no feet and no hands."

[42] Even more telling and directly relevant to the issue before the RPD, was the Applicant's response when asked if she understood her travel to Romania could have an impact on her immigration status:

> Nobody told me that. Or maybe I didn't pay attention because of my memory. If I go, I look in the refrigerator, it happen [*sic*] many times. I am thinking – what do I have to buy? Then I go to the store, and I come home, and I didn't complete all my shopping.

[43] The Applicant was further asked by the Minister's representative if she remembered whether Mr. Ivanyi had read the Minister's application for cessation to her, to which the Applicant responded: "I don't remember anything."

[44] The Applicant points to a case in which the Federal Court held that a person unable to read documents did not receive a fair hearing in the absence of counsel: *Ayala Alvarez v Canada (Citizenship and Immigration),* 2010 FC 792 [*Ayala Alvarez*] at paras 16-18. I find the facts of this case are even more compelling, and the RPD's refusal to grant an adjournment more egregious than in *Ayala Alvarez*.

[45] Like the Applicant here, the applicant in *Ayala Alavez* was unable to retain counsel in a timely fashion in part due to the lack of legal aid funding. In that case, the applicant was unable to read documents due to his visual impairment, and he asked for an adjournment prior to his RPD hearing, which was denied. Unlike the Applicant here, however, Mr. Ayala Alavez did not seek an adjournment at his refugee hearing. In granting the judicial review, Justice O'Reilly noted:

> [15] In my view, in the circumstances of this case, proceeding in the absence of counsel resulted in unfairness to Mr. Ayala Alvarez. The Board relied on a substantial body of documentary evidence that was entirely in English. While Mr. Ayala Alvarez had the assistance of an interpreter and was given an opportunity to look over the documents before the hearing, he could not have absorbed their content or prepared any response to them without further time and assistance.
>
> [16] Further, it was clear that Mr. Ayala Alvarez had a visual disability that made it even more difficult for him to understand and respond to the documentary evidence on which the Board relied. It also made it difficult for him to follow the proceedings. Both the [Refugee Protection Officer] and the [United Nations High Commissioner for Refugees] representative were aware of Mr.

> Ayala Alvarez's circumstances and were concerned about his capacity to proceed. But their concern for his predicament did not cause them to suggest to the Board that proceeding in the absence of counsel might prejudice him.
>
> [17] Mr. Ayala Alvarez was entitled to a fair hearing before the Board. Under the circumstances, I am not satisfied that he received one.

[46] I find the above reasons can be aptly applied to the case before me. I note further there was no indication in this case that the Applicant was given a chance to review the Minister's application with the interpreter, unlike *Ayala Alarez*, notwithstanding her statements that she does not read and did not remember if Mr. Ivanyi had reviewed the Minister's application with her.

[47] The Federal Court of Appeal has stated that "[w]ithout representation, an individual may not able to participate effectively in the decision-making process, especially when facing a more powerful adversary, such as a government department": *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA [*Hillary*] at para 34.

[48] I reject the Respondent's submission that the Applicant and her former counsel(s) failed to establish that she lacked the cognitive ability to represent herself. I will note, however, that my finding is not based so much on the Applicant's dated medical evidence, but on her actual responses to the questioning by the RPD Member as quoted above.

[49] The Applicant's explanation for not being able to remember the content of the Minister's application – the core issue in her case – was to say that she also could not remember what she

was going to buy when she went shopping, as if the two events were of equal magnitude of importance. This response alone ought to have signalled to the RPD Member that the Applicant was not able to appreciate the matter at hand and thus unable to participate in the hearing in a meaningful way. Further, if the Applicant could not even remember the content of the Minister's application, she could not be expected to know the case she had to meet to overcome the Minister's allegation that she has reavailed herself of Romania's protection.

[50] I also find the RPD Member downplayed the Applicant's vulnerability by labelling her a polyglot. Being able to speak four languages does not make the Applicant literate, or make her understand the Minister's cessation application and the legal issues at play. Nor does it assist the Applicant remembering and understanding the nature of the Minister's application. By the same token, just because the Applicant has the wherewithal to ask for help on the street or when she travels, as the Member noted, does not mean she does not require counsel to represent herself in a hearing that would determine her future in Canada.

[51] The RPD Member's attempt to inflate the Applicant's capacity is further displayed in his finding that "she has applied either two or three times for Canadian citizenship." Among the medical evidence before the RPD was a 2013 letter from Dr. Katherine Rouleau opining that the Applicant has an acquired brain injury and a learning disability. The letter indicates that she is illiterate, that her memory conditions preclude her from learning normally, and that her memory is poor. This letter was previously submitted on the Applicant's behalf in order to seek an exemption from the requirement of the citizenship exam. In choosing to reference the Applicant's decision to apply for Canadian citizenship, but not her request for an exemption

from the onerous exam, the RPD has thus ignored the particular circumstances of the Applicant that may justify granting the adjournment she requested.

[52] I note the Respondent's submission that an illiterate litigant is in the same position as any other litigant to establish his or her case, citing *Reinhardt v Canada (Attorney General)*, 2016 FCA 158 [*Reinhardt*] at para 32 in support. However, I agree with the Applicant that *Reinhardt* can be distinguished, because it concerned a litigant who was represented during the tribunal proceedings, and because the Court stated that there was no evidence the applicant's representative had any difficulty in understanding the proceedings: *Reinhardt*, at para 20.

[53] I would further note that the issue in this case, i.e., the loss of status and eventual removal from Canada, is clearly of much higher stakes than a litigant's entitlement to the hearing transcript in *Reinhardt*.

[54] Additionally, the Respondent submits that there was no procedural unfairness because the Applicant had four years to prepare for her hearing. She was aware of the opportunity to retain counsel but chose not to, similar to the following cases: *Castillo Avalos v Canada (Citizenship and Immigration)*, 2020 FC 383 [*Castillo Avalos*] at para 54, *Austria* at paras 8–11; *Balasingam v Canada (Citizenship and Immigration)*, 2012 FC 1368 [*Balasingam*] at para 51; *Li v Canada (Citizenship and Immigration)*, 2015 FC 927 [*Li*] at paras 37, 44.

[55] I note, first, that, in each of these four cases cited by the Respondent, the Court specified that the applicant had ***not*** requested an adjournment: *Castillo Avalos*, at para 46, *Austria* at para 8, *Balasingam*, at para 5, and *Li*, at para 43.

[56] As well, the evidence about the applicants' vulnerability in these four cases were found to be limited or not present. For instance, in *Li*, the Court noted, at para 23: "[t]here is no evidence before me that the Applicant was confused, did not understand, or was prevented in any way from making his case at the hearing."

[57] I also agree with the Applicant that she did not "choose" not to retain counsel. She contacted Mr. Ivanyi after being informed of the hearing date but was unable to retain him at the time due to a lack of funds. She then contacted the Refugee Law Office but Ms. Robinson was unable to represent her due to a breakdown of the solicitor-client relationship. She went back to Mr. Ivanyi who, as shown above, had indicated he could represent her if the hearing were adjourned.

[58] In conclusion, I find the personal circumstances of the Applicant, specifically her illiteracy and her memory issues, render her unable to participate meaningfully in the adjudicative process.

<u>The legal issue was complex and was not only about why the Applicant returned to Romania</u>

[59] The Applicant argues that a "primary factor" in determining the scope of procedural fairness is whether the case concerns questions that are of a "legal or complex nature": *Ha v*

Canada (Minister of Citizenship and Immigration), 2004 FCA 49. As noted by Sexton, J.A. at para 51:

> [51] In the past when the courts have addressed the issue of whether the duty of fairness includes a right to counsel in particular circumstances, one of the primary factors considered was whether the questions are of a legal or complex nature such that the individual's ability to participate effectively without a lawyer was in question….

[60] The Applicant submits that her cessation hearing was complex, given that it involved nine pages of submissions by the Minister, which referred to various legal sources such as legislation, case law, and scholarly commentary.

[61] I agree. Contrary to what the RPD Member suggested to the Applicant, the hearing was not ***only*** about why the Applicant returned to Romania, and nothing else. The Respondent does not make any argument to the contrary.

[62] The complexity of the case is evident in the nine-page written submissions prepared by the Minister's representative based on numerous legal documents and principles. The submissions made reference to *IRPA*, the United Nations Refugee Convention, the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee status, jurisprudence from the Federal Court, as well as legal treatises by academics. The complexity was also underscored by Justice Ahmed in *Gabor* when he granted the Applicant's stay motion and noted:

> [5] In my view, the Applicant's argument that the RPD breached its duty of fairness by not providing her with an adjournment raises a serious issue. Matters of cessation are legally complex; their consequences are serious; and due to her intellectual disability, the

> Applicant did not have the resources to properly represent her interests at the RPD hearing.

[63] I agree with the Applicant that if she is incapable of reading out her home address, she cannot be expected to effectively respond to written arguments based on legal treatises, international law and Canadian jurisprudence.

[64] In conclusion, in light of the Applicant's personal circumstances, including her illiteracy and her memory issues, and given the complexity of the legal issues involved, I find that the RPD has breached procedural fairness by failing to adjourn the hearing so that the Applicant could be represented by her counsel, as she and her counsel at the time had requested.

B. *Did the RPD breach procedural fairness by failing to endure the Applicant could appreciate the nature of proceedings?*

[65] Having found that there was evidence indicating the Applicant's illiteracy and memory issue was impeding her ability to meaningfully participate at the hearing, I find that the RPD had an obligation to ensure the Applicant could appreciate the nature of proceedings, which the RPD Member has failed to fulfil.

[66] In addition to downplaying the Applicant's vulnerability, as I have noted above, I find the RPD Member also downplayed the seriousness of the hearing by insisting, for instance, that the hearing would be "short, very short", that "we can be out of here very quickly", and that "it's only about why you returned to Romania."

[67] The Applicant argues, and I agree, that this was misleading because a cessation hearing is not only about "why you returned." Rather, other factors can be relevant, such as an attempt to hide while visiting one's home country: *Peiqrishvili v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1205 [*Peiqrishvili*] at para 24. And, arguably, evidence that the state will not provide actual protection: *Din v Canada (Citizenship and Immigration)*, 2019 FC 425 [*Din*] at paras 43-45.

[68] I also find the RPD Member's claim that he has been "exceptionally generous" in explaining the process not borne out by the record before me. The Member never explained, for instance, what "status" the Minister sought to cease that the Applicant had acquired previously. He never explained that granting the Minister's application would result in the loss of the Applicant's permanent residence as well as her deportation from Canada.

[69] As the Applicant submits: "A trial judge who is dealing with an unrepresented litigant has the right and the obligation to ensure that the litigant understands the nature of the proceedings. This may well require the judge to intervene in the proceedings": *Wagg v Canada*, 2003 FCA 303 at para 33; see also *Lally v Telus Communications Inc*, 2014 FCA 214 at para 27, in which the Court applied *Wagg* to the tribunal context.

[70] Here, the RPD Member not only failed to take the time to make sure that the Applicant understood the nature of the proceedings, but was hurrying the hearing along by proposing to the Minister's representative that "a more profitable use of our time" would be simply "putting your information to her and ask for a response." This, he said, was needed when "we have these

claimants before us", meaning claimants who do not "have the education" or have "limited capacity." On that basis, the RPD Member decided to give the Minister's Counsel – not the Applicant – some leeway, in her examination.

[71] In other words, the recognition by the RPD Member about the Applicant's "limited capacity" became the reason for accommodating the Minister's representative, as opposed to ensuring the Applicant understood the proceedings she was in. The RPD Member was empowering the "more powerful adversary", *Hillary*, at para 34 in the proceedings, which had the effect of undermining the right of the Applicant, a self-represented litigant, to procedural fairness.

[72] The Applicant refers to *Ghomi Neja v Canada (Citizenship and Immigration)*, 2016 FC 78 [*Ghomi Neja*] at para 13, where the Court found that a cessation hearing was procedurally unfair when the RPD failed to explain "the serious consequences to the Applicant in clear non-legalese language" and "documents were submitted at the hearing of which the Applicant had not had a chance to take cognizance." The same reasoning, I find, can be applied here.

[73] The Respondent argues that self-represented litigants can have a fair proceeding if they can appreciate the nature of the proceedings, have an opportunity to provide evidence, and have an opportunity to make submissions: *Li*, at para 37. The RPD explained the proceedings and the Applicant had the opportunity to respond to the questions of the Minister's representative, the Respondent submits.

[74] However, when the Applicant was not even advised that she could be stripped of her former refugee status and permanent resident status, and when the Minister's representative was being given "leeway" in her questioning of the Applicant who does not even remember the content of the Minister's application, the Respondent's submission that the proceeding was fair amounts to little more than a bald assertion.

C. *Did the RPS breach procedural fairness by failing to provide the Applicant with an opportunity to make submissions?*

[75] As per the concession made by the Respondent, I find that the RPD breached procedural fairness by failing to provide the Applicant with an opportunity to make submissions.

D. *Is a new hearing warranted if the Applicant has not challenged the merits of the Decision?*

[76] The Respondent argues that because the Applicant has not challenged the merits of the Decision, a new hearing is not warranted, citing *Yari v Canada (Citizenship and Immigration)*, 2016 FC 652 [*Yari*] at paras 51-52, where the Federal Court stated that procedural irregularities do not necessarily require the decision to be quashed and a new hearing ordered. I would note, however, that the Court in *Yari* found there was no breach of procedural fairness.

[77] The Respondent also relies on *Renaud v Canada (Attorney General)*, 2013 FCA 266 at paras 4-5 which states "an unfair hearing could render a decision invalid, regardless of the possible outcome of the dispute", with the exception that "where a particular decision on the merits was inevitable, it is possible to uphold the decision in spite of everything."

[78] The Respondent submits that there is nothing in the record to suggest the RPD's findings of fact on the merits of the cessation application were incorrect, nor is there any medical information to support vulnerable status for the Applicant. According to the Respondent, the Applicant testified in a clear, understandable manner and did not show a fear of returning to Romania. In sum, according to the Respondent, the Applicant cannot support a contention that the outcome would be any different if a new hearing were granted.

[79] The test for cessation of refugee protection as a result of reavailment involves three requirements: (a) voluntariness; (b) intention to reavail themself of the protection of the country of nationality; and (c) actual reavailment.

[80] Throughout the entire proceedings, the RPD Member only directed his questions – and that of Minister's representative – to the Applicant's travels to Romania and her use of the Romanian passport. There was no attempt to canvass the legal requirements of reavailment, how they would apply to the Applicant's case, and whether there was evidence to rebut the state protection.

[81] While technically the Respondent is correct in stating the Applicant did not indicate a fear of return to Romania, the question of whether she had fear of return was never put to the Applicant. I would note, moreover, that the Applicant testified that when she went to Romania she was "staying inside the house", and that she "wasn't going outside or anywhere." Neither the RPD Member nor the Minister's representative asked any follow up question arising from that

testimony. Since the Applicant was not represented by counsel, and cannot be presumed to know the case to be met, she also did not offer any further evidence in this regard on her own.

[82] The Applicant submits to this Court that if she had been informed of the possibility of retaining counsel to prepare post-hearing submissions, she would have done so. In addition, counsel could have explored the issues of whether she attempted to hide while visiting Romania, and any evidence of whether Romania would provide actual protection to her as a Romani woman, both of which could have rebutted the presumption of reavailment: *Peiqrishvili*, at para 24, and *Din*, at para 43.

[83] While the Applicant's affidavit did not specifically address the merits of the RPD finding, she did state, among other things, how her brain injury may have impacted her. At the hearing before me, her counsel further suggested that her mental health issue may offer some "novel arguments" with regard to the legal requirements of reavailment.

[84] In *Din*, while recognizing that "it is only in 'exceptional circumstances' that a refugee who travels to his/her country of nationality on a passport issued by that country will not result in the termination of refugee protection", para 46, Justice Russell granted the judicial review on the basis that the RDP did not consider whether by giving the applicant a passport, the applicant's home country was also granting him actual protection, para 45.

[85] In this case, the RPD never explored nor addressed the Applicant's "intent" to reavail herself of Romania's protection, nor whether actual protection was granted to the Applicant by

Romania. Similar to *Din*, at para 46, “we don’t know yet if this is an exceptional case because the RPD failed to address the applicable criteria”, in this case due to the procedural fairness breach.

[86] The inevitable outcome exception to the general rule for overturning a decision based on procedural unfairness is a narrow one. I find that the Respondent has not made out this narrow exception in this case. It is not inevitable that with competent legal representation, the Applicant would be unable to present further evidence or submissions to rebut the reavailament allegations, which could lead to a different outcome.

[87] The appropriate remedy in this case is therefore to refer the matter back for re-determination.

[88] At the hearing, the Applicant raised an additional issue and asked this Court to “censure” the RPD Member for his conduct. The Applicant’s request does not fall within my role. I have indicated my assessment of the Decision and the manner in which the RPD Member conducted the hearing. It is up to the RPD to determine what, if any, action needs to be taken in view of my findings.

V. Conclusion

[89] The application for judicial review is granted and the matter is returned for redetermination by a different member of the RPD.

[90] There is no question to certify.

JUDGMENT in IMM-1101-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different member of the RPD.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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