Federal Court  Cour fédérale

Date: 20120829

Docket: IMM-8948-11

Citation: 2012 FC 1025

Ottawa, Ontario, August 29, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOZSEF PUSUMA, AGNES TIMEA DAROCZI,
VIKTORIA LAURA PUSUMA DAROCZI
(by her litigation guardians)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 5 December 2011 (Decision) which refused the Applicants' request to have their claims for protection under sections 96 and 97 of the Act reopened.

BACKGROUND

[2] The Applicants are Roma and citizens of Hungary. They came to Canada to seek protection from persecution based on their ethnicity and their political beliefs. They are currently subject to enforceable removal orders. After Justice Roger Hughes refused to stay their deportation on 8 December 2011, the Applicants took sanctuary at an unnamed Anglican church in Toronto where they remain.

[3] The Applicants claimed refugee protection in Canada on 17 September 2009. They said they faced persecution because of the Male Applicant's work with Viktoria Mohacsi (Mohacsi), a member of the European Parliament who advocated for Roma rights and because they are Roma. After they claimed protection, they retained counsel to represent them: Mr. Hohots, a lawyer, and Mr. Sarkozi, an immigration consultant. After retaining counsel, the Applicants say they provided Mr. Sarkozi with a letter from Mohacsi confirming the Male Applicant's employment (Mohacsi Letter). They also say they gave him a DVD containing a documentary on persecution of Roma people in Hungary.

Procedural History

[4] The RPD heard the Applicants' claims over two sittings. Mr. Hohots's articling student represented them at the first sitting, where they asked for and received a postponement because the Female Applicant was ill. Mr. Sarkozi represented the Applicants at the second sitting.

[5] At the second sitting, the Applicants attempted to introduce the Mohacsi Letter and DVD to show country conditions in Hungary. The RPD refused to admit this evidence because the

Applicants had not submitted it more then twenty days before the hearing according to paragraph 29(4)(*a*) of the *Refugee Protection Division Rules* SOR/2002-228 (Rules). They had also not provided an English translation of the Mohacsi Letter. The RPD viewed the DVD as part of the Applicants' final submissions.

[6] The RPD considered the Applicants' claims and rejected them on 25 February 2011 (Refugee Decision). The determinative issue was state protection. The RPD found the Male Applicant had not reported incidents of persecution to the police and had not reasonably explained his failure to do so. The Male Applicant's failure to do everything reasonably expected of him to seek protection could not rebut the presumption that state protection is available in Hungary. The RPD mentioned the DVD in its reasons, finding that it showed Hungary faced problems with discrimination in the past. However, other evidence showed Hungary had taken steps to address this issue. The RPD found state protection was available to the Applicants in Hungary.

[7] Crucial aspects of the Male Applicant's story were not credible. Although he alleged he had worked for Mohacsi, the Male Applicant had not provided documentary evidence to corroborate this allegation. The RPD rejected the Applicants' explanation for not providing a translated copy of the Mohacsi Letter. The 1½ years between their claims for protection and the hearing was enough time to have had the letter translated. The Applicants could have provided information about Mohacsi from the internet, but they did not. The Male Applicant had not mentioned an attack he suffered in 2009 in an interview with Citizenship and Immigration Canada (CIC) which he testified about at the hearing.

[8] After the RPD rejected their claims, the Applicants applied to the Court for leave and judicial review of the Refugee Decision (IMM-1993-11). They say they asked Mr. Hohots to

represent them on that application, but the Court's file indicates they were self-represented. Justice Michael Kelen dismissed the application with respect to the Refugee Decision on 3 June 2011 because no application record was filed.

[9] The Applicants applied for a Pre-Removal Risk Assessment, which was denied. They also asked for a deferral of their removal, which was also denied. Justice Robert Barnes denied their application for leave and judicial review of the deferral decision on 7 March 2012 (IMM-8947-11).

[10] Following the dismissal of their first application to the Court, the Applicants retained their current counsel. They filed complaints against their previous representatives with the Law Society of Upper Canada (LSUC) on Friday, 25 November 2011 and the Canadian Society of Immigration Consultants (CSIC) on Monday, 28 November 2011. They then asked the RPD to re-open their claims under section 55 of the Rules on Tuesday, 29 November 2011. The core of their submissions was an allegation that the conduct of their previous representatives had breached their right to procedural fairness. They said that previous counsel failed to submit a translation of the Mohacsi Letter before the deadline passed under paragraph 29(4)(*a*) of the Rules and that counsel's incompetence prevented them from presenting critical evidence. *El Kaissi v Canada (Minister of Citizenship and Immigration)* 2011 FC 1234 holds that this was a breach of procedural fairness which required the RPD to re-open their claims.

[11] The Respondent made submissions opposing the request to reopen. He said there was no evidence the previous representatives were aware of the allegations against them. The Respondent also pointed out the Refugee Decision was based on credibility and the availability of state protection.

[12] The RPD considered the Applicants' request to re-open their claims and rejected it on 5 December 2011. The RPD notified the applicants of the Decision on 7 December 2011.

DECISION UNDER REVIEW

[13] The RPD rejected the Applicants' request to reopen their claims because their counsel's incompetence had not breached their right to procedural fairness. The RPD also found there was no breach of procedural fairness from the original panel's refusal to admit the Mohacsi Letter or the DVD into evidence.

[14] The RPD briefly reviewed the Refugee Decision, finding that the major credibility concern was the Male Applicant's failure to disclose the 2009 attack in his interview with CIC. The Applicants' refugee claims were refused because state protection was available to them in Hungary. The RPD found the original panel was entitled to reject the Mohacsi Letter under subsection 29(4) of the Rules. There was no breach of procedural fairness in this regard.

[15] The Applicants also could not establish a breach of procedural fairness from the conduct of their previous representatives because they had not given them an opportunity to respond to the allegations against them. The Applicants had filed complaints about their previous representatives with the LSUC and the CSIC, but this was not enough. The RPD relied on *Ghahremani v Canada (Minister of Citizenship and Immigration)* 2006 FC 1494; and *Gonzalez v Canada (Minister of Citizenship and Immigration)* 2006 FC 1274. The RPD also pointed out that *Betesh v Canada (Minister of Citizenship and Immigration)* 2008 FC 173 establishes that a new hearing because of counsel incompetence should only be granted in exceptional cases and where there is a reasonable chance the result would have been different had counsel not been incompetent.

ISSUES

[16] The Applicants raise the following issues in this application:

a. Whether the RPD erred by requiring them to file complaints about previous counsel and give previous counsel notice of their allegations;

b. Whether the RPD breached their right to procedural fairness by not putting any notice requirement to them for them to address;

c. Whether the RPD's finding that previous counsel's incompetence did not affect the original panel's conclusion state protection was available was reasonable.

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] The first issue is a question of law. *Dunsmuir*, above, at paragraph 54 establishes that questions of law in which a decision-maker has a particular expertise are to be evaluated on the reasonableness standard. Recently, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, the Supreme Court of Canada held at paragraph 30 that correctness applies only in certain enumerated categories: constitutional questions, questions of central importance to the legal system as a whole, questions on the jurisdictional lines between

specialized tribunals, and true questions of vires. This is not such a question, so the standard of review on the first issue is reasonableness.

[19] The third issue relates to the RPD's finding of fact. *Dunsmuir*, above, at paragraph 53 establishes that findings of fact are to be evaluated on the reasonableness standard.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[21] The second issue in this case implicates the Applicant's opportunity to respond, which is an aspect of the duty of fairness. It is well established that such questions are subject to the correctness standard. In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review on the second issue is correctness.

STATUTORY PROVISIONS

[22] The following provisions of the Rules are applicable in this proceeding:

55. (1) A claimant or the Minister may make an application to the Division to re open a claim for refugee protection that has been decided or abandoned.	**55.** (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
[…]	[…]
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

ARGUMENTS

The Applicants

[23] Under section 55 of the Regulations, a breach of procedural fairness requires the RPD to reopen a claim. In *Matondo v Canada (Minister of Citizenship and Immigration)* 2005 FC 416, Justice Sean Harrington said at paragraph 14 that "Section 55(4) of the Regulations is clear. If there was a breach of natural justice, the claim has to be reopened. There is no discretion vested with the Board." *Memari v Canada (Minister of Citizenship and Immigration)* 2010 FC 1196 establishes that counsel's incompetence can result in a breach of procedural fairness if that incompetence results in a miscarriage of justice. See paragraphs 33 to 36 and *El Kaissi*, above, at paragraph 18.

[24] There was no legal basis for the RPD to require the Applicants to show they had made a complaint to the governing bodies for their previous representatives and to notify those

representatives of the allegations against them. In *Shirvan v Canada (Minister of Citizenship and Immigration)* 2005 FC 1509, Justice Max Teitelbaum held at paragraphs 31 and 32 that

> Before examining allegations of incompetence, the Court must first determine whether the Applicants have met their preliminary burden of giving notice to Mr. Hadad of the allegations. Counsel for the Applicants wrote to the Canadian Society of Immigration Consultants in a letter dated August 15, 2005, in which counsel complained of Mr. Hadad's treatment of the Applicants and others, and requested that the CSIC immediately prohibit Mr. Hadad from practicing as an immigration consultant.
>
> The letter was dated August 15, 2005, but the Applicants commenced this action in March. This does not pose a problem for the Applicants. The Courts have required a letter to a governing body as a form of corroborating evidence of allegations of incompetence. Courts do not wish to entertain assertions of incompetence without some supporting evidence (*Nunez v. Canada (MCI)*, [2000] F.C.J. No. 555 (T.D.) at para. 19; *Bader v. Canada (MCI)*, [2002] F.C.J. No. 408, 2002 FCT 304 at para. 8). The letter provides sufficient corroborating evidence, and provided sufficient notice of the allegation to the Applicants' former counsel. In addition, the Respondent wrote directly to Mr. Hadad in a letter dated October 12, 2005. This letter would have provided Mr. Hadad with sufficient time to consider responding to the allegations made by the plaintiffs in this matter.

[25] A formal complaint is an acceptable and sufficient means of giving notice to an allegedly incompetent representative, but it is not the only means of doing so. See *M.A.C. v Canada (Minister of Citizenship and Immigration)* 2009 FC 1174 at paragraph 31. Further, *Betesh*, above, at paragraph 32 specifically says that either notice to a governing body or informing previous counsel personally will meet the threshold requirement of establishing this kind of procedural violation. See also *Ghahremeni*, above.

[26] The RPD unreasonably held that the Applicants had to inform their previous representatives of the allegations against them and complain to the applicable governing bodies. This is an error of law which requires the Decision to be returned for reconsideration.

[27] In this case, counsel's incompetence meant the Applicants were precluded from admitting the Mohacsi Letter into evidence before the RPD panel which heard their claims. This omission affected the RPD's finding on state protection and credibility. *Flores v Canada (Minister of Citizenship and Immigration)* 2010 FC 503 at paragraphs 30 and 31 shows that, in order to properly assess state protection, the RPD must first assess the risk a refugee claimant faces. The Mohacsi Letter showed the Male Applicant was involved with a high profile member of the European Parliament. His risk profile was different from that of ordinary Hungarian, so the exclusion of the Mohacsi Letter impacted the RPD's state protection analysis. Previous counsel's incompetence prevented the Applicants from adducing evidence which was critical to their case, so the RPD's finding that the original panel's state protection analysis was unaffected by counsel's incompetence was unreasonable. Had counsel's incompetence not prevented the Applicants from adducing the Mohacsi Letter as evidence, the result may have been different.

Procedural Fairness

[28] In the event the RPD reasonably found the Applicants were required to give notice to previous counsel and complain to their governing bodies, the Applicants argue that the RPD breached their right to procedural fairness by not informing them of the dual requirement. The Applicants could not reasonably have known of this requirement, so the RPD was obligated to inform them of it. The RPD did not, but decided their application on this basis anyway.

The Respondent

[29] In order to successfully claim counsel's incompetence amounted to a breach of procedural fairness, claimants must first give their previous counsel notice of their allegations. See *Shirvan*, above, at paragraphs 31 and 32, and *Betesh*, above. The RPD reasonably found that, even though the Applicants had complained to the LSUC and the CSIC, they had not given their previous representatives notice or an opportunity to respond to the allegations against them. The Applicants also have an alternative remedy available to them, in that they can apply for another PRRA.

The Applicants' Reply

[30] Although the Respondent has relied on *Betesh*, above, for the proposition that both notice and a complaint are required, *Betesh* does not support this position. In *Betesh*, above, Justice James O'Reilly denied the application for judicial review because the applicants in that case had "not provided evidence that their consultant was informed of their allegations or that any complaint was made to the Canadian Society of Immigration Consultants." Paragraph 17 of *M.A.C.*, above, establishes that a formal complaint is an acceptable way to give counsel notice. The Applicants did this, so it was an error for the RPD to deny their request on this basis.

The Respondent's Further Memorandum

[31] The RPD's Decision not to reopen the Applicants' claims was based on a reasonable conclusion their previous representatives did not know the Applicants had alleged they were incompetent. In their request to reopen their claims, the Applicants said they would provide

documents from Mohacsi to show the situation people face in Hungary, but they did not submit these documents.

Failure to Notify Previous Representatives

[32] The RPD reasonably concluded the Applicants had not given their previous representatives sufficient notice of the allegations against them. The Applicants' complaints were filed only ten days before the RPD made the Decision. *Shirvan* and *M.A.C.*, above, establish that incompetence can only establish a breach of procedural fairness where previous counsel has had adequate notice of the allegation of incompetance. Nothing on the record before the Court shows the LSUC or the CSIC had contacted Mr. Hohots or Mr. Sarkozi in the ten days between the filing of the complaints and the Decision. The previous representatives could only have known about the allegations if the Applicants had contacted them.

[33] In *Arndorfer v Canada (Minister of Citizenship and Immigration)* 2001 FCT 20, the Court directed applicants alleging incompetence to serve their application record on previous counsel. The Court also directed the applicants in that case to waive privilege so that previous counsel could respond to the allegations of incompetence. This shows the importance of allowing previous representatives an opportunity to respond to allegations against them.

[34] The Respondent admits counsel incompetence may breach procedural fairness. However, there must be clear and convincing evidence of incompetence. Prejudice arising from the incompetence must also be shown. See *Ghahremani*, above, at paragraph 6. Further, it must be "reasonably probable that, but for the professional error or errors in question, the result of the proceeding would have been different." See *Gonzalez*, above, at paragraph 27.

[35] The RPD reasonably concluded the Applicants had not shown that previous counsels' incompetence had affected the result of their refugee claims. The absence of the Mohacsi letter only went to the RPD's conclusion the Male Applicant had not worked for Mohacsi. His failure to mention the 2009 attack in his PIF was a greater concern in the Refugee Decision and was not connected to any incompetence.

[36] The Applicants have also said their previous counsel failed to file country condition evidence to establish the risk they face. They have not said what evidence he failed to file or how this would have changed the Refugee Decision.

[37] The Applicants' claims were denied because state protection was available to them in Hungary. When they asked the RPD to reopen their claims, the Applicants did not submit any evidence to show Hungarian authorities do not provide adequate protection for Roma rights activists like the Male Applicant.

ANALYSIS

[38] Applicants' counsel has given me the procedural history of this matter and the difficulties encountered by the Applicants along the way. However, for purposes of this review, I am confined to the Decision and the record before me as it relates to the issues raised.

[39] First of all, I accept the proposition that the excluded Mohacsi Letter, dealing as it does with the Applicants' activities and profile in Hungary, is material to a state protection analysis, so that if the letter was improperly excluded the state protection findings cannot stand.

[40] I also accept that the RPD's interpretation of the notice requirement where former counsel are accused of incompetence was a major part of its Decision. As the Decision says:

> The [Applicants] did file complaints with the Law Society of Upper Canada and the regulatory body for immigration consultants. However, there is nothing in the application to indicate that the [Applicants] gave former counsel an opportunity to provide their explanation as required in *Gharameni, Irav v M.C.I. (F.C. no IMM-1740-06)* […] whereby the Court stated: This court is reluctant to entertain assertions of incompetence without proper notice being given to former counsel and the appropriate Law Society or CSIC. Moreover, the same conclusion was reached in *Ramiro Gonzales, Norvin v M.C.I. (F.C. no. IMM-1158-06)* […] whereby the Court also stated that: An applicant cannot validly cite a professional error of his former counsel without supply [sic] the latter's explanation regarding the error complained of.

[41] I do not read this passage as showing that the RPD imposed on the Applicants some kind of inappropriate dual notice requirement. Rather, the RPD's finding was that, on the facts of this case, the Applicants' complaints to the LSUC and the CSIC were not sufficient notice to allow them to establish a breach of procedural fairness from the conduct of their previous representatives. This, I think, was a reasonable conclusion.

[42] As *Shirvan*, above, makes clear, the "Courts have required a letter to a governing body as a form of corroborating evidence of allegations of incompetence." [Emphasis added]. But this does not automatically fulfil the notice requirement. As it happens, on the facts of *Shirvan*, the letter to the governing body was also "sufficient notice of the allegation to the Applicant's former counsel," but there is nothing in *Shirvan* which says this will always be the case. Even in *Shirvan*, Justice Teitelbaum pointed out that

> In addition, the Respondent wrote directly to Ms. Hadad in a letter dated October 12, 2005. This letter would have provided Ms. Hadad

> with sufficient time to consider responding to the allegations made by the Plaintiffs in this matter.

In other words, Justice Teitelbaum satisfied himself that, on the facts before him, adequate notice had been given. He did not say that a complaint filed with a governing body is sufficient notice in every case. Also, even adequate notice to former counsel will not fulfil the "corroboration" requirement referred to by Justice Teitelbaum. Both requirements need to be satisfied in each case.

[43] The Court has held in the past that a complaint to a governing body may be enough to give a previous representative notice of an allegation of incompetence. I agree. However, this will not always be the case and each tribunal has to reassure itself that, on the facts before it, former counsel has been given adequate notice and an opportunity to respond. In the present case the RPD is concerned about adequate notice because it needs to have a full set of facts before it in order to evaluate whether a previous representative actually was incompetent. The RPD is appropriately reluctant to make a factual finding of this nature without allowing for the previous representative to respond to the allegations and provide an explanation.

[44] In this case, it was reasonable for the RPD to require more than just the complaints to the LSUC or CSIC. The Applicants' central allegation against their previous representatives was that they failed to submit an English translation of the Mohacsi Letter. They said in their submissions in support of their request to reopen that they had "acted with great care in their case, providing evidence of central importance to their case long before the hearing." This was an assertion of fact that may or may not have been correct. The previous representatives may have had a legitimate explanation for why the Mohacsi Letter was not translated before the hearing.

[45] Although they complained to the LSUC and the CSIC, the complaints the Applicants filed, which they have reproduced in their application record, merely recite the allegations they had made before the RPD. They did not provide any further evidence to corroborate the allegations of incompetence. It was therefore reasonable for the RPD to expect that the Applicants would provide further corroboration and proof of adequate notice to their former representatives.

[46] As the Respondent points out, the Board's conclusion that the complaints to the LSUC and to the CSIC did not constitute adequate notice to previous counsel was reasonable in light of the fact that the complaints were filed, at most, 10 days earlier.

[47] There is no evidence before this Court, and there was none before the RPD, as to whether the governing bodies in question would have contacted previous counsel within this time period. There is no evidence as to how long an investigation would take. Furthermore, despite a complaint to the Law Society or CSIC, one has to ask how the previous representatives would know that their competence was being challenged in open Court, unless they were directly contacted by the applicants making the assertion, and were given an opportunity to respond.

[48] This concern is reflected in *Arndorfer*, above, where upon the granting of leave, the court issued a direction that the application record be served upon previous counsel, and that the applicants waive solicitor-client privilege so as to allow their former counsel to respond to the allegations of incompetence. The waiver of solicitor-client privilege was required so the Court would have the benefit of all the facts necessary to address the allegation of incompetence.

[49] I find, then, that the RPD did not impose a dual requirement on the Applicants that the case law says is not required. It reasonably concluded that the complaint they filed was not enough in this case to meet the notice requirement.

[50] Counsel have referred me to a range of decisions from this court that deal with the notice requirement. In some cases, for example *Ghahremani*, above, there is a suggestion that notice of allegations of incompetence should be given to former counsel as well as the regulatory body. Other cases, for example, *M.A.C.*, above, at paragraphs 31 and 32, appear to suggest that the requirement to give notice can be satisfied either when an applicant makes a complaint to a governing body or when the applicant provides evidence that their previous representative was informed directly of the allegations against them. There are also cases, for example, in *Ramiro* and *Gonzalez*, above, where the obligations upon an applicant are not entirely clear.

[51] In *Betesh*, above, Justice O'Reilly provided the following summary of his view of the governing principles at paragraph 15:

> The applicants acknowledge that they must meet a very strict test in order to be granted a new hearing based on the incompetence of their advisor. Justice Marshall Rothstein stated that a new hearing should be granted only in the most exceptional cases: *Huynh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 642 (T.D.) (QL). Further, they must show that there is a reasonable probability that the result would have been different: *Shirvan v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1864, 2005 FC 1509. Generally speaking, they must also show that the advisor was given notice of the allegation of incompetence and a chance to respond: *Shirvan*, above; *Nunez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 555.

[52] My view of these cases is that none of them deal directly with the issue that the Applicants assert before me: that notice to the relevant regulatory body will always be enough to satisfy the

notice requirement. Further, I do not see how such a position can withstand scrutiny. It would mean that a claimant could give notice to the relevant regulatory body in such a way and at such a time that no response from previous counsel would be possible in the circumstances, and still satisfy the notice requirement. I think this was very much the concern of the RPD in the present case.

[53] My view of the cases is that the requirement for adequate notice can be satisfied in several ways, but notice must always be adequate on the facts of each case. Sometimes, a complaint to a governing body may suffice, and sometimes, such as the present, something more will be needed to convince the RPD and the Court that a former legal counsel or consultant has received adequate notice and has been given a chance to respond. On the facts before it, the RPD felt that notice to the governing bodies was not sufficient to satisfy it that adequate notice had been given. The Applicants should also have informed their previous representatives in a timely way so that the RPD could satisfy itself they had been given a reasonable chance to respond and that it had the necessary facts to assess the allegation of incompetence. On the facts before it, I do not think the RPD made an error of law, or an unreasonable finding. But the matter does not end here.

[54] The Applicants also argue that they were entitled to rely upon previous cases where notice to the relevant regulatory body has been held as sufficient so that, if the RPD did not think this was enough on the facts of this case, there was an obligation to alert them to this deficiency and given them an opportunity to correct the problem, or at least respond with further submissions. They say it was procedurally unfair for the RPD to issue its Decision without doing this, and that they are the victims of a breach of procedural fairness.

[55] I do not think this argument can be sustained. First of all, all applicants and their counsel must be assumed to know that in every case where the incompetence of previous counsel is alleged,

the RPD and/or the court will seriously examine (a) the *bona fides* of the complaint e.g. whether the applicant has informed the relevant regulatory body and (b) whether the former representative has been given adequate notice and a chance to respond. Sometimes, perhaps, both issues can be satisfied by a complaint to the regulatory body, but this will depend upon whether the complaints process has allowed for a response. There is always, however, a danger that former counsel may not even know they are being accused of professional incompetence in judicial review proceedings.

[56] All of this means that, in every case, because complaints against former counsel are so easy to make, the onus remains on every applicant to convince the RPD, or the court, that adequate notice has been given. The burden remains with applicants and their counsel to satisfy the RPD and the court that, in their case, they have given former counsel a reasonable chance to respond. Applicants and their counsel must be deemed to understand that they must assess the situation themselves and produce evidence to convince the RPD and the court that they have done what is required of them in the circumstances of the case. The burden cannot be avoided by looking for an arbitrary general rule, (e.g. that notice to a regulatory body will always suffice) or by requiring the RPD to assess the application and, if it decides adequate notice has not been given, to inform the applicants of its concerns and give the applicants a further opportunity to correct defects in their application.

[57] I do not think that procedural unfairness arises on the present facts because the Applicants and their new counsel must be deemed to know the law and to know they will be assessed on the basis of their application. If an application involves an allegation of incompetence against former counsel, the tribunal and the Court will require that adequate notice has been given on the facts of the case and that former counsel has had an opportunity to respond. If applicants rely solely upon

notice to a regulatory body, then, as the case law teaches, this may not always suffice. If an applicant is going to make an extraordinary allegation of incompetence, then they must be prepared to satisfy the criteria articulated by Justice O'Reilly in *Betesh*. If they have not done this, they cannot demand prior notice from the RPD that they have not satisfied this requirement, and an opportunity to rectify their application. In each case, applicants and their counsel must assume the responsibility of ensuring that adequate notice is given and previous counsel has had an opportunity to respond. Considerable caution is required in this matter.

Certification

[58] The Applicants have proposed the following questions for certification:

i. Where an applicant alleges a breach of procedural fairness resulting from inadequate representation, is the requirement to give notice always met by the filing of a formal complaint to a regulatory body?

ii. If not, in a case where a formal complaint has already been filed with the regulatory body:

a. May a decision-maker require, in addition, that the impugned representative be advised directly of the basis for the complaint and provided an opportunity to respond?

b. Does the duty of procedural fairness require that the decision-maker advise the applicant of this additional notice requirement and provide an opportunity to satisfy the requirement before rejecting the application?

[59] The Respondent opposes certification and says that, given the fact-specific nature of the incompetence allegation in this case, it was reasonable for the RPD to conclude the Applicants' previous counsel ought to have been notified of the allegations against them. The Respondent also says the Applicants' failure to file any evidence showing human rights activists are at a higher risk of persecution in Hungary means any credibility assessment, which could have been tainted by counsel incompetence, does not matter. The questions the Applicants have proposed would not be dispositive of an appeal.

[60] The Federal Court of Appeal considered the test for certification in *Zazai v Canada (Minister of Citizenship and Immigration)* 2004 FCA 89 and affirmed the principle that a certified question must be a question of general importance which would be dispositive of an appeal. The question must also have been raised and dealt with in the application for judicial review. Where the question does not arise, or the applications judge decides it does not need to be dealt with, it is inappropriate for certification. See paragraphs 11 and 12. In *Boni v Canada (Minister of Citizenship and Immigration)* 2006 FCA 68, the Federal Court of Appeal held that a certified question must lend itself to a generic approach and yield an answer of general application.

[61] Given what I have said in my judgment, the first question the Applicants have proposed is not appropriate for certification. As I have held, whether notification of the regulatory body satisfies the notice requirement is a question of fact to be determined in all the circumstances. Answering this question would require the Federal Court of Appeal to make a factual determination applicable to all future cases where counsel incompetence is alleged. This question does not lend itself to a generic approach or give an answer of general application. Further, this question calls on the Federal Court of Appeal to make a factual determination which is clearly within the jurisdiction of the RPD.

[62] With respect to the second proposed question, I do not think it arises from my decision in this case. As I have held, the RPD in this case did not impose an additional notice requirement on the Applicants. What it found was that their complaints to the LSUC and the CSIC were not sufficient to meet the requirement to notify their previous representatives of the allegations against them. I have also concluded that procedural unfairness does not arise in this case because the Applicants must be taken to have known that adequate notice, regardless of the form it took, was required. An answer to the second proposed question would not be dispositive of an appeal so it is inappropriate for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-8948-11
STYLE OF CAUSE:	**JOZSEF PUSUMA, AGNES TIMEA DAROCZI, VIKTORIA LAURA PUSUMA DAROCZI (by her litigation guardians)** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 26, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	August 29, 2012

APPEARANCES:

Andrew Brouwer	**APPLICANTS**
John Loncar	**RESPONDENT**

SOLICITORS OF RECORD:

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