

Federal Court



Cour fédérale

Date: 20150218

Docket: IMM-5739-13

Citation: 2015 FC 202

Ottawa, Ontario, February 18, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

**LAJOS GUYLAS
MARIA GULYASNE LAKATOS
LAJOS GULYAS**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a June 27, 2013 decision by the Refugee Protection Division [the RPD or the Board] concluding that the applicants are not

Convention Refugees nor persons in need of protection as defined under section 96 and subsection 97(1) of the IRPA.

[2] The applicants are seeking to have the decision quashed and referred back to a differently constituted panel with such directions as the Court considers appropriate. While several issues have been raised in this matter, I find that the most significant one is whether there has been a failure of procedural fairness in failing to postpone the hearing as requested by the applicants' counsel so that they could be represented before the Board.

[3] Having concluded that there was a failure of procedural fairness, the application is allowed.

II. Background

A. *Experiences in Hungary*

[4] Mr. Lajos Gulyas [the male applicant], Ms. Maria Gulyasne Lakatos [the female applicant], and their son Lajos Gulyas [the minor applicant], herein collectively referred to as the applicants, are Hungarian citizens. They entered Canada in June 2011 and applied for refugee protection at the port of entry based on their alleged fears of persecution in Hungary due to their Roma ethnicity.

[5] In the male applicant's Personal Information Form [the PIF] it was alleged that, because they are Roma, they have been subjected to "varying degrees of discrimination, intimidation, and

harassment and abuse” throughout their lives in Hungary. The male applicant recounted an incident on March 15, 2010 where two Hungarian Guards harassed and uttered racial slurs toward the applicants and physically attacked the male applicant in a local park [the Park Incident]. He immediately went to a nearby police station to report the incident, but as recounted in the PIF, it was not a positive experience and he was given no resolution:

...the officer who took my statement seemed reluctant to do it and was very dismissive of my statement. He smiled as he took my statement and asked me: “Isn’t it possible that you were the one who started the whole thing?” I left the police station feeling powerless and helpless. I never heard back from the police. I knew that they had not taken my report seriously.

[Emphasis added.]

[6] The female applicant alleges that she had difficulty obtaining stable employment because she is Roma. Starting in 2011, she suffered from repeated racially-motivated verbal abuse from one of her co-workers, with the situation culminating in him spitting on her [the Workplace Incident]. Their supervisor told her that “if she didn’t like the situation, she should leave the company because they could easily find another worker.” She did not return to work after that incident.

[7] The minor applicant was allegedly physically abused by his kindergarten teacher, exhibiting bruises, small wounds, and continuous diaper rash [the School Incident]. The adult applicants confronted the teacher about these issues, but she was not responsive. They went to the school principal, but she was also not helpful, telling them that “if [they] were not happy, [they] should just take [their] son out of the school.” The applicants’ evidence at the RPD

hearing was that the minor applicant had required medical treatment due to the physical abuse he suffered at the hands of his teacher.

[8] The applicants also allege that they fear for their lives and safety in Hungary due to the rise of the Jobbik party to power. They claim this has led to greater intolerance as people become “more brazen and blatant in their racism toward Romas,” having been “encouraged and emboldened by the Jobbik party.” They also alleged that many Hungarian police officers are members of the Jobbik Party.

B. *Attempts to Secure Counsel*

[9] After they arrived in Canada, the applicants sought temporary shelter at the Christie Refugee Welcome Center [the Center] and, with assistance from the Center, they applied to Legal Aid Ontario [Legal Aid] for funding. They received a Legal Aid certificate and retained Ms. Elyse Korman, who completed their PIF and submitted it to the RPD.

[10] In the fall of 2011, the applicants were notified by Ms. Korman’s office that Legal Aid had declined to provide any further funding and that Ms. Korman could no longer represent them. The applicants took a number of steps to secure counsel including: meeting with staff at the Center, contacting Legal Aid, and meeting with other organizations that might be able to assist them. These efforts were largely unsuccessful but notably, the Center attempted to make an appointment with Downtown Legal Services [DLS], the University of Toronto Faculty of Law teaching clinic. For reasons that are unclear, no appointment was actually made by DLS. In the spring of 2013, the applicants were contacted by Ms. Korman’s office indicating that she could

represent them at the RPD hearing but the applicants could not afford her fees so she was not retained.

[11] On May 6, 2013 the applicants received a Notice to Appear which indicated that their hearing was set for June 26, 2013. They made attempts to find a lawyer, but this proved to be either beyond their means or impossible within the short time frame before the hearing. The applicants contacted the Center, which made an appointment with DLS on their behalf for June 19, 2013. The applicants attended the appointment but DLS was unable to represent them at the RPD hearing due to the extremely short timeline and the nature of the organization (i.e. being a student clinic). DLS did, however, submit a letter to the RPD on June 21, 2013 requesting a one-month postponement of the hearing so that they could adequately prepare. The letter included an explanation of the applicants' desire to have legal counsel and their attempts to do so, as well as indicating alternative dates where DLS could attend a hearing. No response was received to the letter.

C. *RPD Hearing*

[12] The applicants were unrepresented at the RPD hearing. At the outset of the hearing, there were a several irregularities. First, the interpreter noted that he was having a "hearing problem" that day and they seem to have arranged the seating to try to accommodate that issue. More importantly, the RPD had mistakenly double-booked the RPD Member [the Member] to hear another refugee claimant who was present to have his claim heard, when the normal practice is only to schedule one hearing for the morning. After some discussion, the Member decided to hear the applicants' claim first.

[13] The applicants' evidence on this application is that the Member seemed impatient throughout the hearing, "speaking quickly, expressing frustration through facial expressions and hand gestures, occasionally raising his voice to underscore dissatisfaction at the pace of the proceedings, interrupting the applicants and the interpreter during testimony." During the introductory portion of the hearing, the Member specifically indicated to the interpreter that certain matters might not need to be translated due to time constraints:

PRESIDING MEMBER: Okay. All right. So okay. Don't even translate this because we've got time issues. Okay, oh do translate.

[Emphasis added.]

[14] The Member asked the male applicant if they were prepared to proceed with the hearing without counsel. The resulting exchange was recorded in the transcript prepared by the RPD [the RPD transcript] as follows:

PRESIDING MEMBER: Yeah, okay. So there's an issue with lawyer. You had a lawyer; you don't have a lawyer; you had a new lawyer; now you're not here with a lawyer. What's happening?

...

MALE CLAIMANT: We got only three hours from Legal Aid. It was not enough for more than preparing our PIF.

PRESIDING MEMBER: Okay. Okay. All right. The point is, are you are going to proceed without a lawyer today?

MALE CLAIMANT: [Hungarian words]

PRESIDING MEMBER: Slow, slow. Short sentences.

MALE CLAIMANT: If we have to go ahead we can go ahead.

PRESIDING MEMBER: You have to ---

MALE CLAIMANT: On the other hand ---

PRESIDING MEMBER: Yeah.

MALE CLAIMANT: We went to the Legal Aid office and they told us that they sent a letter here asking for more time **because** ---

PRESIDING MEMBER: No. Sir, you can't. I got the letter. You have to go ahead, okay? Just tell him that and I'll continue. Tell him that and I'll continue.

Okay. You had a right to a lawyer. You lost your lawyer. You picked up a new lawyer. But if the, you can't – **if the lawyer picks up a file he has to be ready to go at the hearing. Yours wasn't.**

So you have to go ahead.

[Emphasis added.]

[15] Since the applicants were unrepresented, the Member advised them of their rights to appeal to the Federal Court and their ability to obtain a stay.

[16] Near the end of the hearing, the female applicant asked to give some evidence privately, without the male applicant being present. She testified that in April 2011, she was raped by a co-worker who also lived near the applicants' home. She said that her assailant threatened to kill her and to stab her husband if she told anyone about the assault and that this influenced her decision to flee Hungary. She did not make a police report nor did she seek medical attention and had never revealed this incident to anyone, including her husband, before the hearing. The Member asked questions about possible motivations behind the assault, which were recorded in the RPD transcript as follows:

PRESIDING MEMBER: Were you assaulted because you're a Roma or because you're a lady?

FEMALE CLAIMANT: It's because he belongs to the skinheads with the big, in the big boots, that kind of person.

PRESIDING MEMBER: You actually didn't say that it was a skinhead that attacked you. You said it was a man from the neighbourhood. Why are you now saying it's a skinhead?

FEMALE CLAIMANT: He was that kind of white skinhead in big boots.

PRESIDING MEMBER: Yeah, okay. You also didn't say that he in any way insulted your ethnicity or indicated he was attacking you because of your ethnicity, is that right?

FEMALE CLAIMANT: I don't know why it happened. I don't know why he kept an eye on me, why he did it exactly to me.

[Emphasis added.]

[17] The female applicant indicated that the assault caused her to fear returning to Hungary because she feared that the assault would come to light and her husband would be harmed. The Member indicated that he did not understand and asked her whether she was afraid of the assailant, which she confirmed.

III. Impugned Decision

A. *No Counsel*

[18] The RPD found that the applicants confirmed at the hearing that they were prepared to testify without counsel and noted that they made an oral plea at the conclusion of the hearing in lieu of counsel submissions.

B. *Credibility*

[19] The RPD concluded that the six-year-old minor claimant's claim must fail because he provided no oral testimony at the hearing and no independent evidence was submitted on his behalf. The male applicant gave most of the oral testimony, though the female applicant indicated that she agreed with what he said during the hearing.

[20] The RPD made negative credibility inferences against the applicants because they made allegations in the PIF which were inconsistent with their oral testimony and unsupported by documentary evidence. These included the following:

- The male applicant testified that the Park Incident occurred on May 15, 2011, whereas in the PIF it was alleged to have occurred on May 15, 2010 and he could not provide a satisfactory explanation for the inconsistency;
- There was no police report or medical note related to the Park Incident;
- The male applicant alleged at the hearing that he had been attacked a few other times between 2002 and 2011, but he testified that they were minor and these attacks were undocumented, however the applicants argue that this testimony was not correctly translated;

- The female applicant testified that she started being harassed at work in May 2010 (when she started that job), whereas in the PIF it was alleged to have occurred in early 2011 and she could not provide a satisfactory explanation for the inconsistency;
- The female applicant did not report the workplace harassment to the police, so it was undocumented;
- The female applicant testified that she was terminated following the workplace harassment, whereas in the PIF it was alleged that she had quit; and
- The mistreatment of the minor applicant was not documented, though it was indicated that the he had to go to hospital several times and had reported to the principal.

[21] Based on the foregoing, the RPD concluded that the applicants' evidence was not credible and insufficient to support their claim. Specifically, the RPD did not accept the allegations that the male applicant was attacked in the park, that the female applicant was mistreated at work, or that the minor applicant was mistreated at school. The inconsistencies in their evidence were deemed to have more importance because they were related to only "major" incidents being alleged by the applicants.

[22] The RPD found the female applicant's spontaneous testimony regarding her sexual assault to be credible, accepting that she was "raped as alleged, due to her very emotional testimony," despite the other negative credibility findings and lack of documentations. The RPD

accepted that it was “quite understandable” that she had not included the assault in the PIF or reported the incident to police.

[23] The RPD stated that he applied the Chairperson’s Guideline 4, *Women Refugee Claimants Fearing Gender-Related Persecution* [the Gender Guidelines]. The female applicant was not a refugee because “it was not likely, despite [her] alleged fear, that she would be raped again by the same man...although she understandably may be traumatized by this event” and it was not clear that state protection would not be adequate for “female victims of violent rapes by strangers in outdoor areas in Hungary.” However, the RPD did not accept the female applicant’s statement that the man that attacked her was a skinhead, characterizing this as an embellishment and “late allegation.” The RPD therefore concluded that the female applicant had been “raped, if indeed she was raped, [not] because she was a Roma but rather because she was a woman.” On this basis, it was concluded that she did not require Canada’s protection because she was raped and no analysis was carried out under the Gender Guidelines.

C. *State Protection*

[24] In light of the credibility findings, the RPD did not accept the applicants’ claim that they had made a police report regarding the Park Incident or that they had reported the School Incident to the principal. Therefore, the RPD concluded that they had made no efforts to seek state protection before coming to Canada.

[25] The RPD summarized the objective evidence regarding the availability of state protection in Hungary and treatment of Roma, concluding that there was “mixed evidence which generally

suggests that adequate state protection for Roma might be available.” In the absence of clear and convincing evidence from the applicants that protection would not have been available, the RPD concluded that adequate state protection would have been available to them if they had chosen to avail themselves of it.

D. *Persecution vs. Discrimination/Harassment*

[26] The RPD concluded that the applicants had not been persecuted in Hungary, in that they had “not suffered serious harm merely by virtue of them having lived as Romas in Hungary.” This appears to be based on the RPD’s findings that both adult applicants were employed, that they had adequate food, shelter, clothing, and that they had adequate access to education and government services.

[27] The RPD also assessed whether the applicants required protection due to their profile as Roma in Hungary. He acknowledged that there are significant challenges for Roma in Hungary but that these issues are discrimination and harassment, not persecution. Persecution was defined as serious harm of a sustained or systemic violation of human rights. He also noted that while there is a possibility that the applicants could be victims of hate crimes on account of being Roma, this does not rise above the level of a mere possibility.

IV. Issues

[28] While I find that there are a number of problems with the reasons, the only issue that I need to consider is whether an unreasonable breach of procedural fairness occurred by the refusal to postpone the hearing to allow the applicants to be represented by counsel.

V. Standard of Review

[29] While procedural fairness and natural justice issues raised are said to be reviewed on the correctness standard (*Mission Institute v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43, I adopt the hybrid standard recently enunciated by the Federal Court of Appeal in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245, 246 ACWS (3d) 191 [*Forest Ethics*] (see also: *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 34-42, 455 NR 87 and *Maritime Broadcasting System Ltd. v Canadian Media Guild*, 2014 FCA 59 at paras 50-56, 373 DLR (4th) 167). The procedural fairness issue is to be determined on the correctness standard, but the Court must give some deference to the Board's procedural choices.

VI. Analysis

[30] The respondent argues that the applicants agreed to proceed without counsel. It submits that the male applicant was clearly asked whether he was ready to proceed without counsel and that the evidence supports the conclusion that the applicants did not request an adjournment.

[31] I disagree with this interpretation of the evidence. The member had in his possession the letter of the applicants' counsel seeking a postponement some four or five days prior to the hearing date. Moreover, it is obvious from the record that the officer's mind was made up prior to hearing submissions from the applicants. The member's position was that when a new lawyer is retained with a pending hearing date determined, "he has to be ready to go at the hearing. Yours wasn't."

[32] I understand from the submissions of counsel during the hearing that recent amendments to the legislation has changed the scheduling process such that dates are given for hearings at the initial meetings with refugee claimants. However, the applicants' circumstances of scheduling fell within the transition period for the amendments, where notice of the hearing was provided a month before the hearing date.

[33] Prior to the respondent providing the Court with submissions on a certified question regarding the standard of review, no specific reference had been made to the *Refugee Protection Division Rules*, SOR/2012-25 [the Rules] on applications seeking to change dates, or any jurisprudence pertaining to this issue. The respondent referred the Court to portions of rules 50 and 54. I set out below what appears to be all of the provisions of the Rules relevant to the issue of modifying dates for an RPD hearing:

3. (1) As soon as a claim for refugee protection is referred to the Division, or as soon as possible before it is deemed to be referred under subsection 100(3) of the Act, an officer must fix a date, time and location for the claimant to

3. (1) Dès qu'une demande d'asile est déférée à la Section ou dès que possible avant qu'une demande soit réputée avoir été déférée en application du paragraphe 100(3) de la Loi, l'agent fixe une date, une heure et un lieu pour

attend a hearing on the claim, within the time limits set out in the Regulations, from the dates, times and locations provided by the Division.

l'audience relative à la demande du demandeur d'asile, dans les délais prévus par le Règlement, parmi les date, heure et lieu proposes par la Section.

50. (1) Unless these Rules provide otherwise, an application must be made in writing, without delay, and must be received by the Division no later than 10 days before the date fixed for the next proceeding.

50. (1) Sauf indication contraire des présentes règles, toute demande est faite par écrit, sans délai, et doit être reçue par la Section au plus tard dix jours avant la date fixée pour la prochaine procédure.

(2) The Division must not allow a party to make an application orally at a proceeding unless the party, with reasonable effort, could not have made a written application before the proceeding.

(2) La Section ne peut autoriser que la demande soit faite oralement pendant une procédure que si la partie a été dans l'impossibilité, malgré des efforts raisonnables, de le faire par écrit avant la procédure.

...

...

54. (1) Subject to subrule (5), an application to change the date or time of a proceeding must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

54. (1) Sous réserve du paragraphe (5), la demande de changer la date ou l'heure d'une procédure est faite conformément à la règle 50, mais la partie n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle.

(2) The application must

(2) La demande :

(a) be made without delay;

a) est faite sans délai;

(b) be received by the Division no later than three working days before the date fixed for the proceeding, unless the application is made for medical reasons or other emergencies; and

b) est reçue par la Section au plus tard trois jours ouvrables avant la date fixée pour la procédure, à moins que la demande soit faite pour des raisons médicales ou d'autres urgences;

(c) include at least three dates and times, which are no later than 10 working days after the date originally fixed for the proceeding, on which the party is available to start or continue the proceeding.

(3) If it is not possible for the party to make the application in accordance with paragraph (2)(b), the party must appear on the date fixed for the proceeding and make the application orally before the time fixed for the proceeding.

(4) Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as

(a) the change is required to accommodate a vulnerable person; or

(b) an emergency or other development outside the party's control and the party has acted diligently.

(5) If, at the time the officer fixed the hearing date under subrule 3(1), a claimant did not have counsel or was unable to provide the dates when their counsel would be available to attend a hearing, the claimant may make an application to change the date or time of the hearing. Subject to operational limitations, the Division must allow the application if

c) inclut au moins trois dates et heures, qui sont au plus tard dix jours ouvrables après la date initialement fixée pour la procédure, auxquelles la partie est disponible pour commencer ou poursuivre la procédure.

(3) S'il ne lui est pas possible de faire la demande conformément à l'alinéa (2)b), la partie se présente à la date fixée pour la procédure et fait sa demande oralement avant l'heure fixée pour la procédure.

4) Sous réserve du paragraphe (5), la Section ne peut accueillir la demande, sauf en cas des circonstances exceptionnelles, notamment:

(a) le changement est nécessaire pour accommoder une personne vulnérable;

b) dans le cas d'une urgence ou d'un autre développement hors du contrôle de la partie, lorsque celle-ci s'est conduite avec diligence.

(5) Si, au moment où l'agent a fixé la date d'une audience en vertu du paragraphe 3(1), il n'avait pas de conseil ou était incapable de transmettre les dates auxquelles son conseil serait disponible pour se présenter à une audience, le demandeur d'asile peut faire une demande pour changer la date ou l'heure de l'audience. Sous réserve de restrictions

d'ordre fonctionnel, la Section accueille la demande si, à la fois:

- | | |
|---|---|
| (a) the claimant retains counsel no later than five working days after the day on which the hearing date was fixed by the officer; | a) le demandeur d'asile retient les services d'un conseil au plus tard cinq jours ouvrables après la date à laquelle l'audience a été fixée par l'agent; |
| (b) the counsel retained is not available on the date fixed for the hearing; | b) le conseil n'est pas disponible à la date fixée pour l'audience; |
| (c) the application is made in writing; | c) la demande est faite par écrit; |
| (d) the application is made without delay and no later than five working days after the day on which the hearing date was fixed by the officer; and | d) la demande est faite sans délai et au plus tard cinq jours ouvrables après la date à laquelle l'audience a été fixée par l'agent; et |
| (e) the claimant provides at least three dates and times when counsel is available, which are within the time limits set out in the Regulations for the hearing of the claim.
... | e) le demandeur d'asile transmet au moins trois dates et heures auxquelles le conseil est disponible, qui sont dans les délais prévus par le Règlement pour l'audience relative à la demande d'asile.
... |
| (10) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding. | (10) Sauf si elle reçoit une décision de la Section accueillant la demande, la partie est tenue de se présenter pour la procédure à la date et à l'heure fixées et d'être prête à commencer ou à poursuivre la procédure. |
| (11) If an application for a change to the date or time of a proceeding is allowed, the new date fixed by the Division must | (11) Si la demande de changement de date ou d'heure d'une procédure est accueillie, la Section fixe une nouvelle |

be no later than 10 working days after the date originally fixed for the proceeding or as soon as possible after that date.

[Emphasis added]

date qui tombe au plus tard dix jours ouvrables après la date initialement fixée ou dès que possible après cette date.

[Soulignement ajoutés.]

[34] With regard to these provisions, it is clear from rule 50(2) that an exception applies to the requirement to apply in writing where the party could not have applied without unreasonable effort. In addition, it would appear that rule 54(2)(b) permits an application within three working days before the date fixed for the proceeding. In addition, rule 54(4) permits a change to the date of the hearing where exceptional circumstances occur, such as when accommodating a vulnerable person or when other developments that are outside the party's control arise and the party has acted diligently. Rule 54(5), while having reference to the amended procedure to fix hearing dates under rule 3(1) whereby the date is fixed when the matter is referred to the RPD, nonetheless describes "operational limitations" as a factor in allowing the application.

[35] In an assignment procedure where dates are set long in advance of their occurrence, the need for a restrictive policy on adjournments can be understood. However, in the transition period, in the context of a one-off situation where the date was fixed in the month before the hearing, a fair and reasonable approach must consider the circumstances of the applicants. For that reason, I find that the RPD erred in relying upon the policy reflected in the amended Rules, which I find was applied by his conclusion that once counsel picks up a file "he has to be ready to go at the hearing".

[36] The Rules refer to circumstances such as the vulnerability of the party, developments outside the party's control, the diligence of the party, the extent of the requested adjournment and the RPD's operational limitations as factors which must be considered in deciding whether to grant an adjournment request. I am also of the view that the RPD's dealings with the party must be both fair and reasonable in the circumstances.

[37] The right to counsel is important and can be a determinative factor in the outcome of these decisions, particularly where there is some sense that the applicants are vulnerable. In this matter, the applicants were not conversant in English and there appear to have been some issues with respect to the quality of the interpretation, which partly may have been induced by the RPD's consideration of the limited time available as noted in the above-referenced remark. The failure to have counsel present at the hearing generally leaves the clients at a serious disadvantage when new issues arise, or where the RPD member asks a question that would normally give rise to reply questions by counsel to elucidate a matter. This may have been a factor in this case.

[38] The male applicant outlined his problems with obtaining funding. I am satisfied that the applicants were acting in good faith at all times – they understood their disadvantage in not being represented and made diligent attempts to obtain counsel. They finally succeeded at the last moment, but given the short time-frame, their lawyer explained the situation to the RPD and requested a short postponement to allow him to represent the applicants. There is no indication on the record that the RPD could not have accommodated a postponement to the proposed dates or that any other operational considerations would have prevented the case from being

reassigned to another date. In any event, in the circumstances any dates that were available could have been stipulated by the RPD on a take-it-or-leave-it basis to meet the low threshold of providing procedural fairness in the exercise of its discretion to refuse an adjournment based on counsel's unavailability.

[39] I find that there are other pertinent factors that give rise to an appearance of unfairness around the Member's decision-making process refusing the postponement. The Member already found himself in a situation where it made sense to grant an adjournment to the applicants, given that he had been double-booked and was going to have to deal with two matters in the time normally allotted for a single hearing. Justice must be seen to be done, so while I find it commendable from an efficiency standpoint that the Member was prepared to deal with both matters, the aura of urgency that pervaded the hearing undermined the process. A reading of the transcript suggests some sense of impatience and concern on the part of the Member about being able to complete the hearing.

[40] Perhaps more importantly, the manner in which the request for an adjournment was decided smacks of unreasonableness by its peremptory nature, giving the appearance of lack of transparency. I find that after acknowledging the applicants' predicament, the Member then somewhat forced the applicants to agree to proceed without counsel by proposing a no-win choice by asking "are you are going to proceed without a lawyer today." The principal applicant responded that if he had to, he would, but when he tried to explain his funding predicament to the Member, the Member indicated that he had no real choice stating, "[you] have to". In effect, the

process followed to refuse the adjournment was not truly transparent or intelligible, which adds to its unfairness and unreasonableness.

[41] Any concerns that I have for setting aside the decision are also attenuated by the singularly unusual circumstances of the case and the substantive issues concerning whether the Member rejected the application without any proper consideration of the Gender Guidelines, which beside mentioning, did not receive any analysis. It is generally not sufficient to merely mention the Guidelines without demonstrating their application (*Odia v Canada (Citizenship and Immigration)*, 2014 FC 663 at para 18, citing *A.M.E. v Canada (Citizenship and Immigration)*, 2011 FC 444, 388 FTR 122 and *Yoon v Canada (Citizenship and Immigration)*, 2010 FC 1017, 377 FTR 149).

[42] I do not need to further consider this issue because I am satisfied that the decision to refuse the applicants' request for a short postponement breached the tenets of procedural fairness, despite the flexibility to be accorded to the Member in determining the appropriate procedure. As a result, the matter must be set aside and sent back for a redetermination before another RPD panel member.

[43] I also reject the request of the applicant to certify a question concerning the standard of review applicable to the decision. As indicated above, I apply the hybrid standard enunciated in *Forest Ethics* of correctness, with some deference to the Board's choice of procedure, thereby rendering the issue of the standard review not determinative of the case.

VII. Conclusion

[44] The application is allowed and the matter is to be returned for reconsideration before another member of the Refugee Protection Division. No issue is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the matter is referred to another member of the RPD for reconsideration. No questions are certified for appeal.

“Peter Annis”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5739-13

STYLE OF CAUSE: LAJOS GUYLAS, MARIA GULYASNE LAKATOS,
LAJOD GULYAS v THE MINISTER OF CITIZENSHIP
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DATE OF HEARING: DECEMBER 3, 2014

JUDGMENT AND REASONS: ANNIS J.

DATED: FEBRUARY 18, 2015

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