Federal Court Cour fédérale

Date: 20150429

Dockets: IMM-7966-13
IMM-8082-13

Citation: 2015 FC 562

Ottawa, Ontario, April 29, 2015

PRESENT: The Honourable Madam Justice Strickland

Docket: IMM-7966-13

BETWEEN:

ZOLTAN KOKY, MILADA KOKYOVA,
ZOLTAN KOKY

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

Docket: IMM-8082-13

AND BETWEEN:

ZLATICA KOKYOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of two decisions made by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada dated November 4, 2012 and November 24, 2013, respectively. In the first, the panel member (Member) determined that the claims of Zoltan Koky (Principal Applicant) and his two minor children, Milada Kokyova and Zoltan Koky Jr., seeking protection under ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), were abandoned (IMM-7966-13). In the second, the Member rejected the claim of Zlatica Kokyova, the Principal Applicant's wife, finding that she was neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97, respectively, of the IRPA (IMM-8082-13).

[2] The Principal Applicant, his wife and their two minor children (the Applicants) are citizens of Slovakia. The RPD scheduled the Applicants' hearing for August 8, 2013. The claims of the family were to be heard together and they all relied on the Personal Information Form narrative (PIF) of the Principal Applicant.

[3] All of the Applicants attended on August 8, 2013 at which time their counsel provided the Member with a letter dated July 29, 2013 from Ms. Kokyova's primary care physician. This indicated that he had been treating Ms. Kokyova for a year and that she suffered from post-

traumatic stress disorder (PTSD), having in the past been harassed and attacked by skinheads in Slovakia. Her condition and treatment was further described and her physician noted:

> It is also important to understand that because of PTSD Ms. Kokyova may have a difficult time representing herself during the hearing as well as accurately recalling past events. Patients with PTSD often have difficulty recalling the original inciting event because they have re-experienced it so many times in their head and certain memories can become distorted. Her PTSD has also led her to develop a very high degree of anxiety in some situations and this will likely be exacerbated when she is in a courtroom environment.

[4] The RPD was also double-booked, and, ultimately, the hearing was adjourned to October 16, 2013.

[5] On October 16, 2013 the Principal Applicant and the two minor Applicants attended the reconvened hearing, however, Ms. Kokyova did not. Further medical documentation was submitted, which consisted of a letter from a psychiatrist who had assessed Ms. Kokyova with PTSD on October 15, 2013. He described her treatment, drugs and psychotherapy, as of that date and stated that her symptomology had been severe and had recently heightened with the upcoming refugee hearing and the uncertainty of possible return to Slovakia. Also submitted was a note from the Toronto East General Hospital Emergency Department stating that Ms. Kokyova had been seen there on October 15-16, 2013 and would miss the hearing.

[6] The Principal Applicant requested an adjournment, which the Member refused. The Member then disjoined the claim of Ms. Kokyova, pursuant to Rule 56 of the *Refugee Protection Division Rules*, SOR/2012-256 (RPD Rules). In addition, because the Principal Applicant refused to testify in the absence of his wife, the Member immediately commenced abandonment

proceedings pursuant to RPD Rule 65(1)(*a*). The Member did not accept the Principal Applicant's explanation that he wished his wife to be in attendance, even if she could not testify, and declared the claims of the Principal Applicant and the two minor Applicants to be abandoned pursuant to s 168 of the IRPA.

[7] Subsequently, on November 14, 2013, the hearing of Ms. Kokyova was convened. Counsel moved to have the Member recuse himself owing to bias, which request the Member refused. Counsel also requested that the other family members' claims be rejoined, this was also refused. The Member proposed that the Principal Applicant testify on behalf of his wife in light of her psychological condition, however, the Principal Applicant declined to do so. The Member also offered to have the claim determined on the basis of the submissions of counsel and the written evidence, but counsel for Ms. Kokyova declined. Ms. Kokyova testified, and the Member found that she was not credible, that her claim was undocumented, that there was less than a serious possibility that she would be physically attacked because she is Roma if she returned to Slovakia, and that the discrimination against Roma in Slovakia did not constitute persecution. Accordingly, Ms. Kokyova was not a Convention refugee pursuant to s 96 nor a person in need of protection under s 97 of the IRPA.

IMM-7966-13

Issues

[8] In my view, these are the issues:

1. Did the Member breach the principles of procedural fairness and natural justice by refusing an adjournment and proceeding with the hearing?

2. Was there a reasonable apprehension of bias or actual bias?

Standard of Review

[9] The Applicants make no submission on the standard of review. The Respondent submits, and I agree, that on questions of procedural fairness and natural justice the standard of review is correctness (*Juste v Canada (Citizenship and Immigration)*, 2008 FC 670 at paras 23-24; *Olson v Canada (Public Safety and Emergency Preparedness),* 2007 FC 458 at para 27). Under the correctness standard no deference is owed by the reviewing Court, which will undertake its own analysis of the question and reach its own conclusion (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50; *Wu v Canada (Attorney General)*, 2013 FC 838 at para 12; *Etienne v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1128 at para 14; *Lambie v Canada (Attorney General)*, 2011 FC 104 at para 37; *Kaur v Canada (Citizenship and Immigration)*, 2010 FC 442 at para 6; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53; *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 at para 7).

Decision Under Review

[10] The Member acknowledged that the RPD was double-booked on August 8, 2013 and that therefore the matter could not proceed on that date. Accordingly, he adjourned it to October 16, 2013. The Member also acknowledged receipt of the letter of July 29, 2012 from Ms. Kokyova's physician and concluded from it that, although he was double-booked, Ms. Kokyova was also not available (able) to testify on that day. Further, it appeared to him that Ms. Kokyova's psychological condition would be long standing. Therefore, he had indicated to counsel, presuming that at the next hearing date that she was still psychologically unavailable to

testify, that the Principal Claimant would act as Designated Representative (DR) for his wife. The Member stated that his records indicated that counsel for the Applicants either agreed with this or at least did not disagree. The Member then acknowledged that his use of the term DR was incorrect, as he should have said that Ms. Kokyova would be designated as a Vulnerable Person under Guideline 8. He explained "that the Panel's intent for the claimant to testify for his wife, as she could not, was clearly stated and understood, and agreed to, by counsel".

[11] While Ms. Kokyova did not attend the October 16, 2013 hearing, the decision states that the Member reminded counsel and the Principal Applicant of the Member's previous advice that the Principal Applicant would testify on behalf of his wife and suggested, therefore, that the hearing proceed. And, on that basis, the Member refused a request for an adjournment. He disjoined Ms. Kokyova's claim on the authority of RPD Rule 56, as disjoining the claims would promote the efficient administration of the RPD's work and would not cause injustice. He stated that the next step in Ms. Kokyova's claim would be an abandonment hearing. The Member also suggested that consideration be given to allowing the Principal Applicant to give evidence for his wife at that time, as she would likely be designated a Vulnerable Person, and that if her claim were successful then the disjoined claimants could be landed under her application for landing.

[12] As the Principal Applicant refused to testify, the Member commenced abandonment proceedings pursuant to RPD Rule 65(1)(*a*). The Principal Applicant was asked to make submissions as to why the claims should not be abandoned. He submitted that, as the October 16, 2013 hearing was essentially the first hearing, the claim should not be abandoned at that stage. The Member rejected this argument, finding that the double-booking and unavailability of

the RPD were irrelevant, given that Ms. Kokyova was also "not available" to testify at that time. Further, at the first sitting the Member had advised counsel and the Principal Applicant that, if Ms. Kokyova were subsequently not available to testify, the Principal Applicant would testify for them both.

[13] The Member did not accept the substantive objection of the Principal Applicant that he wished to have his wife in attendance for moral support, even if she could not testify. The Member noted that the Principal Applicant was a 45 year old mature adult with no stated medical or psychological issues that might have prevented him from giving evidence. And, while at the first sitting he was anxious, this was a normal reaction for refugee claimants and was insufficient reason for a claim not to proceed.

[14] The Member found that the absence of the Principal Applicant's wife was insufficient reason for him to refuse to testify to advance his own refugee claim. The Member declared the claim of the Principal Applicant, and the related claims of the two minor Applicants, to be abandoned pursuant to Rule 168 of the IRPA.

ISSUE 1: Did the Member breach the principles of procedural fairness and natural justice by refusing an adjournment and proceeding with the hearing?

Principal Applicant's Position

[15] The Principal Applicant takes the position that the Member failed to consider any of the factors stipulated by the RPD Rules to be considered when a postponement is requested. Further, that as a matter of law and procedure, Ms. Kokyova had the right to be present at the

hearing of the Principal Applicant's claim and to decide whether she would give evidence. She was unfairly denied that right, even though her absence on October 16, 2013 due to medical issues, was documented.

[16] The Principal Applicant also submits that to proceed as the Member did was in breach of the RPD's policy that a family's claims should normally be heard together. Accordingly, the Member thereby exceeded his jurisdiction. It was also contrary to RPD policy and erroneous to declare the claims abandoned on October 16, 2013 because, as is the normal process, the RPD had set a special hearing date, November 6, 2013, for that purpose in the event that the Applicants failed to appear at the regularly scheduled hearing. The Principal Applicant was, in effect, penalized for having appeared on October 16, 2013 as, had he not done so, he would have been entitled to a full abandonment hearing on November 6, 2013.

[17] Further, that the Member had no basis to declare the claims to have been abandoned, as the Principal Applicant had no intention to abandon and fully intended to pursue them.

[18] The Principal Applicant asserts that the Member's actions were entirely unfair, erroneous and inappropriate; that he circumvented RPD policies to achieve his own aim; that without good reason he attempted to force the Applicants to proceed "even if it was illegal" or to declare their claims abandoned; that he would not let anything stand in his way, including the improper disjoining of he claims; and that he "made it his personal mission to achieve his objectives". Further, that his conduct and demeanour "were so outrageous, that it became obvious that he could not decide fairly in the Applicants' cases, whether with respect to the hastily convened

'Abandonment Hearing' or on the merits of the Applicants' refugee claims". The Member also dismissed the motion that he recuse himself on the basis of reasonable apprehension of bias, yet there is no mention of that motion in his decision nor any reasons for his denial of the motion. The Principal Applicant asserts that the Member's aggressive behaviour and actions gave rise to a reasonable apprehension of bias that resulted in his exceeding his jurisdiction, regardless of the fact that he may have otherwise reached a correct result (*R v S (RD),* [1997] 3 SCR 484 [*RDS*]).

Respondent's Position

[19] The Respondent submits that RPD Rule 56(5) sets out some of the factors that the RPD considers when joining or separating a claim and that these include the promotion of the efficient administration of the RPD's work and whether joining or separating would cause an injustice. RPD Rule 65(1) concerns abandonment and requires the RPD to give a claimant the opportunity to explain why the claim should not be abandoned immediately if the claimant is present at the proceeding and the RPD considers it fair to do so or, in any other case, by way of a special hearing.

[20] In the circumstances of this matter it was within the RPD's purview to disjoin the claim of the Principal Applicant's wife and to proceed with the other Applicants' claims. The Principal Applicant was given an opportunity to explain why the claims should not be declared abandoned, and the Member gave reasons as to why the explanation offered was not acceptable.

[21] As to the Applicant's arguments that the Board was biased because it would not adjourn the hearing, it is trite law that a decision-maker is presumed to act impartially (*Elkebti v Canada*

(Solicitor General), (March 22, 2004) IMM-1876-04 1877-04; *Jones v Canada (Minister of National Revenue)*, 2004 FC 382 at para 29). Further, the Applicants have failed to demonstrate how the Member acted in a biased manner. The Principal Applicant's affidavit acknowledges that after his counsel provided arguments and reasons for not separating the claims and not proceeding with the hearing, the Member left the room to consider the issues and returned to render his decision. The fact that the Applicants disagree with the outcome does not demonstrate bias. Nor was there a breach of natural justice.

[22] The Respondent submits that the Applicants have failed to establish that they were not given an adequate opportunity to be heard by a disinterested and impartial tribunal. Rather, the Principal Applicant failed to provide an adequate reason for his own refusal to testify at his scheduled refugee hearing, even after it was made clear to him that his claim would be deemed abandoned.

Analysis

[23] To understand the procedural context of this matter, a review of the transcript of the proceedings is required.

(a) *Transcript*

[24] The transcript indicates that at the first scheduled hearing date, August 8, 2013, all of the family members attended. The Member acknowledged the letter from Ms. Kokyova's physician and indicated, as it appeared that her psychological condition would be long standing, that the

Principal Applicant could act as a DR for his wife and the matter could proceed. Counsel for the Applicants did not agree with this and stated that the Principal Applicant was unwell and that Ms. Kokyova was unable to speak. The Principal Applicant advised the Member that he was anxious, had stage fright and believed he would be less anxious on another day. Counsel also opposed the Principal Applicant's acting as DR for his wife in those circumstances.

[25] The Member suggested, given that anxiety on the part of the Principal Applicant was a normal response to such a hearing, that because the Principal Applicant was the author of the common narrative and the hearing would be starting late in any event because of the double-booking, that the Principal Applicant's testimony proceed and that Ms. Kokyova's testimony, if any, could be addressed when the matter was continued on the next date.

[26] Counsel opposed this on the basis that the Principal Applicant had said he was nervous and because it would be unfair to require the Applicants to wait an hour or two. Counsel then stated that he had to leave at 4:00 p.m. and that the interpreter wished to leave at 3:45 p.m..

[27] Given this, the Member set the matter over and stated:

> **MEMBER:** And what I am going to do is I'm going to tell you now that if the female claimant is unable to testify or comprehend it's my proposal to designate the male claimant as her DR.
>
> **COUNSEL:** Okay.
>
> **MEMBER:** Okay?
>
> **COUNSEL:** Okay. But could you give us a least a month or two so that she…
>
> **MEMBER:** Yeah, I think so. I think so. I'm not going to book it in August. It'll be September at the earliest.

(CTR at 884)

[28] The Member also explained to the Principal Applicant that, if at the next hearing date his wife was unable to testify, the Member was going to want the Principal Applicant to speak for her (CTR at 885) and restated his view to counsel (CTR at 886) while acknowledging that Ms. Kokyova was shaking and visibly anxious.

[29] This is reflected in the Member's decision when he states that his intent was for the Principal Applicant to testify on behalf of his wife, as she could not do so. That is, he made it known on August 8, 2013 that if the Principal Applicant's wife could not testify at the next appearance date, he expected the Principal Applicant to testify on her behalf. The effect would be the same whether he was designated as a DR or she was designated as a Vulnerable Person.

[30] In the event, Ms. Kokyova was unable to attend the October 16, 2013 hearing. The transcript indicates that counsel sought a postponement. The Member reminded counsel that on August 8, 2013 he had indicated that if Ms. Kokyova could not testify then the Principal Applicant would be her DR. Counsel opposed this on the basis that Ms. Kokyova had the right to testify or at least be at the hearing. The Member noted that the Principal Applicant was the author of the common PIF narrative and that he was in attendance and able to testify. Counsel then submitted that while there was no medical note, the Member should take judicial notice of the fact that when a wife is in emergency the husband is probably not in a good state of mind. Much further discussion ensued, and counsel for the Applicants set out his position that, in the circumstances, it would be unfair to proceed.

[31] The Member then asked counsel if he wanted to ask the Principal Applicant whether he had changed his mind about refusing to testify. The Principal Applicant then stated:

> **CLAIMANT 1:** I would like to mention to you, sir, that my wife didn't participate last time because she was very sick and today she doesn't feel well. Last time, and today she doesn't feel it as well… she doesn't feel well as well. If it's possible I don't want to testify today without her saying some important stuff, sir, today.
>
> **MEMBER:** Okay. I notice she doesn't have her own story. Does she have new things other than what you told us about that she wants to say?
>
> **CLAIMANT 1:** No, sir. It's a common story for both of us.
>
> (CTR at 901)

[32] The Member then sought counsel's submissions on disjoining Ms. Kokyova's claim, given that the Principal Applicant refused to testify. Counsel opposed this, and, again, much debate ensued. The Member then held that the hearing of the claims of the Principal Applicant and the two minor Applicants would proceed immediately. If Ms. Kokyova was able to give testimony in the future, or to do so by her DR, then she would have the opportunity to do so. The Member stated that this was in the interest of administrative efficiency. Counsel's position was, given that the Member was not able to proceed on August 8, 2013, that this was effectively the first hearing date and it was unfair in that circumstance to disjoin the claims and force the Principal Applicant to proceed in the absence of his wife.

[33] The Member then asked the Principal Applicant what the likelihood was of his wife's being able to testify in two or three weeks, or at least be in attendance to give him the support that he said he needed. The Principal Applicant responded that she was very sick and that he was not sure if she would be ready in one, two or three months.

[34] The claim was disjoined. The Principal Applicant continued to refuse to testify, and the Member then advised of his intent to declare the claims of the Principal Applicant and the minor Applicants abandoned and sought counsel's submissions in that regard. At this point counsel advised that he wanted to bring a motion to have the Member recuse himself from the matter because he had "taken a heavy handed view of this case. You have gone beyond any reasonable actions and have disjoined the case as a malicious move on your part" (CTR at 909). Counsel then restated his prior submissions as to the unfairness of the Member's actions and stated that the Member was trying to circumvent the law to create unfairness. The Member did not agree that he was unfair or bias and refused the motion. The Member reserved his decision and, ultimately, found that the Principal Applicant had abandoned his claim.

[35] Against that backdrop, it is now necessary to analyse the Member's decision in the context of the Applicants' challenges to it.

[36] As to the disjoining of the claims, the following IRPA sections and RPD Rules are relevant:

RPD Rules:

Application to join	**Demande de jonction**
56. (1) A party may make an application to the Division to join claims or applications to vacate or to cease refugee protection.	56. (1) Toute partie peut demander à la Section de joindre des demandes d'asile, d'annulation ou de constat de perte de l'asile.

Application to separate

(2) A party may make an application to the Division to separate claims or applications to vacate or to cease refugee protection that are joined.

Demande de séparation

(2) Toute partie peut demander à la Section de séparer des demandes d'asile, d'annulation ou de constat de perte de l'asile qui sont jointes.

Form of application and providing application

(3) A party who makes an application to join or separate claims or applications to vacate or to cease refugee protection must do so in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration. The party must also

(*a*) provide a copy of the application to any person who will be affected by the Division's decision on the application; and

(*b*) provide to the Division a written statement indicating how and when the copy of the application was provided to any affected person, together with proof that the party provided the copy to that person.

Forme et transmission de la demande

(3) La partie fait sa demande de jonction ou de séparation des demandes d'asile ou d'annulation ou de constat de perte de l'asile conformément à la règle 50, mais elle n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle. De plus, elle transmet :

a) à toute personne qui sera touchée par la décision de la Section à l'égard de la demande, une copie de la demande;

b) à la Section, une déclaration écrite indiquant à quel moment et de quelle façon la copie de la demande a été transmise à toute personne touchée, et une preuve de la transmission.

Time limit

(4) Documents provided under this rule must be received by their recipients no later than 20 days before the date fixed for the hearing.

Délai

(4) Les documents transmis en application de la présente règle doivent être reçus par leurs destinataires au plus tard vingt jours avant la date fixée pour l'audience.

Factors

(5) In deciding the application to join or separate, the Division must consider any relevant factors, including whether

(*a*) the claims or applications to vacate or to cease refugee protection involve similar questions of fact or law;

(*b*) allowing the application to join or separate would promote the efficient administration of the Division's work; and

(*c*) allowing the application to join or separate would likely cause an injustice.

Éléments à considérer

(5) Pour statuer sur la demande de jonction ou de séparation, la Section prend en considération tout élément pertinent, notamment la possibilité que :

a) des questions similaires de droit ou de fait découlent des demandes d'asile, d'annulation ou de constat de perte de l'asile;

b) l'accueil de la demande de jonction ou de séparation puisse favoriser l'efficacité du travail de la Section;

c) l'accueil de la demande de jonction ou de séparation puisse vraisemblablement causer une injustice.

No applicable rule

69. In the absence of a provision in these Rules dealing with a matter raised during the proceedings, the Division may do whatever is necessary to deal with the matter.

Cas non prévus

69. Dans le cas où les présentes règles ne contiennent pas de dispositions permettant de régler une question qui survient dans le cadre des procédures, la Section peut prendre toute mesure nécessaire pour régler celle-ci.

Powers of Division

70. The Division may, after giving the parties notice and an opportunity to object,

(*a*) act on its own initiative, without a party having to make an application or request to the Division;

Pouvoirs de la Section

70. La Section peut, si elle en avise au préalable les parties et leur donne la possibilité de s'opposer :

a) agir de sa propre initiative sans qu'une partie ait à lui présenter une demande;

(*b*) change a requirement of a rule;

b) modifier l'exigence d'une règle;

(*c*) excuse a person from a requirement of a rule; and

c) permettre à une personne de ne pas suivre une règle;

(*d*) extend a time limit, before or after the time limit has expired, or shorten it if the time limit has not expired.

d) proroger un délai avant ou après son expiration ou l'abréger avant son expiration.

IRPA provisions:

Sole and exclusive jurisdiction

162. (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

Compétence exclusive

162. (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie.

Procedure

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

Fonctionnement

(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

[…]

[…]

Powers of a commissioner

165. The Refugee Protection Division, the Refugee Appeal Division and the Immigration Division and each member of those Divisions have the powers and authority of a

Pouvoir d'enquête

165. La Section de la protection des réfugiés, la Section d'appel des réfugiés et la Section de l'immigration et chacun de leurs commissaires sont investis des pouvoirs d'un

commissioner appointed under Part I of the Inquiries Act and may do any other thing they consider necessary to provide a full and proper hearing.	commissaire nommé aux termes de la partie I de la Loi sur les enquêtes et peuvent prendre les mesures que ceux-ci jugent utiles à la procédure.

[37] With respect to the disjoining of Ms. Kokyova's claim, the Member stated that he relied on RPD Rule 56. However, as is apparent from the above, RPD Rule 56 has no application. It pertains to disjoinder upon application by a party. In this instance, as the Minister did not intervene, the only parties were the claimants, who did not bring a motion for disjoinder. However, while RPD Rule 56(5) has no application, the Respondent points to ss 162(1) and 165 of the IRPA. I would also note s 162(2) and RPD Rule 70.

[38] As seen from the transcript, although Ms. Kokyova was unable to proceed owing to illness, the Member was prepared to at least begin the hearing on August 8, 2013 after he had dealt with the double-booked matter, at least starting the testimony of the Principal Applicant. However, the Principal Applicant claimed to be anxious and did not want to proceed. The Member accommodated this by not requiring a late start on that date, stipulating that if Ms. Kokyova could not proceed on the following date that the Principal Applicant would act as her DR. Counsel agreed to this. While the RPD Rule 56(6) factors do not apply, the Member explained that his reason for proceeding in this manner was administrative efficiency and that it would not cause an injustice. In my view, he also had authority pursuant to RPD Rule 70(*a*) to act on his own initiative and gave the Applicants notice, to which counsel responded, that he was considering disjoining the claims. The Member was the master of his own procedure (*Julien v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 150 at para 16; *Badalyan v Canada (Citizenship and Immigration)*, 2010 FC 561 at para 15; *Benitez v Canada (Minister of*

Citizenship and Immigration), 2006 FC 461 at para 183; *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at paras 568-569).

[39] While the Member could have permitted a postponement on October 16, 2013, given the medical evidence (RPD Rule 54(3), (4), (6) and (7)), he was not compelled to do so, particularly as the medical evidence did not indicate when Ms. Kokyova would be able to testify (*Cruz Telez v Canada (Citizenship and Immigration)*, 2013 FC 102 at para 17; *Javadi v Canada (Citizenship and Immigration)*, 2012 FC 278 at paras 25-26; *Wagg v R*, 2003 FC 303 at para 19; *Julien v Canada (Citizenship and Immigration)*, 2010 FC 351 at paras 28-30). Further, by disjoining Ms. Kokyova's claim he, in effect, preserved her claim, even though the claims of her family members were ultimately abandoned. In this regard, there was no procedural unfairness.

[40] The Member also had the authority, pursuant to RPD Rule 65, to find that the remaining claims were abandoned:

ABANDONMENT	**DÉSISTEMENT**
Opportunity to explain	**Possibilité de s'expliquer**
65. (1) In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned,	65. (1) Lorsqu'elle détermine si elle prononce ou non le désistement d'une demande d'asile aux termes du paragraphe 168(1) de la Loi, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé :
(*a*) immediately, if the claimant is present at the proceeding and the Division	*a*) sur-le-champ, dans le cas où le demandeur d'asile est présent à la procédure et où la

considers that it is fair to do so; or

Section juge qu'il est équitable de le faire;

(*b*) in any other case, by way of a special hearing.

b) au cours d'une audience spéciale, dans tout autre cas.

Special hearing — Basis of Claim Form

Audience spéciale — Formulaire de fondement de la demande d'asile

(2) The special hearing on the abandonment of the claim for the failure to provide a completed Basis of Claim Form in accordance with paragraph 7(5)(*a*) must be held no later than five working days after the day on which the completed Basis of Claim Form was due. At the special hearing, the claimant must provide their completed Basis of Claim Form, unless the form has already been provided to the Division.

(2) L'audience spéciale sur le désistement de la demande d'asile pour défaut de transmettre en vertu de l'alinéa 7(5)*a*) un Formulaire de fondement de la demande d'asile rempli, est tenue au plus tard cinq jours ouvrables après la date à laquelle le formulaire devait être transmis. À l'audience spéciale, le demandeur d'asile transmet son Formulaire de fondement de la demande d'asile rempli, à moins qu'il ne l'ait déjà transmis à la Section.

Special hearing — failure to appear

Audience spéciale — omission de se présenter

(3) The special hearing on the abandonment of the claim for the failure to appear for the hearing of the claim must be held no later than five working days after the day originally fixed for the hearing of the claim.

(3) L'audience spéciale sur le désistement de la demande d'asile pour défaut de se présenter à l'audience relative à la demande d'asile est tenue au plus tard cinq jours ouvrables après la date initialement fixée pour l'audience relative à la demande d'asile.

Factors to consider

Éléments à considérer

(4) The Division must consider, in deciding if the claim should be declared abandoned, the explanation

(4) Pour décider si elle prononce le désistement de la demande d'asile, la Section prend en considération

given by the claimant and any other relevant factors, including the fact that the claimant is ready to start or continue the proceedings.

l'explication donnée par le demandeur d'asile et tout autre élément pertinent, notamment le fait qu'il est prêt à commencer ou à poursuivre les procédures.

Medical reasons

(5) If the claimant's explanation includes medical reasons, other than those related to their counsel, they must provide, together with the explanation, the original of a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate.

Raisons médicales

(5) Si l'explication du demandeur d'asile comporte des raisons médicales, à l'exception de celles ayant trait à son conseil, le demandeur d'asile transmet avec l'explication un certificat médical original, récent, daté et lisible, signé par un médecin qualifié, et sur lequel sont imprimés ou estampillés les nom et adresse de ce dernier.

Content of certificate

(6) The medical certificate must set out

(*a*) the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim, or otherwise pursuing their claim, as the case may be; and

(*b*) the date on which the claimant is expected to be able to pursue their claim.

Contenu du certificat

(6) Le certificat médical indique, à la fois :

a) sans mentionner de diagnostic, les particularités de la situation médicale qui ont empêché le demandeur d'asile de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à laquelle il devait être transmis ou de se présenter à l'audience relative à la demande d'asile;

b) la date à laquelle il devrait être en mesure de poursuivre l'affaire.

Failure to provide medical certificate

(7) If a claimant fails to

Défaut de transmettre un certificat médical

(7) À défaut de transmettre un

provide a medical certificate in accordance with subrules (5) and (6), the claimant must include in their explanation	certificat médical, conformément aux paragraphes (5) et (6), le demandeur d'asile inclut dans son explication :
(*a*) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;	*a*) des précisions quant aux efforts qu'il a faits pour obtenir le certificat médical requis ainsi que des éléments de preuve à l'appui;
(*b*) particulars of the medical reasons included in the explanation, supported by corroborating evidence; and	*b*) des précisions quant aux raisons médicales incluses dans l'explication ainsi que des éléments de preuve à l'appui;
(*c*) an explanation of how the medical condition prevented them from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim or otherwise pursuing their claim, as the case may be.	*c*) une explication de la raison pour laquelle la situation médicale l'a empêché de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à laquelle il devait être transmis ou de se présenter à l'audience relative à la demande d'asile.
Start or continue proceedings	**Commencer ou poursuivre les procédures**
(8) If the Division decides not to declare the claim abandoned, other than under subrule (2), it must start or continue the proceedings on the day the decision is made or as soon as possible after that day.	(8) Si la Section décide de ne pas prononcer le désistement, sauf dans le cas prévu au paragraphe (2), elle commence ou poursuit les procédures le jour même de cette décision ou, dès que possible après cette date.

[41] RPD Rule 65(1)(*a*) permitted the Member to immediately declare the claims abandoned if the Applicants were provided with an opportunity to explain why they should not be so declared, the claimants were present and the Member considered it fair to do so. The Applicants

provided no authority for their submission that, because a special hearing date was automatically set in the Notice of Hearing in the event that they did not attend the hearing, in this case November 6, 2013, the Member was precluded from conducting an immediate abandonment hearing. Nor is this supported by a plain reading of RPD Rule 65(1).

[42] As to the Applicants' view that the policy of the RPD of hearing a family's claims together deprived the Member of jurisdiction to disjoin the claims, the Applicants do not identify the policy, nor do they submit any authority for that view. Similarly, although the Applicants take the position that the Member failed to consider any of the factors stipulated by the RPD Rules to be considered when a postponement is requested, they do not cite the specific Rule(s) upon which they rely or identify the factors that they assert were not considered.

[43] In summary, the Member did have the jurisdiction to disjoin Ms. Kokyova's claim. And, given that that Ms. Kokyova was not present on October 16, 2013, the medical evidence, the Member's prior advice that the Principal Applicant would testify on her behalf if she was unable to do so, and, the fact that the family members were all relying on the Principal Applicant's PIF, the Member did not act unfairly in proceeding as he did. And, by disjoining her claim, the hearing for the Principal Applicant and the two minor Applicants could have proceeded while the claim of Ms. Kokyova was preserved. If necessary, the Principal Applicant could later have testified on behalf of his wife if she were declared a Vulnerable Person. Once her claim was disjoined, Ms. Kokyova had no right to attend the hearings of the other Applicants, and the Principal Applicant failed to provide an adequate reason as to why it was necessary for her to be

in attendance when his claim was heard, simply saying that he would be in a bad position to testify without his wife.

[44] With respect to the finding of abandonment, the Member also had the jurisdiction pursuant to RPD Rule 65(1) to declare the claim abandoned at the October 16, 2013 hearing. The Principal Applicant was provided with an opportunity to explain why the claim should not be declared to be abandoned, given his refusal to testify. Although he initially stated that his wife had important evidence to give, he revised this and confirmed that their claim was common. The only other reason provided was that he wished to have her support, even if she could not testify. The Member found this to be insufficient and gave his reasons for that finding. The Principal Applicant persisted with his refusal to testify even though he was advised of the risk of a finding of abandonment. The Principal Applicant, by continuing to refuse to testify when faced with the very real risk of an abandonment finding, failed to demonstrate his intent to continue with the proceedings. In fact, he demonstrated the opposite.

[45] In these circumstances, the Member acted within his authority by declining to postpone the hearing on October 16, 2013, disjoining the claims and finding the Principal Applicant's claim, and those of the minor Applicants to be abandoned. There has been no breach of procedural fairness or natural justice.

Issue 2: Was there a reasonable apprehension of bias or actual bias?

[46] With respect to the Applicants' allegation of reasonable apprehension of bias, it must first be noted that the Applicants provide no particulars in support of that allegation. While they

assert that the Member pursued a single-minded outcome at any cost, the real issue in that regard is the question of procedural fairness. As indicated above, the Member had the jurisdiction to proceed as he did in declining to grant an adjournment, disjoining the claims when faced with the Principal Applicant's refusal to testify, and declaring the Applicants' claims abandoned. The Member explained that he was disjoining the claims for reasons of administrative efficiency and that Ms. Kokyova's claim would be preserved. At the hearing, counsel for the Applicants asserted that if the Member could not see how this was unfair then he could not decide the case fairly. The Member responded that counsel had not given a good reason why disjoining would impact the Principal Applicant's claim (CTR at 906-07).

[47] The Supreme Court of Canada set out the test for reasonable apprehension of bias in *RDS*:

> [31] The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:
>
>> . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>>
>> The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the

> suggestion that the test be related to the "very sensitive or scrupulous conscience".

[…]

[104] In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word 'impartial' . . . connotes absence of bias, actual or perceived". See *also R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

[105] In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:

> The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). [Emphasis in original.]

Scalia J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable — in other words, it is not "wrongful or inappropriate": *Liteky*, *supra*, at p. 1155.

[106] A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.
>
> See also *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.), at para. 64; *Gushman*, *supra*, at para. 29.

[48] The Principal Applicant must establish that the Member's actions or reasons demonstrated actual or perceivable bias. There is a high threshold to be met in this regard: *Zhu v Canada (Citizenship and Immigration)*, 2013 FC 1139 at para 2 [*Zhu*]:

> [2] An applicant alleging bias must meet a very high threshold. He or she must provide "cogent evidence" demonstrating that something a Refugee Protection Division [RPD] member has done gives rise to a reasonable apprehension of bias (*R v RDS*, [1997] 3 SCR 484 at para 116-117). As stated in *Arthur v Canada (Attorney General)*, 2001 FCA 223, allegations of bias cannot be done lightly:
>
> > [8] … An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard … [Emphasis added].
>
> [Emphasis in original]

[49] I agree with the Respondent that the Applicants have failed to demonstrate how the Member acted in a biased manner. Nor have they established that they were not given the opportunity to be heard by a disinterested and impartial tribunal and were, thereby, denied natural justice.

[50] The Applicants also submit that they moved orally to have the Member recuse himself but that the motion was denied and was not referred to in the decision. However, they provided no authority for the proposition that they were entitled to written reasons on the oral motion. There is, however, jurisprudence that suggests that when a motion is decided at an RPD hearing with reasons for dismissing it given orally, the RPD does not have to repeat its reasons in its decision (*Elmahi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1472 at paras 14-16).

[51] In any event, the transcript indicates that the Member did not agree with the Applicants' position that his actions were malicious and an attempt to circumvent the law and to create unfairness or that disjoinder was illegal and inappropriate. He stated that he did not believe that he was being unfair and unbiased, and he denied the motion on that basis. In my view, reading the transcript and the decision in whole, the reasons for the Member's actions were clearly explained and do not support an allegation of apprehension of bias.

[52] For these reasons the application is denied.

IMM-8082-13

Decision Under Review

[53] The Member incorporated the text of his abandonment decision concerning the Principal Applicant and the two minor Applicants into his decision concerning Ms. Kokyova's claim. He noted that on the hearing date Ms. Kokyova appeared and that her husband was in the waiting room. Her counsel moved for the Member to recuse himself due to bias. The Member declined to do so, as he was acting within the RPD Rules with an aim of ensuring full natural justice while at the same time moving efficiently to finalize the claims. Counsel also requested that the Member rejoin the claims of the other family members, which request was refused, as the abandonment decision explained the Member's position.

[54] The Member stated that he was desirous that the four original claimants should somehow have an opportunity to have their claims presented and, if successful, to apply for permanent residence in Canada. This could be achieved even if only Ms. Kokyova's claim was heard, as, if she was successful, the others could be included in her application for landing.

[55] The Member stated that:

> [24] It is recalled that the claimant's husband previously refused to testify because the claimant was not in the hearing room with him. At this hearing, the claimant remained in the waiting room. Thus, the Panel suggested to counsel, as it had suggested before, that, due to the claimant's psychological condition, her husband could testify for her. He was apparently going to do just that in his hearing, but refused because the claimant was not there. This time, the claimant was there, but, counsel advised, he refused to testify. The Panel again suggested that if he were the stronger witness than

> the claimant, with her psychological condition, then it might be better if she [*sic*] testified, and the Panel repeated its suggestion. It was declined again. Counsel advised that her husband was nervous and anxious and had a stomach ache, but that he also just did not want to testify, in that his claim had been found to be abandoned. While not discussed at the hearing, no medical note was supplied in regard to the husband. In fact the Panel would have preferred that her husband give oral evidence, as he did not have any psychological issues, nor was he trembling. However, the Panel cannot decide this matter - it was decided by counsel, the claimant and her husband. The Panel could only make the offer and gently recommend, and it is up to the other parties to make the decision. The Panel did its best to provide reasonable accommodation for the claimant in procedural matters. The Panel also offered counsel the opportunity to have the claim decided by his submissions and the written evidence only, if he believed the claimant could not testify adequately. Counsel declined this option.

[56] Ms. Kokyova did testify and the Member found that her evidence, overall, was not credible and was therefore insufficient to support her claim for refugee status. Somewhat surprisingly, Ms. Kokyova has not challenged that finding.

[57] The Member then considered whether Ms. Kokyova required protection because she is a Roma from Slovakia. The Member stated that he had reviewed the documentation on file and considered counsel's oral submissions as well as a decision referred to by counsel in his submissions. The Member referenced country conditions documents, noted that other documentation in the file was consistent with them and concluded that there was a mere possibility, but less than a serious possibility, that Ms. Kokyova would be physically attacked because she is Roma. Further, that the discrimination against Roma in Slovakia, even viewed collectively and in all its aspects, does not constitute persecution. Accordingly, Ms. Kokyova

was not a Convention refugee or a person in need of protection. This finding has also not been challenged.

[58] The Member also noted that he had refused to enter as an exhibit a DVD of what counsel referred to as approximately "55 or 65" movies, presumably about Roma in Slovakia—the stated reason for this being that if the decision were appealed a written record would have to be created and a DVD could not be duplicated easily, or at all, as a part of a written record. The decision stated that the Member suggested that the DVD could be viewed at the hearing on the record but that no device was available and that counsel had not requested audiovisual equipment although, based on a previous sitting, the Member had indicated that he would not accept the DVD as evidence on the record. The Member also suggested that a transcript of the DVD could be created and submitted by counsel but that this was not pursued. The Member noted that Exhibit C-5 contains some 712 pages of country condition materials. There was also Exhibit R/A-1 and the oral and personal evidence of Ms. Kokyova. The Member concluded that sufficient country evidence was on the record.

Applicant's Position

[59] The written submissions of Ms. Kokyova in this matter are virtually identical to those submitted in matter IMM-7966-13. In addition, she submits that the Member erred in not allowing the postponement on October 16, 2013, when she was clearly genuinely ill. Further, that the decision was demeaning and, in an attempt to cover up and remedy his breaches of procedural fairness, the Member stated that he was going to allow the Principal Applicant, whose claim had been abandoned and who was in the waiting room during the Applicant's hearing, to

testify on her behalf. Ms. Kokyova submits that this was an improper and insulting attempt to place blame on her for not having asked her husband to testify for her.

[60] Further, that the Member failed to admit into evidence the DVD which had been submitted on March 26, 2012. The apparent reason for this was that the Member was unable to play it on his computer. He also declined counsel's offer to play the DVD on his own computer at the hearing. This shows that the Member was biased and not interested in hearing or seeing the evidence.

[61] Ms. Kokyova submits that, based on the events at the October 16, 2013 hearing, at her own hearing and the refusal to admit the DVD, the Member had predetermined her case. His bias was also demonstrated by his statement on several occasions, "let's get this hearing over with".

Respondent's Position

[62] The Respondent points out that Ms. Kokyova does not dispute the negative credibility findings on which the Member based its refusal of her refugee claim. Nor does she dispute his finding that the discrimination that she experienced in Slovakia did not amount to persecution.

[63] The Respondent submits that the Member stated explicitly at the October 16, 2013 hearing that Ms. Kokyova's claim had not been abandoned. Further, that she was in no way prejudiced by the Member's declaration of abandonment in respect of the Principal Applicant's claim, nor was she deprived of her right to be present at her own refugee claim hearing.

[64] The test to establish a reasonable apprehension of bias is a high one (*RDS*) and is largely fact dependent. Ms. Kokyova failed to meet her burden in that regard (*Zhu* at para 46). Instead, she makes repeated bare allegations of bias without reference to the reasons or sworn evidence. The Member considered all of the circumstances surrounding Ms. Kokyova's claim and explained why he refused to rejoin the claims and why he declined to recuse himself. The Member attempted to accommodate Ms. Kokyova's psychological state and also explained his refusal to admit the DVD as evidence at the time of the hearing. The fact that he offered to allow counsel to create and submit a transcript of the DVD discredits Ms. Kokyova's submission that the Member was biased and not interested in seeing or hearing the evidence.

[65] Ms. Kokyova's submission that the Member had predetermined the case is contradicted by his reasons, which fail to disclose evidence that could lead a reasonable person to believe that the Member's hearing of the Applicant's claim was characterised by either actual bias or the appearance thereof. Moreover, Ms. Kokyova's submissions are *ad hominem* attacks that are without evidentiary foundation (*Zhu* at para 46).

[66] The Respondent submits that the Member preserved Ms. Kokyova's right to have her refugee claim heard and that he did not fail to uphold any principle of natural justice or procedural fairness in determining that the Applicant is neither a Convention refugee nor a person in need of protection.

Analysis

[67] In my view, there is no merit to Ms. Kokyova's submission that the Member displayed his bias by demeaning her by inviting her husband to testify on her behalf. As indicated above, at the August 8, 2013, hearing Ms. Kokyova submitted medical evidence of her mental health; indeed, the Member even noted that she was trembling and took no issue with her psychological state. The October 15, 2013 letter from her psychiatrist stated that her symptoms were severe and had improved only modestly with treatment, although he was hopeful that she could make further gains in her treatment if she were able to remain in Canada without threat of removal. She did not attend the hearing of October 16, 2013, owing to her mental health, which was supported by further medical evidence. The proposal that her husband testify on her behalf, initially as a DR but later more correctly on the basis that she be declared a Vulnerable Person, was not inappropriate in such circumstances and is not indicative of bias.

[68] The Member also offered to have the claim decided on the basis of submissions from counsel and the written evidence if Ms. Kokyova was unable to properly testify, owing to her psychological condition.

[69] It is also of note that in paragraph 24 of Ms. Kokyova's written submissions she decries the disjoinder of her claim on the basis that it condemned her to speak alone for herself:

> Mr. Sterlin's actions went far beyond the role of Member herein, and he made it his personal mission to achieve his objectives. Mr. Sterlin even disregarded the fact that by separating Zlatica Kokyova's claim from the claims of the family, he thereby condemned Zlatica Kokyova, the Applicant, to do something which Mr. Sterlin was fully aware that she likely could not do, that

> is, to alone speak for herself, and to testify on her own behalf if her claim proceeded alone.

[70] Yet, in paragraphs 30 and 31 of those same submissions she asserts that the Member demeaned her by suggesting that her husband testify on her behalf:

> In a particularly demeaning portion of his decision, and in an attempt to cover-up and remedy his overwhelming procedural breaches towards this family, Mr. Sterlin states that he was going to allow the adult male husband of the Applicant, whose claim he had recently abandoned on October 16, 2013, and who was in the waiting room during the Applicant's hearing, to testify on her behalf.
>
> It is difficult to find the proper words to characterize this utterly improper and insulting attempt by the Member Mr. Sterlin to place blame on the Applicant, for not having asked her husband to do so. All of this is only exceeded by a bizarre statement by Mr. Sterlin made by him in his decision, where he states that "The Panel did its best to provide reasonable accommodation for the claimant in procedural matters." It is not comprehensible, how Mr. Sterlin could make such a statement, when he had declared Abandoned the claims of the Applicant's husband and both of her children, when he has utterly breached and trampled on all of their procedural rights, as can be seen from the Affidavit, and when he was extremely biased agains [*sic*] this family throughout all of their Hearings.

[71] The Member's suggestion was not an effort to demean Ms. Kokyova, and it certainly did not demonstrate bias. Rather, it was an effort to ensure that the best available evidence was put forward in the circumstances of Ms. Kokyova's mental health, which she herself had raised as a concern.

[72] As to the Member's refusal to recuse himself, Ms. Kokyova's submits that the Member had predetermined her case and that given his "history" with her and her family he should not

have presided over her claim. A review of the hearing transcript shows that the recusal motion was brought at the commencement of the hearing. The motion adduced no factual basis for the allegations of bias toward Ms. Kokyova. Rather, counsel reiterated his position, expressed during the hearing of the Principal Applicant's claim (CTR at 960-62), that the Member had breached procedural fairness and natural justice in that hearing. The Member again denied the motion.

[73] There is also no evidence that the Member had predetermined the outcome. In fact, his reasons state that he wished for the four original claimants to have an opportunity to have their claims presented and that if Ms. Kokyova's claim were to succeed then that the others could be included in her application for landing. The transcript discloses that he repeatedly encouraged counsel and Ms. Kokyova to have her husband give evidence on her behalf in view of her fragile psychological state and in an effort to elicit the best evidence. Moreover, in his decision he fully assessed the facts and the evidence, making findings on credibility, discrimination and persecution, which have not been challenged.

[74] As to the DVD, the Member stated in his decision:

> [28] …In addition, the Panel notes, at a previous sitting (there is a faint possibility, though, that this was in regard to another claim with the same counsel and the same country and profile of claimant) the Panel had also indicated to counsel that it would not accept this CD. Counsel professed to not recall this, but it did occur. Counsel had not requested audiovisual equipment to view this CD at the hearing, despite that he knew or should have known that the Panel would not accept it as evidence on the record.

[75] The transcript shows that the Member declined to accept the DVD because, if the file had to be duplicated for the Court, a paper record would be required. Further, if he wanted to review the evidence later in his office, he did not know if his computer played DVDs. Counsel offered to play the DVD on his computer at the hearing, however, the Member declined as he did not think there was time to watch 65 movies (how long this would have taken is not stated) and that it was not practical. The Member stated that he would accept a transcript of the DVD after the hearing and that the Applicants had supplied 712 pages of country documents, which was sufficient to found his decision. Upon the refusal, counsel again alleged bias.

[76] I have some doubt as to the validity of the basis for the Member's refusal to accept the DVD as evidence in that form, being that it would not comprise a part of the written record. I would note, without deciding the point, that this Court has held that DVDs are admissible before administrative tribunals in other circumstances (*Grenier v Canada (Attorney General)*, 2013 FC 208 at paras 31, 34-39). In any event, the decision indicates that counsel was invited to submit a written transcript of the content of the DVD, which suggests that the Member was willing to consider that evidence. Even if the refusal to accept the DVD was in error, given the offer to accept a written transcript, it is not sufficient to demonstrate bias.

[77] Ms. Kokyova also submits that the Member's statement on several occasions of "let's get this hearing over with" indicated his deep bias and that he was not interested in hearing evidence. Having reviewed the transcript, it is glaringly apparent that counsel opposed every suggestion of the Member and argued, repeatedly, many of the same issues. It is not surprising that at some

stage the Member stated that he desired to get the hearing over with. This, in my view, was an expression of his frustration rather than an indication of bias.

[78] By way of example, at one point in the hearing when the Member stated "let's get this hearing over with" it followed an exchange in which counsel repeatedly interrupted him unnecessarily while he was trying to ask Ms. Kokyova a question. Counsel then asked the Member what he meant by his statement "let's get this hearing over with", and the Member explained that Ms. Kokyova was not feeling well and that arguing back and forth was prolonging the questioning (CTR at 986-88).

[79] Given the foregoing, Ms. Kokyova has failed to establish a breach of procedural fairness, natural justice or bias on the part of the Member. Her application for judicial review is therefore denied.

[80] In summary, while the Applicants disagree with the procedure adopted by the Member, his procedural decisions were within his jurisdiction and were not unfair in the circumstances, nor did they result in a denial of natural justice. Further, the facts and the circumstances of these matters do not meet the high threshold that is required to establish a reasonable apprehension of bias.

[81] Accordingly, both applications are dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The applications for judicial review are dismissed.

2. There shall be no order as to costs.

3. No questions of general importance have been proposed or arise.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7966-13
STYLE OF CAUSE:	ZOLTAN KOKY, MILADA KOKYOVA, ZOLTAN KOKY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-8082-13
STYLE OF CAUSE:	ZLATICA KOKYOVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 9, 2015
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	APRIL 29, 2015

APPEARANCES:

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