Federal Court  Cour fédérale

Date: 20161216

Docket: IMM-919-15

Citation: 2016 FC 1385

Ottawa, Ontario, December 16, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

A. B., C. D. AND E. F.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the February 2, 2015 decision of Mr. John Kivlichan, a member ("Member") of the Refugee Protection Division of the Immigration and Refugee Board of Canada ("RPD"). The Member found that the Applicants were excluded from refugee protection pursuant to Article 1F(b) of the *Convention Relating to the Status of Refugees, 1951*, CTS 1969/6; 189 UNTS 150 ("Convention") as the principal applicant (hereinafter referred to as the "Applicant") had committed the serious non-political

crime of child abduction. Alternatively, that the Applicant was generally not credible, had failed to establish subjective fear or to rebut the presumption of state protection and, on that basis, the Applicant and her two minor children, for whom she had been appointed as the designated representative, were not Convention refugees nor persons in need of protection pursuant to s 96 or s 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

Confidentiality Order

[2] A Confidentiality Order was issued in this matter by Prothonotary Milczynski on March 12, 2015. At the hearing before me, the parties agreed that the documents that had been sealed and filed as confidential in the Court record would remain as such. It was also agreed that the hearing would proceed in open Court which was attended only by persons known to the parties, however, that the names of the Applicants or names of others who might be associated with or serve to identify the Applicants would not be used during oral argument. Because the proceeding was recorded, I will order that, should any third party seek a copy of the recorded proceeding, the Court registry will ensure that any identifying names that may have inadvertently been stated during the course of the hearing will be deleted from the copy of the recording provided to the third party. In my view, no further steps are required. And, had the manner in which the Applicants interpreted the Confidentiality Order, specifically, had the extent of the sealing of the documents challenged, I would have entertained that motion.

Background

[3] The Applicant is a 39-year-old Roma woman from Hungary. In her lengthy Personal Information Form ("PIF") she claims that in Hungary, she worked as a journalist reporting about human rights violations involving the Roma, later as a researcher for the European Roma Rights Centre, and then for the Hungarian Ministry of Education. She served as a Member of the European Parliament ("MEP") from 2004 to 2009 where the focus of her parliamentary work was educational reform in Hungary and, in particular, the desegregation of schools for Roma children.

[4] The Applicant claims that following the establishment in 2007 of an anti-Roma extremist group, the Hungarian Guard, she began to change her focus in the European Parliament to investigate the response of the Hungarian state to, and complicity in violence against Romani people, including serial killings. She was able to provide evidence and file reports with the authorities for 39 cases. After a double murder on February 23, 2009, the Applicant held a press conference demanding an independent investigation. She alleges that during her tenure as a MEP she and her family were the subject of daily insults and threats and that in February 2009, she requested and obtained police protection for herself and her family until the end of her MEP term.

[5] The Applicant claims that between February and August 2009, she met with ambassadors from other countries and requested assistance in investigating the Romani murders. The United States Federal Bureau of Investigation ultimately assisted the Hungarian investigators

which resulted in the apprehension of six persons in August 2009. The Applicant alleges that during this time, she was questioned several times by the National Investigation Office as to whether she was organizing the Romani people for a potential anti-Hungary attack.

[6] The Applicant alleges that on August 29, 2009 she learned that the Hungarian secret service ("Secret Service") was involved in the Roma serial murders. As a result, she asked former liberal political colleagues in the Hungarian Parliament for help and, on September 22, 2009, a Fact Finding Working Group ("Working Group") was created within the Hungarian Parliament to look into the murders. The Applicant alleges that the Working Group shared some evidence with her but, in November 2009, the Hungarian Parliament ordered that information about any Secret Service involvement be held as confidential for eighty years. She claims that she was told that this was done in the interest of avoiding a Gypsy-Hungarian civil war.

[7] In October 2010, the Applicant travelled to New York and Washington to accept an award from Human Rights First for her human rights advocacy. Upon her return to Hungary, she decided to withdraw from public advocacy because she feared her surveillance by the Secret Service could endanger other activists or Roma victims. She also suffered an emotional crisis.

[8] On August 11, 2011 the Applicant learned that Jozsef Gulyas, a member of the Working Group, had been questioned by the Military Public Prosecutor and alleged to have committed the crime of unauthorized secret information collection. Upon learning this, the

Applicant formed the belief that it was no longer safe for her and her family to remain in Hungary as she would be arrested because of her knowledge of the government's involvement in the Romani killings.

[9] The Applicant bought tickets to fly to Canada on August 25, 2011. However, she did not leave at that time because her husband suffered a stroke on August 22, 2011. She claims that in February 2011, she was contacted by a Dublin based foundation, Front Line Defenders for Human Rights, and advised that she ranked number one hundred on a list of one hundred and thirty of the world's most endangered human rights activists. The foundation invited her to attend a five day conference in Dublin which she did. While there, she informed the organizers of her fear of staying in Hungary and they agreed to pay the airfare for her and her family to travel to Canada.

[10] The Applicant came to Canada with her husband and three children on November 26, 2011. At the time of her departure, the Applicant's eldest child, a daughter from a previous marriage, was the subject of contested custody proceedings in Hungary. On December 14, 2011, the Budapest 20th, 21st and 23rd District Court issued a judgment terminating the Applicant's joint custody rights and ordering the child's return to the custody of her father with visitation rights to the Applicant.

[11] Subsequently, on November 30, 2012, the child's father obtained an order from the Ontario Court of Justice ("OCJ") under the *Hague Convention on the Civil Aspects of International Child Abduction, 1980*, CTS 1983/35; 19 ILM 1501 ("Hague Convention")

directing that the child be returned to Hungary. The child was returned to her father and her claim for protection in Canada was withdrawn.

[12] The basis of the Applicant's claim for protection was that she witnessed and experienced many forms of discrimination growing up in Hungary as a Romani child. Further, that throughout her career, she encountered discrimination and persecution because of her ethnicity and advocacy for the Roma people. In this regard, she was threatened during her term as a MEP and was later subjected to two physical attacks. The first in August 2009, when an unknown woman insulted the Applicant for 30 minutes while the Applicant was in her vehicle. The woman kicked the car door and tried unsuccessfully to open it. The Applicant claims that she called the police but they did not respond. The second in the spring of 2010, when the Applicant was insulted by a woman in a supermarket who also attempted to slap her. She did not report this incident to the police.

[13] The Applicant claims that she fears, if she and her family were to return to Hungary, they would be harmed by Neo-Nazis, the Secret Service and the police. She claims that the Secret Service has been monitoring her communications and activities for a number of years and are likely now aware of her knowledge of their and the Hungarian government's involvement in the Roma serial killings. She claims that she and her family are no longer safe anywhere in Hungary and fears that she personally would be detained or even killed if she were to return.

[14] The Minister initially took the position that he would not intervene as he had no concern with the Hague Convention application as the child had been returned to her father in Hungary,

and, with respect to a defamation and libel charge against the Applicant, as the maximum term of imprisonment was only five years, these were not serious crimes under the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*"). However, the Minister subsequently sought to intervene pursuant to s 170(e) of the IRPA and Rule 29 of the *Refugee Protection Division Rules*, SOR/2012-256 ("RPD Rules") in reference to the issue of credibility and, pursuant to Rule 36, to use an undisclosed document, being a Reuters news article dated June 16, 2013 describing an interview of the Applicant concerning her claim for protection. Subsequently, the Minister gave notice that, pursuant to s 170(e) of the IRPA, he intended to participate at the hearing on the basis of his belief that there had been a contravention of Article 1F(b) of the Convention, namely that the Applicant was excluded from refugee protection in Canada as she had committed the serious non-political crime of child abduction before coming to Canada.

[15] As set out in detail in the decision, various matters were addressed by the Member, including an application by the Applicant objecting to the Minister's intervention, which application was denied. The Applicant and the Minister also made several post-hearing submissions and the Applicant, as well as the Member, made post-hearing disclosures. The submissions included responses to requests made by the Member concerning the Supreme Court of Canada's decision in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 ("*Febles*") as it related to the issue of exclusion before the Member, and the relevance of s 283 of the *Criminal Code*. As discussed below, the post-hearing disclosure included various documents pertaining to the claim for protection of an alleged former employee of the Applicant ("Former Employee") and his family, and, members of the Applicant's immediate family who arrived in

Canada in November 2014 and sought refugee protection. The Member issued his decision on February 2, 2015.

Decision Under Review

[16] The decision is 112 pages in length and is comprised of 531 paragraphs. Accordingly, what follows is a brief description of the Member's reasons.

[17] Paragraphs 65 to 257 of the decision concern the Member's exclusion analysis. The Member noted the applicable legislative provisions, jurisprudence speaking to the applicable standard of proof (*Lai v Canada (Minister of Citizenship and Immigration),* 2005 FCA 125) and that the applicability of the exclusion clause is not dependent upon whether the claimant has been charged or convicted of the criminal acts in question (*Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 298 (CA)). The Member also referenced the Supreme Court of Canada's decision in *Febles*. The Member stated that he must first determine "whether there are serious reasons for considering the first part of Article 1F(b) of section 98 of the Act" (at para 76). In that regard, he would review the evidence concerning the abduction of the child and the Hague Convention application. The latter on the basis that it was relevant to the exclusion, although the OCJ decision was not binding upon him (*Kovacs v Canada (Minister of Citizenship and Immigration),* 2005 FC 1473 at paras 9-10 ("*Kovacs*")).

[18] In this regard, the Member provided his description, in great detail, of the facts and findings of the 22 page decision of the OCJ and quoted extensively from it. Of note is that in 2005, a Hungarian court had made an order granting joint legal custody of the child, the adopted

daughter of the Applicant and her ex-husband, which contained a provision allowing either parent to remove the child from Hungary for periods of up to two weeks without the prior consent of the other parent.

[19] The Member noted that in the OCJ proceeding, the child's father gave evidence that the Applicant had told him that she wished to work abroad and to take their daughter with her. Concerned that the child's education had previously been detrimentally impacted by the Applicant's frequent moves, he took the child to the Hungarian government guardianship office where she was interviewed and gave a statement objecting to being removed from Hungary and stating that she wished to remain with her father. The Member noted that the OCJ decision revealed that on September 26, 2011, the Applicant made a complaint to the Hungarian police alleging sexually inappropriate behaviour towards the child by her father, stemming a police investigation. In October 2011, the Hungarian court appointed a lawyer for the child and a psychologist to conduct a family assessment involving the child, the parties, and their current partners, and adjourned the case to December 14, 2011. However, on November 26, 2011, the Applicant removed the child from Hungary, telling her that they were going on a vacation. On December 14, 2011, when the Hungarian court learned of the removal prior to the assessment being completed, it issued a final order dissolving the prior joint custody and placed the child in the custody of her father.

[20] The Member stated that the OCJ agreed, given the provision in the original custody order allowing removal from the country for up to two weeks by either parent, that it appeared the child had not been "wrongfully removed" from Hungary but that "...there can be no doubt that

she was wrongfully retained…" (at para 102). The Member noted the OCJ assessment of the risk of harm to the child if she returned to Hungary, including the Applicant's admission that the child would be safe if she lived with her father and that the risk of harm due to her Roma ethnicity was remote and could be safely managed by her father. Further, that the OCJ had noted that the Applicant did not pursue the allegation of sexually inappropriate behaviour at the hearing before it, conceding that the behaviour alleged could not be established on the balance of probabilities. And that, upon the OCJ's own review of the evidence, including the report of a clinical investigator assisting the Office of the Children's Lawyer ("OCL") who interviewed the child, it agreed with that conclusion.

[21] The Member found that there were serious concerns raised with respect to the overall credibility of the Applicant arising from the OCJ decision. For example, that the Applicant had threatened her daughter that she might have to return to Hungary because, as reported by the clinical investigator, she did not "say the right thing" (at paras 135, 173). The Member found that this suggested that the Applicant has a propensity to focus her efforts on saying the right thing as opposed to telling the truth. Further, because the OCJ was of the view that the Applicant had attempted to mislead her own child in order to gain advantage in the custody situation, this was conduct that spoke poorly to the Applicant's credibility and led the Member to draw an adverse inference. The Member also found that the Applicant had made a false allegation about her ex-husband in the 2011 custody litigation and to the Hungarian police. This led the Member to find that she was willing to misrepresent or to indeed lie in judicial proceedings and to police authorities in order to win her case or otherwise gain advantage and that she allowed her conduct to be governed by the principle that the end justifies the means. The Member went on to make

many other negative credibility findings in concluding that the Applicant was not a credible witness.

[22] Before the Member, the Applicant had submitted that no crime had been committed outside Canada as the Applicant was permitted, by the custody order then in place, to remove her daughter from Hungary for two weeks without the prior consent of her ex-husband. Thus, any crime of abduction occurred only two weeks after the Applicant arrived in Canada, and not in Hungary. In the result, Article 1F(b) had no application. However, the Member found that the Applicant had conceded that she removed her daughter from Hungary not intending to return within two weeks as required by the custody order, but rather with the intent of relocating to Canada without the knowledge or consent of the child's father. The Member found that the "guilty act" of the Applicant was the removal of the child from Hungary with the intent to deprive the child's father of her custody and the intent to contravene the custody order and not to return to Hungary. The Member stated that it was undisputed that the Applicant had a "guilty mind" or *mens rea*.

[23] The Member concluded there were serious reasons for considering that the Applicant had committed a serious non-political crime outside the country of refuge prior to her admission to that country as a refugee, specifically, s 282 of the *Criminal Code* - Abduction in contravention of a custody order. Alternatively, s 283 - Abduction, applied in which event the Attorney General's consent for that charge was not relevant to the Member's determination. He stated that in order for him to find that the Article 1F(b) exclusionary provisions applied, he need only determine that both the guilty mind and the guilty act were present. Based on his prior factual

findings, the Member also found that there was no available defence of imminent harm pursuant to s 285 of the *Criminal Code*. He then quoted paragraph 62 of *Febles* and applied the factors listed in *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404 ("*Jayasekara*") (which application is discussed further in the analysis below).

[24] As to whether the crime met the criteria of a serious non-political crime as envisioned by Article 1F(b), the Member stated that the OCJ had found the Applicant to have contravened an important international convention regarding child abduction. Therefore, the offence was sufficiently serious, applying the comments from *Febles* and the factors from *Jayasekara*. He concluded that on the totality of the evidence, he was satisfied that the Minister had established that there are serious reasons for considering that the Applicant has committed a serious non-political crime before coming to Canada.

[25] In paragraphs 258 to 528 of his decision, the Member conducted an analysis of the merits of the refugee claim. The Member made further adverse credibility findings and found the Applicant's claim to lack credibility. He also found that the evidence did not support that she and her children had been marginalized or discriminated against on the basis of ethnicity. To the contrary, the evidence was that the Applicant had achieved success in Hungary. She had obtained a university degree, owned properties in Budapest, had been employed from 1991 to 2009 and was then selected to hold a political post. Her sister had stated in an interview that, because of the social origin of her family, she had never been discriminated against. Further, the OCJ had found, amongst other things, that the Applicant's daughter had not been attacked or persecuted and had attended desegregated schools. The Member found that this all suggested a

limited risk for the Applicant and her children and provided little persuasive evidence of discriminatory treatment of the children.

[26] The Member did not accept the Applicant's unsubstantiated allegation that there was a government conspiracy or that the Secret Service or other agent of the Hungarian government was directly responsible for the Roma killings in 2008 and 2009. He gave greater weight to documentary evidence that contained a contrary opinion and concluded that police incompetence does not necessarily equate to police complicity or apathy. The Member also found that the Applicant's inability to give any persuasive testimony about the existence of any state secrets, or her knowledge or possession of them, impugned her credibility and undermined the well-foundedness of her alleged fear of persecution from the Hungarian state and its agents. Further, if she were to return to Hungary, she could openly make her allegations of government involvement in the killings or assaults on Roma without fear of reprisal, although there was no credible evidence to support her allegations.

[27] The Member also drew an adverse inference from the Applicant's continued participation in media interviews regarding her refugee claim and her knowledge of state secrets while her claim, and those of her immediate family, had yet to be determined. Further, the Member found that the Applicant had, in her original PIF, sought to deceive the Immigration and Refugee Board of Canada with respect to the status of her daughter's custody and that her conduct in that regard impugned her credibility. Similarly, her PIF failed to mention her allegation, made before the Member, of being stopped daily by the police. The Member found that the Applicant had failed to give a reasonable explanation for the omission and drew a negative credibility inference.

Based on the cumulative credibility findings the Member found that the Applicant had failed to provide sufficient credible evidence regarding her motivation for leaving Hungary and he did not believe that she feared the Secret Service nor that she came to Canada because of a genuine subjective fear of persecution.

[28] With respect to subjective fear, the Member noted that the Applicant delayed her departure from Hungary and found that her reason for doing so was not reasonable. Further, the Applicant had not sought protection when she went to the United States in October 2010. In addition, the Applicant travelled to Ireland in September 2011 and, although she could not claim asylum there, the Member found that her voluntary return to Hungary was inconsistent with her alleged fear of persecution. He drew negative inferences regarding her subjective fear and credibility.

[29] The Member also found that the Applicant had failed to rebut the presumption of state protection. The Member acknowledged that the objective evidence was mixed regarding Hungary's efforts to provide protection to Roma against discrimination and that there had been local failures in that regard. He also stated that he had weighed the comments of a refugee coordinator with Amnesty International and an affidavit of a former Hungarian Minister of Education concerning risks to Roma rights activists. However, the Member found that the subjective evidence did not support that the Applicant had personally experienced serious problems of discrimination. Further, while the Applicant expressed distrust of the police, she had been provided with police protection when she requested it during her tenure as a MEP which indicated that the police were willing and able to offer protection. Given her general lack

of credibility, the Member did not accept that the police protection would not be provided, if requested, after her MEP term concluded. The Member stated that, viewed fairly, the objective evidence indicated that Hungary has taken serious measures to address and improve state protection for minorities suffering from discrimination, which included Roma, that it continued to battle right wing extremism and, while the results may not be perfect, there have been concrete signs of many operational successes.

[30] The Member acknowledged two psychiatric reports submitted by the Applicant but afforded them little or no weight.

[31] The Member also referenced the claim by the alleged Former Employee and his family in which the RPD had rejected an effort to submit a letter from the Applicant identifying herself as the current director of the "Fund of Movement for Desegregation" in Hungary and stating that the claimant in that application had been her employee. The Member sought and received written testimony from the Applicant in response to questions that were raised by documentation in the alleged Former Employee's claim, including why she had not mentioned him in her PIF nor an alleged targeted attack on him and his family by neo-Nazis because of his association with the Applicant and her work. The Member rejected the Applicant's explanation for the omission as spurious and lacking merit and drew a negative credibility inference. Further, he found that she knowingly provided corroborating evidence in support of the alleged Former Employee's fraudulent refugee claim and that she was a willing accomplice in that regard. This further supported his view that the Applicant generally lacked credibility.

[32] The Member also addressed post-hearing disclosure submitted by the Applicant concerning the refugee claim made by her mother, her sister and her sister's children but gave little weight to any of the assertions made by the Applicant's sister or other members of her family in their refugee claims.

[33] The Member stated that, even taking the Applicant's profile into account, he made a general finding of a lack of credibility given the "cumulative, important and remarkable, litany of negative credibility findings and inferences" as noted in his reasons (at para 528).

Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.
…	…

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98 La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Convention Relating to the Status of Refugees, 1951, CTS 1969/6; 189 UNTS 150

Article 1	Article premier
…	…
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
…	…
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiées;

Criminal Code, RSC 1985, c C-46

282 (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian or any other person who has the lawful care or	282 (1) Quiconque, étant le père, la mère, le tuteur ou une personne ayant la garde ou la charge légale d'une personne âgée de moins de quatorze ans, enlève, entraîne, retient, reçoit, cache ou héberge cette personne contrairement aux dispositions d'une ordonnance rendue par un tribunal au Canada relativement à la garde de cette personne, avec l'intention de priver de la possession de celle-ci le père, la mère, le tuteur ou une autre

charge of that person, of the possession of that person is guilty of

personne ayant la garde ou la charge légale de cette personne, est coupable :

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

a) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

(b) an offence punishable on summary conviction.

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

(2) Where a count charges an offence under subsection (1) and the offence is not proven only because the accused did not believe that there was a valid custody order but the evidence does prove an offence under section 283, the accused may be convicted of an offence under section 283.

(2) Lorsqu'un chef d'accusation vise l'infraction prévue au paragraphe (1) et que celle-ci n'est pas prouvée du seul fait que l'accusé ne croyait pas qu'il existait une ordonnance de garde valide, ce dernier peut cependant être reconnu coupable de l'infraction prévue à l'article 283 s'il y a preuve de cette dernière.

283 (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, whether or not there is a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of

283 (1) Quiconque, étant le père, la mère, le tuteur ou une personne ayant la garde ou la charge légale d'une personne âgée de moins de quatorze ans, enlève, entraîne, retient, reçoit, cache ou héberge cette personne, qu'il y ait ou non une ordonnance rendue par un tribunal au Canada relativement à la garde de cette personne, dans l'intention de priver de la possession de celle-ci le père, la mère, le tuteur ou une autre personne ayant la garde ou la charge légale de cette personne est coupable :

(a) an indictable offence and is

a) soit d'un acte criminel

liable to imprisonment for a term not exceeding ten years; or

passible d’un emprisonnement maximal de dix ans;

(b) an offence punishable on summary conviction.

b) soit d’une infraction punissable sur déclaration de culpabilité par procédure sommaire.

(2) No proceedings may be commenced under subsection (1) without the consent of the Attorney General or counsel instructed by him for that purpose.

(2) Aucune poursuite ne peut être engagée en vertu du paragraphe (1) sans le consentement du procureur général ou d’un avocat qu’il mandate à cette fin.

284 No one shall be found guilty of an offence under sections 281 to 283 if he establishes that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of that young person

284 Nul ne peut être déclaré coupable d’une infraction prévue aux articles 281 à 283 s’il démontre que le père, la mère, le tuteur ou l’autre personne qui avait la garde ou la charge légale de la personne âgée de moins de quatorze ans en question a consenti aux actes reprochés.

285 No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.

285 Nul ne peut être déclaré coupable d’une infraction prévue aux articles 280 à 283 si le tribunal est convaincu que les actes reprochés étaient nécessaires pour protéger la jeune personne en question d’un danger imminent ou si l’accusé fuyait pour se protéger d’un tel danger.

286 In proceedings in respect of an offence under sections 280 to 283, it is not a defence to any charge that a young

286 Dans les procédures portant sur une infraction visée aux articles 280 à 283, ne constitue pas une défense le

person consented to or suggested any conduct of the accused.	fait que la jeune personne a consenti aux actes posés par l'accusé ou les a suggérés.
…	…
787 (1) Unless otherwise provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five thousand dollars or to a term of imprisonment not exceeding six months or to both.	787 (1) Sauf disposition contraire de la loi, toute personne déclarée coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire est passible d'une amende maximale de cinq mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

Hague Convention on the Civil Aspects of International Child Abduction, 1980, CTS 1983/35; 19 ILM 1501

The States signatory to the present Convention,	Les Etats signataires de la présente Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,	Profondément convaincus que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,	Désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites et établir des procédures en vue de garantir le retour immédiat de l'enfant dans l'Etat de sa résidence habituelle, ainsi que d'assurer la protection du droit de visite,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -	Ont résolu de conclure une Convention à cet effet, et sont convenus des dispositions suivantes :

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are -

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

CHAPITRE I – CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet :

a) d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant ;

b) de faire respecter effectivement dans les autres Etats contractants les droits de garde et de visite existant dans un Etat contractant.

Article 2

Les Etats contractants prennent toutes mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention. A cet effet, ils doivent recourir à leurs procédures d'urgence.

Article 3

Le déplacement ou le non-retour d'un enfant est considéré comme illicite :

a) lorsqu'il a lieu en violation d'un droit de garde, attribué à une personne, une institution ou tout autre organisme, seul ou conjointement, par le droit de l'Etat dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour; et

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

b) que ce droit était exercé de façon effective seul ou conjointement, au moment du déplacement ou du non-retour, ou l'eût été si de tels événements n'étaient survenus.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Le droit de garde visé en a) peut notamment résulter d'une attribution de plein droit, d'une décision judiciaire ou administrative, ou d'un accord en vigueur selon le droit de cet Etat.

…

…

Article 7

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la présente Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

En particulier, soit directement, soit avec le concours de tout intermédiaire, elles doivent prendre toutes les mesures appropriées :

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

a) pour localiser un enfant déplacé ou retenu illicitement;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

b) pour prévenir de nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées, en prenant ou faisant prendre des mesures

provisoires;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

c) pour assurer la remise volontaire de l'enfant ou faciliter une solution amiable ;

d) to exchange, where desirable, information relating to the social background of the child;

d) pour échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant ;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

e) pour fournir des informations générales concernant le droit de leur Etat relatives à l'application de la Convention ;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

f) pour introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de permettre l'organisation ou l'exercice effectif du droit de visite;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

g) pour accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris la participation d'un avocat ;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

h) pour assurer, sur le plan administratif, si nécessaire et opportun, le retour sans danger de l'enfant ;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

i) pour se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, lever les obstacles éventuellement rencontrés lors

	de son application.
Article 8	Article 8
Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.	La personne, l'institution ou l'organisme qui prétend qu'un enfant a été déplacé ou retenu en violation d'un droit de garde peut saisir soit l'Autorité centrale de la résidence habituelle de l'enfant, soit celle de tout autre Etat contractant, pour que celles-ci prêtent leur assistance en vue d'assurer le retour de l'enfant.
…	…

Issues

[34] In my view, the issues arising in this matter can be stated as follows:

i. Did the Member err in finding that the Applicant was excluded pursuant to Article 1F(b) of the Convention?

ii. Did the Member err in his treatment of the evidence?

iii. Did the Member exceed his jurisdiction or breach his duty of procedural fairness?

Standard of Review

[35] The Applicant submits that decisions of the RPD are generally reviewable on the reasonableness standard but that the standard rises to correctness on errors of law (*Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*")). The Applicant submits that all of the errors of the Member fall below the reasonableness threshold. The Member's exceeding of his jurisdiction and breach of procedural fairness are matters which are reviewable for correctness. The

Respondent agrees that all of the issues are reviewable on a standard of reasonableness with the exception of questions of procedural fairness which are reviewed on a correctness standard.

[36] The determination of exclusion from the Convention pursuant to Article 1F(b) has previously been found by this Court to be a question of mixed fact and law reviewable on the reasonableness standard (*Jayasekara*, at para 14; *Villalobos v Canada (Citizenship and Immigration)*, 2015 FC 60 at para 13; *Roberts v Canada (Citizenship and Immigration)*, 2011 FC 632 at para 27).

[37] The RPD's assessment of the evidence is also reviewable on the reasonableness standard and is a matter to which deference is owed (*Liang v Canada (Citizenship and Immigration)*, 2013 FC 765 at para 43; *Walcott v Canada (Citizenship and Immigration*), 2010 FC 505 at para 18; *Gvozdenovic v Canada (Citizenship and Immigration)*, 2013 FC 851 at para 15; *Alhayek v Canada (Citizenship and Immigration)*, 2012 FC 1126 at para 49).

[38] Reasonableness is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[39] Jurisprudence has established that for issues of procedural fairness, including whether the RPD exceeded its jurisdiction and whether there is a reasonable apprehension of bias, correctness is the appropriate standard of review (*Yin v Canada (Citizenship and Immigration)*, 2010 FC 544

at paras 19-21; *Jadallah v Canada (Citizenship and Immigration)*, 2016 FC 1240 at para 24; *Gurusamy v Canada (Citizenship and Immigration)*, 2011 FC 990 at para 21).

[40] When applying the correctness standard of review, a reviewing court will not show deference to the decision-maker's reasoning process but will rather undertake its own analysis of the question (*Dunsmuir* at para 50).

Issue 1: Did the Member err in finding that the Applicant was excluded pursuant to Article 1F(b) of the Convention?

Applicant's Position

[41] The Applicant submits that to be excluded pursuant to Article 1F(b), the burden was on the Minister to establish both that there were "serious reasons for considering" that the Applicant committed a "serious non-political crime", and, that the crime occurred outside of Canada prior to the Applicant's entry. As neither of these factors were established, the Member erred in his conclusion.

[42] In determining whether the crime was "serious", the Member was required to follow the guidance provided by the Supreme Court of Canada in *Febles*. Specifically, although a crime will generally be considered as serious where a maximum sentence of ten or more years could have been imposed had the crime been committed in Canada ("ten year rule"), this is a generalization that should not be understood as a rigid presumption that is impossible to rebut.

[43] Further, in applying *Febles*, this Court has held that a wide sentencing range and the fact that the crime for which a claimant was convicted would fall on the lower end of the range is a critical factor that must be taken into account when determining if a crime should be considered a "serious non-political crime" (*Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 at para 48 ("*Jung*")). The Member was also required to consider that the penalty that would actually be imposed for an offence is likely to be much lower than the prescribed maximum (*Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709 at paras 16-20, 22 ("*Tabagua*")).

[44] In this matter, at issue are s 282 and s 283 of the *Criminal Code*, both of which stipulate a ten year maximum sentence. The Applicant submits that the courts rarely impose the maximum sentence in cases of parental abduction (*R v Thrones*, 2009 ONCJ 469 at para 32 ("*Thrones*")) and that the Member failed to engage in the required potential sentencing analysis which led to the erroneous conclusion that the crime committed by the Applicant was a serious non-political crime. Further, that it was unreasonable for the Member to rely on his own subjective view of what amounts to a serious crime in the face of evidence that the crime would attract a term of imprisonment which was between six months to two years (*Hersy v Canada (Citizenship and Immigration)*, 2016 FC 190 at para 68 ("*Hersy*")).

[45] The Applicant also submits that the Member failed to conduct an objective and impartial analysis of the factors laid out in *Jayasekara* to assess the seriousness of the crime.

[46] Additionally, that Article 1F(b) is limited to crimes committed prior to entry to Canada (*Malouf v Canada (Citizenship and Immigration)*, [1995] 1 FC 537; *Pushpanathan v Canada (Employment and Immigration)*, [1998] 1 SCR 982 at paras 73-74). In this case, the evidence establishes that, pursuant to the custody order, the Applicant was permitted to take the child out of Hungary for up to two weeks without the consent of the child's father. As such, any criminal act of the Applicant occurred in Canada and is therefore beyond the scope of Article 1F(b) which requires that the act be committed outside the country of refuge (*Reyes Rivas v Canada (Citizenship and Immigration)*, 2007 FC 317).

[47] The Applicant makes various other submissions as set out in her written representations.

Respondent's Position

[48] The Respondent submits that the Member's exclusion analysis was reasonable as the evidence established that the Applicant wrongfully retained the child and committed child abduction.

[49] The Respondent's written submissions describe Canada's entry into the Hague Convention thirty-six years ago and a July 25, 2015 report of the Senate Standing Committee on Human Rights, *Alert: Challenges and International Mechanisms to Address Cross-Border Child Abduction* ("Senate Report") as being representative of Canada's views with respect to international child abduction. The Senate Report was not before the Member.

[50] The Respondent submits that the policy objectives of Article 1F(b) include national interest. In that regard, the Respondent notes that access to refugee protection is not absolute. Exclusion clauses were included in the 1951 Refugee Convention because states had expressed concerns over an influx of common criminals, Article 1F(b) was enacted in that regard. The Respondent submits that a similar policy objective was identified in *Febles* when the Supreme Court of Canada stated that exclusion clauses are not to be interpreted so narrowly as to ignore a contracting state's need to control who enters its territory. Similarly, in *Jayasekara*, the Federal Court of Appeal stated that the perspective of the receiving state cannot be ignored in determining the seriousness of the crime. International treaties that Canada is a party to are also relevant considerations of its national interest and this Court has found no error in a decision of the RPD to treat the Hague Convention as a demonstration of the international community's view of international child abduction as a serious matter (*Kovacs* at para 27). The Respondent also submits that Canada's national interest is to deter child abduction.

[51] The Respondent submits that child abduction is a serious matter (*R v Mendez,* [1997] OJ No 13 (CA) at para 28) and misconduct of the most serious order given its consequences for both the child and the parent from whom he or she is taken (*R v Dawson,* [1996] 3 SCR 783 at para 84).

[52] The Respondent submits that sentencing is not an appropriate reference. In this regard and as recognized in *Jayasekara*, lenient sentences may actually be imposed with respect to serious crimes. However, the sentence does not diminish the seriousness of the crime (*Jayasekara* at para 41). The Respondent submits that *Febles* did not consider the crime of

international child abduction and nor do any of the post *Febles* cases. Further, that relying on sentencing in a wide range of highly fact-specific and distinguishable cases dangerously over simplifies the consequences of what Canadian courts have repeatedly recognized as a very serious crime.

[53] Despite that submission, the Respondent appears to agree that the ten year rule is relevant for the purposes of determining exclusion. However, the fact that an individual could receive a sentence at the lower end of the spectrum is not *prima facie* a rebuttal of the ten year rule presumption. Further, relying on Canadian sentencing where the Applicant has not been charged or convicted is asking the RPD to act as a sentencing criminal judge. In the absence of an actual penalty having been prescribed, the Member considered international standards, citing paragraph 37 of *Jayasekara*.

[54] The Respondent submits that the crime occurred outside of Canada. With respect to the elements of the crime, the Member considered both s 282 and s 283 of the *Criminal Code* and noted that the Applicant admitted in her oral testimony, and the OCJ decision confirmed that she removed the child from Hungary with the intention of wrongfully retaining her in Canada. The Member found that at the time the Applicant was leaving Hungary, she had the requisite intent to commit the crime of child abduction and mislead the child in order to deprive her of the custody of her father.

[55] The Respondent also submits that the onus was on the Applicant to rebut the seriousness of the child abduction but she provided minimal submissions on these factors. Based on the evidence before the Member, his review of the *Jayasekara* factors was reasonable.

[56] As well, the Applicant did not address s 787 of the *Criminal Code* but merely submitted that if the choice of the mode of prosecution was a relevant consideration, then the absence of a charge weighed against a finding that the alleged crime is serious. In any event, pursuant to s 36(3) of the IRPA, for purposes of the administration of the IRPA, the hybrid offence is deemed indictable even if the Crown elects to proceed summarily.

Analysis

[57] For the reasons below, I have concluded that the Member's finding that the Applicant committed a serious non-political crime pursuant to Article 1F(b) is unreasonable. There are two reasons for this. First, the Member failed to properly apply *Febles* and to consider the sentencing range. Second, his application of the *Jayasekara* factors was unreasonable.

Febles and sentencing range

[58] In *Febles*, the Supreme Court of Canada considered the question of whether Article 1F(b) barred the applicant therein from refugee protection because of the crimes he had committed before he came to Canada. There the applicant had been convicted in the United States and served time in prison for two assaults with a deadly weapon.

[59] In its analysis, the Supreme Court of Canada addressed the object and purpose of the Refugee Convention, which includes the international community's profound concern for refugees and commitment to assure refugees the widest possible exercise of fundamental rights and freedoms, but rejected a narrow interpretation of its exclusion clauses on the basis that:

> [29] The problem with this approach is that it risks upsetting the balance between humane treatment of victims of oppression and the other interests of signatory countries, which they did not renounce simply by together making certain provisions to aid victims of oppression. The Refugee Convention is not itself an abstract principle, but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests. In *R. (European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 A.C. 1, the U.K. House of Lords stated that the Refugee Convention "represent[s] a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other" (para. 15).
>
> [29] I agree with this statement of the Refugee Convention's twin purposes. While exclusion clauses should not be enlarged in a manner inconsistent with the Refugee Convention's broad humanitarian aims, neither should overly narrow interpretations be adopted which ignore the contracting states' need to control who enters their territory. Nor do a treaty's broad purposes alter the fact that the purpose of an exclusion clause is to exclude. In short, broad purposes do not invite interpretations of exclusion clauses unsupported by the text.

[60] As to Article 1F(b):

> [35] … I conclude that Article 1F(*b*) serves one main purpose - to exclude persons who have committed a serious crime. This exclusion is central to the balance the *Refugee Convention* strikes between helping victims of oppression by allowing them to start new lives in other countries and protecting the interests of receiving countries. Article 1F(*b*) is not directed solely at fugitives and neither is it directed solely at some subset of serious criminals who are undeserving at the time of the refugee application. Rather, in excluding all claimants who have committed serious non-

> political crimes, Article 1F(*b*) expresses the contracting states' agreement that such persons by definition would be undeserving of refugee protection by reason of their serious criminality.

[61] The Supreme Court of Canada concluded that although excluding people who have committed serious crimes may support a number of subsidiary rationales, "its purpose is clear in excluding persons from protection who previously committed serious crimes abroad" (at para 36).

[62] As to how a crime's seriousness is to be assessed, the Supreme Court of Canada stated:

> [61] The appellant concedes that his crimes were "serious" when they were committed, obviating the need to discuss what constitutes a "serious . . . crime" under Article 1F(b). However, a few comments on the question may be helpful.
>
> [62] **The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(*b*) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and**

> **crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.**
>
> (emphasis added)

[63] As noted by the Applicant in *Tabagua*, this Court applied *Febles* and held that the RPD's failure to discuss the sentence that the applicant would have likely received was a reviewable error. There the applicant had been convicted of shoplifting in the United States prior to seeking refugee protection in Canada. The RPD found that there were serious reasons to consider that the applicant's actions, had they been committed in Canada, would carry a maximum penalty of at least ten years' imprisonment. In this regard, it focussed not on the shoplifting but rather on the applicant's use of a forged passport and fraudulent identity when she was arrested and convicted of shoplifting. The RPD found that such actions would correspond to the offences set out in ss 57(b)(i) and ss 403(1) and (2) of the *Criminal Code* - namely forgery of or uttering a forged passport and identity fraud. The RPD found that these crimes are indictable offences and that, depending on the offence in question, carry a maximum sentence of 10 to 14 years' imprisonment. Accordingly, that the first branch of the *Jayasekara* inquiry was satisfied.

[64] In reviewing the RPD's decision, Justice Gleason stated that prior to *Febles*, as noted by Justice de Montigny at paragraph 32 of *Jung*, "… the presumption that a crime is 'serious' under Article 1F(b) if, were it committed in Canada, it would be punishable by a maximum of at least 10 years' imprisonment, was consistently applied by the Courts…". However, that the Supreme Court of Canada had "significantly nuanced this proposition in *Febles*", referring to paragraph 62 of that decision.

[65] Justice Gleason noted that in *Jung* Justice de Montigny had set aside a decision of the RPD which, like the decision before her, was premised in large part on the fact that the maximum punishment for the crimes in question was a sentence of more than ten years' imprisonment. Justice de Montigny wrote:

> [48] At the end of the day, however, the most egregious error of the Board member was her failure to take into account what the Supreme Court considered a critical factor in *Febles*, namely the wide Canadian sentencing range and the fact that the crime for which the Applicant was convicted would fall at the less serious end of the range. This consideration was quite relevant in the case at bar: the Canadian sentence for fraud over $5,000 has a large sentencing range (0 to 14 years), and the Applicant's crime - fraud of $50,000 with a 10 month sentence - *prima facie* falls at the low end of this range. The wide sentencing range and the Applicant's low actual sentence (not only was the actual sentence only two years but it was suspended and the only jail time was 165 days pre-trial custody) were clearly a most relevant factor in determining whether the crime was serious.
>
> [49] On that basis alone, the decision of the Board ought to be quashed and the matter returned for reconsideration by a different panel of the Board.

[66] Justice Gleason concluded that the RPD's reasoning in the case before her evinced the same problems. There, in assessing seriousness, the RPD looked only to the maximum potential sentences and erroneously stated that both crimes were indictable offences when, in fact, the offence of identity theft, created by s 403 of the *Criminal Code*, is a hybrid offence, in respect of which the Crown may elect to proceed either by way of indictment or by way of summary conviction.

[67] In that regard Justice Gleason stated:

> [19] As for the use of a forged passport, the maximum sentence prescribed by section 57 of the *Criminal Code* is 14 years'

> imprisonment (in respect of a forgery committed in respect of a Canadian passport). However, as my colleague, Justice Mosley, noted in *Almrei v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1002, 247 ACWS (3d) 650 (at para 48), "[t]he actual penalty that would be imposed for such an offence is, of course, likely to be much less, particularly for an offender without any prior criminal history in this country." The same might also be said of the offence of identity theft, even if prosecuted by way of indictment.
>
> [20] Here, the RPD failed to discuss what penalty the applicant might have received, had she been charged in Canada, and failed to note that the only evidence of the actual use by the applicant of the forged passport (as opposed to the use of the fraudulent Khachirova identity) was the fact that the applicant used the forged passport to gain access to the U.S. However, she claims she was required to do so to escape her persecutor. If believed, this would constitute a mitigating factor that the Board did not assess and that would also possibly have mitigated a sentence had the crime been committed in Canada and had the applicant been charged with it.
>
> [21] As the RPD failed to undertake the type of analysis that the Supreme Court mandated is required in *Febles* and failed to assess the seriousness of the applicant's conduct in light of the range of sentences available, the Board's decision must be set aside and the matter remitted for reconsideration as occurred in *Jung*. Contrary to what the respondent argues, the need for the type of analysis mandated by *Febles* is not lessened by the fact that the applicant was not charged and therefore was not sentenced. If anything, these facts would tend to show that the applicant's actions fall at the less serious end of the spectrum and therefore that a sentence well below the maximum would likely have been imposed had the applicant committed the offences and been charged in Canada.
>
> [22] The foregoing points should have been considered by the Board and its failure to do so renders its decision unreasonable. As in *Jung*, for much the same reasons, the Board's decision in this case must be set aside.

[68] In this case, the Member specifically requested that counsel provide him with post-hearing submissions on the applicability of *Febles*. In her written response, the Applicant submitted that *Febles* was highly relevant to the determination to be made by the Member. She

noted the Court's clear direction that the presumption of seriousness for offences with ten year maximum sentences should not be applied in a "mechanistic, decontextualized or unjust manner" and the Court's warning that "a claimant whose crime would fall at least at the less serious end" of a sentencing range with a ten year maximum in Canada "should not be presumptively excluded" (at para 62). In her response, the Applicant also submitted that consideration of the sentence that would likely be imposed for a specific offence was not a matter of pure speculation as had been submitted by the Minister. She summarized sixteen cases which dealt with sentencing for parental child abduction, including cases with far more egregious fact patterns, which she submitted established that any sentence actually applied would have been at the very lowest end of the spectrum. She also quoted from *Thrones* at para 32:

> [A]ppellate courts, while deploring crimes involving abduction of children, do not impose anything even close to the maximum penalties prescribed in the *Code*. In parental abduction cases, for example, where the maximum penalty by indictment is *ten* years, sentence rarely come anywhere close.

[69] Regardless of his request for and receipt of these submissions, the Member did not conduct a *Febles* analysis or explain why he declined to do so. In paragraphs 72 to 74 of his reasons, the Member describes the Supreme Court of Canada's decision. He then quotes a portion of paragraph 26 of that decision, which reads, in whole, as follows:

> [26] That the *Refugee Convention* drafters intended that persons who commit crimes in the country of refuge be treated differently than those who commit crimes outside the country of refuge prior to claiming refugee protection makes sense. When a person commits a crime inside the country of refuge, the country of refuge is called to rely on *its own* sovereign legal system, rather than on an international treaty. In Canada's case, it has done so by enacting a parallel and virtually identical provision regarding the effect of commission of a crime: s. 101(2)(a) of the *IRPA* specifies that a refugee protection claim cannot be made in the event "of a conviction *in Canada* [where] the conviction is for an offence

> under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years". Therefore, the discrepancy and resultant absurdity contended by Mr. Febles do not exist. In any event, different concerns arise when a country is asked to take in claimants who have committed crimes abroad, and the context provided by Article 33(2) of the *Refugee Convention* does not aid in the interpretive task at hand.

[70] Apparently based on this, the Member concludes "Therefore, there is a measure or standard to apply to determine, firstly, whether there are serious reasons for considering the first part of Article 1F(b) of section 98 of the Act" (at para 76). At paragraph 239 of his reasons, the Member describes the Supreme Court of Canada's comments in paragraph 62 of *Febles* as "suggestions in obiter comments about the applicability of the exclusion provision under Article 1F(b)". He then reproduced paragraph 62, but did not in any way comment on or engage with its content.

[71] Although it is not clear from his reasons, it appears that the Member was of the view that he need not address the Supreme Court of Canada's direction concerning the role of a sentencing range when determining the seriousness of a crime for the purposes of exclusion pursuant to Article 1F(b), as these were merely suggestions *in obiter*. Instead, he appears to have determined that the applicable standard for determining if there were serious reasons for considering that the Applicant had committed a serious non-political crime outside Canada, prior to her admission to Canada as a refugee, was the fact of the existence of the Hague Convention and the evidence that confirmed that the Applicant had removed and wrongfully retained the child, who was subsequently returned to her father by way of the Hague Convention order of the OCJ. As discussed further below, I do not agree that this was determinative.

[72] In my view, it is significant that in *Febles*, the Supreme Court of Canada acknowledged examples of serious crimes, such as homicide and rape, which it found are significantly serious to presumptively warrant exclusion. However, it also found, even when such serious crimes are at issue, that the presumption may still be rebuttable in a particular case. Accordingly, the Member erred in failing to apply *Febles* and to consider whether the ten year rule had been rebutted in the case before him. As it was the case in *Jung* and *Tabagua*, this is a reviewable error.

Jayasekara Factors

[73] In his analysis of the *Jayasekara* factors, the Member briefly addressed the mode of prosecution, stating that there were no charges against the Applicant in Hungary, nor did it appear likely that she would be charged there. And, although he acknowledged that both s 282 and s 283 of the *Criminal Code* are hybrid offences, this was the total extent of his analysis of the mode of prosecution factor.

[74] What was not considered by the Member was that, if charged in Canada with child abduction, the Crown could elect to proceed by indictment, attracting a sentence not exceeding ten years as specifically prescribed in s 282(1)(a) or ss 283(1)(a), respectively. Alternatively, the Crown could elect to proceed by summary conviction. Neither s 282(1)(b) nor s 283(1)(b) prescribe a minimum sentence for child abduction when the Crown elects to proceed by summary conviction. In that circumstance, s 787 of the *Criminal Code* applies. This states that the maximum sentences for summary conviction crimes where there is otherwise no penalty prescribed for the offence is six months of imprisonment, a fine of $5,000, or both.

[75] As stated by the Federal Court of Appeal in *Jayasekara*, where hybrid offences exist "the choice of the mode of prosecution is relevant to the assessment of the seriousness of the crime if there is a substantial difference between the penalty prescribed for summary conviction offence and that provided for an indictable offence" (at para 46). In this matter, there is a wide range of potential sentences for the crime of child abduction, from six months to ten years, which was not considered by the Member. As to the Respondent's submission that the Applicant did not raise s 787 of the *Criminal Code*, this is of no merit. In my view, it was not open to the Member, when considering the seriousness of the offence, to fail to consider an applicable provision of the *Criminal Code* that described the lower end of the sentencing range applicable to the s 282 and s 283 offences that he was considering, whether or not the Applicant specifically referred to that section of the *Criminal Code*.

[76] As to the Respondent's reference to s 36(3)(a) of the IRPA, it pertains to inadmissibility on grounds of serious criminality pursuant to s 36(1). It states that when an offence may be prosecuted either summarily or by indictment, it is deemed to be an indictable offence, even if it has been prosecuted summarily. The Respondent points to no similar provision applicable to Article 1F(b) exclusions.

[77] The next *Jayasekera* factor addressed by the Member was the penalty prescribed. He again acknowledged that the Applicant had not been subject to any penalty with respect to the child abduction but found that there was no hard and fast rule that this was required to exclude a person. The Member stated "As acknowledged by the Federal Court of Appeal in *Jayasekara* at paragraph 37, the gravity of a crime must be judged against international standards. The Hague

Convention in an important international standard" (at para 248). That was the extent of the Member's consideration of this factor.

[78] While the Member did not err to the extent of his finding that the laying of charges or the entering of a conviction are not prerequisites to exclusion pursuant to Article 1F(b) (see *Zrig v Canada (Citizenship and Immigration)*, 2003 FCA 178 at para 129; *Kovacs* at para 26; *Botezatu v Canada (Citizenship and Immigration)*, 2011 FC 917 at para 10), in my view, he did err in his interpretation of paragraph 37 of *Jayasekara* and, based on that error, in circumscribing his assessment of the seriousness of the crime.

[79] In *Jayasekara*, the Federal Court of Appeal considered the standards applicable to the determination of the gravity of a crime. In that regard, at paragraph 37 the Court stated:

> [37] The UNHCR-issued *Guidelines on International Protection* (The UN Refugee Agency), at paragraph 38, suggest that the gravity of a crime be "judged against international standards, not simply by its characterization in the host State or country of origin". **This is, of course, to avoid the profound disparities which may exist between countries with respect to the same behaviour.** As Branson J. wrote in *Igor Ovcharuk v. Minister for Immigration and Multicultural Affairs*, *supra*, at page 15 of his reasons for judgment, "one needs only to bring to mind regimes under which conduct such as peaceful political dissent, the possession of alcohol and the "immodest" dress of women is regarded as seriously criminal".
>
> (emphasis added)

[80] The Court continued its analysis, noting that while regard should be had to international standards, the perspective of the receiving state cannot be ignored in determining the seriousness

of the crime as the protection conferred by Article 1F(b) is given to the receiving state. It concluded that:

> [44] I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(*b*) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction… **In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors**. There is no balancing, however, with factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin…
>
> (emphasis added)

[81] Thus, in my view, paragraph 37 does not support the proposition that the existence of an international convention, such as the Hague Convention, is the sole factor or "standard" against which seriousness must be assessed. Rather, even where a presumption of seriousness may attach to a crime internationally, the presumption is rebuttable based on the identified factors.

[82] Indeed, in *Jayasekara*, when considering whether the crime in that case was serious and justified the application of the exclusion clause, the Federal Court of Appeal noted that the claimant had been convicted in the United States for trafficking opium. The evidence before it revealed that drug trafficking is treated as a serious crime across the international spectrum. The Court noted that in accordance with the three *United Nations Drug Conventions*, the *1961 Single Convention on Narcotic Drugs* (amended by the Protocol of 25 March 1972), 976 UNTS 105; the *1971 Convention Against Psychotropic Substances*, 1019 UNTS 175; and the *1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, E/Conf

82/15, signatory nations are required to coordinate preventive and repressive action against drug trafficking, including the imposition of penal provisions as necessary. The choice of penal provisions remained at the discretion of the member state and could exceed those provided by the conventions if the member state deemed them desirable or necessary for the protection of public health and welfare.

[83] The Federal Court of Appeal wrote that, as reflected by the penal provisions enacted, most signatory states define and treat drug trafficking as a serious crime. It conducted comparisons of sentences imposed by various states and noted that in this country a person who sells opium is liable to imprisonment for life. It found that there was no doubt that Parliament considered the trafficking of opium as a serious crime.

[84] However, the Federal Court of Appeal concluded that in determining whether the claimant had been convicted of a serious crime, the RPD had looked at a multitude of factors: the gravity of the crime; the sentence imposed in the United States; the facts underlying the conviction (i.e. the nature of the substance trafficked); the finding in *Chan v Canada (Citizenship and Immigration)*, [2000] 4 FC 390 (CA) that a crime is a serious non-political crime if a maximum sentence of ten years or more could have been imposed if the crime had been committed in Canada; the objective gravity of a crime of trafficking in opium in Canada which carries a possible penalty of life imprisonment; and, the fact that the claimant violated his probation order and later absconded. The Federal Court of Appeal concluded that the applications judge had committed no error when he found that it was reasonable for the RPD to

conclude on those factors that the claimant's conviction in the United States gave it a serious reason to believe that he had committed a serious non-political crime outside the country.

[85] Significantly, the fact of the existence of international conventions concerning state coordination to prevent and repress drug trafficking was not found to be determinative of the seriousness of the crime.

[86] On the question of the significance of international treaties, the Respondent relies heavily on *Kovacs*. There, the applicant was also a citizen of Hungary who claimed protection in Canada for herself and her children. The RPD found that she was not credible and also determined that she was excluded from refugee protection pursuant to Article 1F(b) on the basis that there were serious reasons for considering that she may have committed a serious non-political crime outside Canada, the abduction of her son. The paragraph of *Kovacs* that the Respondent relies upon is as follows:

> [27] The Applicants also submit that the Board erred in relying on *Chan, supra* for guidance in defining a serious non-political crime. In their submission, *Chan* only states that exclusion does not apply to crimes committed outside Canada where a sentence has already been served, unless the refugee claimant has been declared a danger to the public. In my view, the Applicants have misunderstood the use made by the Board of the *Chan* decision. In the part of the decision dealing with this question, the Board was assessing whether kidnapping of a child is a "serious non-political crime". **In its analysis, the Board referred to the *Chan* decision as describing a sentence of ten or more years as one that is indicative of such a crime. The Board also considered the existence of the Hague Convention as a demonstration of the international community's view of international kidnapping as a serious matter. I see no error in the Board's use of the *Chan* decision or its analysis of whether international kidnapping of a child constitutes a serious non-political crime.**
>
> (emphasis added)

[87] In my view, *Kovacs* recognizes the existence of the Hague Convention as one factor to be considered when determining if child abduction is a serious crime for the purposes of Article 1F(b). However, it does not support a contention that it is the only factor to be considered, that its existence creates a non-rebuttable presumption that child abduction is, in every case, serious in the context of an Article 1F(b) analysis, or, that it is the primary factor to be considered. *Kovacs*, of course, also pre-dates the Supreme Court of Canada's decision in *Febles*. And, while it is true that *Febles* was concerned with convictions for assault with a deadly weapon and not child abduction, to my mind, this is not a relevant distinction. As noted above, the Supreme Court of Canada accepted that homicide, rape, child molestation, wounding, arson, drug trafficking and armed robbery were good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. Yet, stated that, even when dealing with presumptively serious crimes, the presumption can be rebutted in a particular case and, for that reason, the ten year rule should not be applied in a mechanistic decontextualized or unjust manner. Thus, even if child abduction is also a presumptively serious crime, as I believe it to be, the presumption is rebuttable.

[88] As to the Respondent's argument that conducting a sentencing analysis in this circumstance, where no charges have been laid or conviction entered, is not warranted by *Febles* and that conducting such an analysis would be "speculative" and beyond the jurisdiction of the RPD as the RPD is not a sentencing judge, I do not agree with that view. As stated by Justice Gleason in *Tabagua*, the need for the type of analysis mandated by *Febles* is not lessened by the fact that the applicant was not charged and therefore was not sentenced. If anything, these facts would tend to show that the applicant's actions fall at the less serious end of the spectrum

and therefore that a sentence well below the maximum would likely have been imposed had the applicant committed the offences and been charged in Canada (*Tabagua* at para 21).

[89] Further, this Court has held that a failure to consider sentencing case law decisions, as the Member did in this case, is unreasonable, concluding in *Hersy*:

> 71 In the end, instead of looking at similar cases as a guide to how the Applicant would be treated in Canada from the sentencing perspective, the Board simply falls back on its own subjective notion of what is serious in Canada without any objective evidence to support it.

[90] In my view, the failure to apply *Febles* and the errors in the analysis of the *Jayasekara* factors are more than sufficient to render the Member's exclusion analysis unreasonable. Accordingly, I need not address the Applicant's submission that because the crime of child abduction occurred in Canada, after the expiry of the two week period within which the Applicant was permitted by the custody order to remove the child from Hungary without the prior consent of her father, Article 1F(b) has no application.

Issue 2: Did the Member err in in his treatment of the evidence?

[91] In the alternative to his exclusion analysis, the Member also conducted an analysis of the Applicant's refugee claim on its merits.

Applicant's Position

[92] The Applicant submits that, regardless of the Member's negative credibility findings, based on her own testimony, there was sufficient reliable third party and other objective source evidence to support a well-founded fear of persecution for the Applicant on the basis of her profile as a Roma rights activist, which profile the Member accepted. The Applicant submits that the Member erred by failing to properly consider that evidence.

[93] In particular, the Member had before him expert reports confirming the particularized risk faced by Roma advocates including a letter from Amnesty International and an expert affidavit from a highly respected Roma rights advocate, Aladar Horvath. Additionally, before the Member was the acknowledgement in the OCJ decision by the Applicant's ex-husband that the Applicant was for many years subjected to threats and persecution because of her advocacy activities as well as copies of online threats and racist comments about the Applicant. The Applicant submits that this evidence was ignored or unreasonably dismissed.

[94] As to the treatment of the claims of other claimants, the Applicant acknowledges that Rule 21 of the RPD Rules permitted the Member to disclose and rely on information from another claim if the claims involved similar questions of fact or the information was otherwise relevant. The Applicant also concedes that the files of the alleged Former Employee and his family as well as those of her sister and mother are relevant to her own claim, but submits that the Member erred in law and came to unreasonable or perverse conclusions in respect of this information.

[95] The Applicant asserts that the Member determined without a hearing that the alleged Former Employee's claim was fraudulent and that the Applicant was a willing accomplice to it. His treatment of the material was perverse and unreasonable and procedural fairness required that he put his concerns to the Applicant and the alleged Former Employee before reaching his highly prejudicial credibility determinations.

[96] The Applicant also submits that the Member made rulings on the credibility of claims made by her sister and mother, which claims were still pending before another member, and thereby exceeded his jurisdiction. Further, that it was a breach of the duty of procedural fairness owed to those claimants to have pronounced on the credibility of their claims without giving them an opportunity to be heard.

Respondent's Position

[97] The Respondent submits that the Applicant failed to rebut the presumption of state protection with clear and convincing proof. In that regard, the Member considered the Applicant's testimony and the country condition documents. The evidence established that the Applicant had been provided with police protection, including 24 hour protection, between February and July 2009. After the period of police protection ended, on the two occasions when the Applicant alleged to have been targeted, she reported one incident to the police and testified that she was in no immediate danger when the incident occurred as she was safely inside her car. On the second occasion, she chose not to file a report. Aside from these two incidents which were perpetrated by two women in their 60's, the Applicant reported no other incidents of attacks

before 2011 and testified that this was because she had a degree of protection through the power of the press.

[98] The Member also considered both the evidence of Aladar Horvath and the letter from Amnesty International and his treatment of this evidence was reasonable. In particular, the Member explained that the evidence of a lack of state protection for Roma rights advocates in the Amnesty International letter was rebutted by the fact that the Applicant was able to obtain state protection. As well, the Member noted that the affidavit of Aladar Horvath was written before the August 2013 convictions and sentencing of those who were involved in the August 2009 serial murders.

[99] The Respondent submits that the Member acted reasonably in relying on information from the refugee claims of the Applicant's sister and mother. Further, it was the Applicant herself who initially provided post-hearing disclosure about these claims and when the Member subsequently disclosed additional documents, the Applicant was invited to make further submissions on those disclosures but failed to do so.

[100] The Respondent submits, contrary to the Applicant's argument, that the Member did not explicitly find that the members of the Applicant's family were not credible nor did he state that the assertions of those persons were false. The Member was simply expressing that he was not in a position to decide this one way or the other. Nor is there any evidence that these observations informed the outcome of those claims.

[101] Further, that the Member acted reasonably in relying on information from the alleged Former Employee's claim. The Member disclosed the documents to the Applicant, and requested and received submissions in response. It was open to the Member to question why the Applicant had not mentioned the alleged Former Employee in her claim forms and at her hearing. The Respondent submits that there is no merit in the Applicant's assertion that procedural fairness required that the Member put his concerns before the Applicant and the alleged Former Employee before making adverse credibility findings. Further, the Member's conclusion that the corroborating evidence was provided by the Applicant to support the alleged Former Employee's fraudulent claim was based on the best information available to him at the time he made his decision.

[102] In any event, even if the Member's observations about the credibility of the alleged Former Employee's claim were material to the disposition of his claim, such findings in the Applicant's claim would not have been binding on the member seized of the alleged Former Employee's claim.

Analysis

(i) Profile

[103] As a preliminary point, I note that the RPD and its members are best placed to assess credibility and are to be afforded significant deference (*Aguebor v Canada (Employment and Immigration)*, [1993] FCJ No 732 (CA) at para 4; *Abbas v Canada (Citizenship and Immigration*), 2016 FC 911 at para 22; *Platin Vargas v Canada (Citizenship and Immigration),*

2014 FC 484 at para 10). In his reasons, the Member made many adverse inferences and negative credibility findings, however, the Applicant in this application has not seriously challenged those findings. In my view, even if the Applicant were to have taken issue with some of those findings, the great majority were open to the Member based on the evidence before him. Instead, the Applicant submits that even if she was found to be not credible, there was sufficient reliable third party or objective evidence to support her claim that she was at risk of persecution because of her profile as an activist for Roma rights and, as such, she would not receive adequate state protection. The Applicant submits that the Member ignored or improperly dismissed that evidence.

[104] In that regard, she references the Amnesty International letter dated February 21, 2013 and addressed to her counsel. The letter accurately describes itself as providing an overview of the human rights situation in Hungary. The last paragraph of the letter states:

> In the context of ongoing discrimination and violence against Roma in Hungry, there are serious concerns that those who speak out in defense of Roma rights are not adequately protected by state authorities. It is not unusual for Romani community organizers and spokespeople, and members of their family to be targeted by individuals and vigilante groups. This can include attacks on their property, physical attacks, death threats; and persistent harassment. State authorities do not consistently respond to such complaints. It is the view of Amnesty International that the cumulative nature of such prejudicial actions or threats in conjunction with the lack of measures ensuring their safety can amount to persecution in some cases.

[105] Despite the Applicant's contention, the Member did not ignore this evidence and specifically stated that he had weighed it. Nor did he dismiss it. Rather, the Member found that other credible evidence established that the Applicant and her family had been provided with

adequate state protection prior to their departure from Hungary. This finding was supported by the evidence as described in the Member's reasons. Thus, the Applicant did not fit within the circumstance described by the Amnesty International letter.

[106] Similarly the Member took into account the affidavit of Dr. Balint Magyar, the former Hungarian Minister of Education, which described the particularized risk that the Applicant faces given her profile as a Roma rights activist. The Member quoted an excerpt of that affidavit which states that "…Human rights activities entail more risks for a Roma than for a non-Roma individual" (at para 445). However, he found that this does not suggest that state protection would not be forthcoming should the Applicant seek it (I note that the parties refer to this reference by the Member as coming from the affidavit of Aladar Horvath).

[107] The Applicant also challenges the Member's further comment that the Magyar affidavit was written prior to the August 2013 conviction of the perpetrators of the 2009 Roma murders and failed to take into account the actions of the Hungarian court in convicting and sentencing those involved. The Applicant submits that the arrests did not eliminate the risks to Roma rights activists. That may be so, but the Member was entitled to consider the affidavit in the overall context of his state protection analysis.

[108] The January 26, 2012 Statutory Declaration of Aladar Horvath, who the Member acknowledged was a prominent Roma rights activist, spoke to the current country conditions for Roma in Hungary and did not address the risk that may be faced by Roma activists or the

Applicant in particular. When considered against the Member's state protection analysis, I find that no error arises from the Member's treatment of this evidence.

[109] The Applicant also places great emphasis on the fact that in the OCJ hearing, the Applicant's ex-husband "confirmed" that the Applicant had for years been subjected to threats and persecution because of her advocacy, but that the Member did not address this. What the Applicant refers the Court to in this regard is paragraph 56 of the OCJ decision:

> [56] The Applicant [ex-husband] argues that Respondent [Applicant herein] has faced threats and persecution because of her advocacy activities for at least ten years; that she has tolerated and managed this risk; and that her real motive for leaving Hungry (and abducting E. in the process) is economic. She has been unable to find employment which she finds suitable since she lost her seat as a member of the European Parliament.

[110] I would note that, in this paragraph, the OCJ was summarizing the argument of the Applicant's ex-husband, not citing evidence given in support of that argument. Further, the Member quoted paragraph 56 of the OCJ decision in paragraph 109 and then again at paragraph 386 of his reasons. The Member reviewed the Applicant's own evidence, contained in her PIF and in her testimony given during her hearing, as to threats during her time as a MEP, when she was afforded full time police protection, and after her term, but did not conclude that adequate state protection would not be forthcoming if sought. In my view, the Applicant's ex-husband's argument made in the context of the OCJ hearing was just one piece of evidence to be weighed in the state protection analysis. The Member was aware of it but it was not a critical piece of contradictory evidence and the Member's failure to more specifically address it as a part of his consideration of risk to the Applicant as a Roma activist does not render his decision unreasonable (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1998] FCJ No 1425

(FCTD) at paras 16-17; *Voloshyn v Canada (Citizenship and Immigration)*, 2016 FC 480 at para 25; *Herrera Andrade v Canada (Citizenship and Immigration)*, 2012 FC 1490 at para 9), particularly as the same line of argument submitted that the Applicant was able to manage that risk.

[111] In my view, the Applicant is really taking issue with the weight afforded to the documentary evidence in this case, which is properly a matter for the RPD to address (*Huang v Canada (Employment and Immigration)*, [1993] FCJ No 901 at para 14 ("*Huang*")). Moreover, the Member's failure to mention some documentary evidence is not fatal to the decision as it is assumed that he weighed and considered all of the evidence unless it is shown to the contrary (*Velinova v Canada (Citizenship and Immigration)*, 2008 FC 268 at para 21; *Hassan v Canada (Employment and Immigration)*, [1992] FCJ No 946 (CA) at para 3).

[112] In sum, I am not convinced that the Member erred in his treatment of the above evidence. More significantly, viewing the Member's state protection analysis as a whole, including the Member's recognition of the Applicant's profile, I agree with the Respondent that the Applicant failed to rebut the presumption of state protection with clear and convincing evidence (*Ward v Canada (Employment and Immigration)*, [1993] 2 SCR 689 at para 59; *Canada (Citizenship and Immigration) v Flores Carillo*, 2008 FCA 94 at para 38; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 57).

(ii) Psychiatric Reports

[113] Although not raised in her written representations when appearing before me, the Applicant submitted that the Member had failed to put to her his concerns about two psychiatric

reports which she had submitted and, based on the Supreme Court of Canada's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy"*), had improperly discounted the reports. The Respondent, who had been given little advance notice of this issue, submitted that *Kanthasamy* had no application and could be distinguished on its facts. The Respondent submitted that this was not a situation where credibility was not at issue, such as *John v Canada (Citizenship and Immigration)*, 2016 FC 915 but was more analogous to *Sitnikova v Canada (Citizenship and Immigration)*, 2016 FC 464 ("*Sitnikova"*) where the officer found that the story upon which the psychological report was made was not credible and on that basis assigned it less weight.

[114] I would first note that the Member's decision was issued on February 2, 2015 and the Supreme Court of Canada issued *Kanthasamy* on December 10, 2015. Accordingly, the Member could not have been expected to frame his analysis of the psychiatric reports in the context of that decision.

[115] The reports were from Dr. Thirlwell, a psychiatrist, dated August 13, 2012 ("Thirlwell Report") and from Dr. Kumar, a psychiatrist at Humber River Hospitals, dated September 10, 2013 ("Kumar Report"). The Member gave these reports little or no weight.

[116] As to the Kumar Report, the Member found that it related specifically to the Applicant's anxiety on the eve of a hearing resumption and gave no specific, detailed information beyond generalities. I find no error in this conclusion. The report is actually a two paragraph letter from Dr. Kumar addressed "to whom it may concern". It states that Dr. Kumar has been treating the

Applicant for depression and anxiety since March 2013 but nothing further on that point. The letter then states that the Applicant attended at his office on the date of the letter in a state of severe anxiety which she reported arose from recent changes to the refugee hearing scheduled for the following day which she was completely unprepared and emotionally ready to address. Dr. Kumar stated that he did not feel she was in a mental state to testify and thought it would be humane and prudent to delay the hearing. Based on this letter, and out of concern that the Applicant be treated fairly, the hearing was postponed to November 26, 2013.

[117] In my view, the letter has little if any probative value and the Member did not err in affording it little or no weight.

[118] The Thirlwell Report is addressed to the Applicant's counsel and states that counsel requested that the Applicant be assessed as to her psychological and emotional functioning and the potential harmful effects of being removed from Canada. The first 15 pages of the 20 page report are primarily a recitation of the Applicant's background as provided by her to Dr. Thirlwell. Based on this, the doctor concluded that the emotional and psychological stress caused by her circumstances in Hungary had caused the Applicant to develop symptoms of severe depression and complex post-traumatic stress disorder ("PTSD") with marked anxiety and panic attacks. It was recommended that the Applicant receive psychotherapeutic treatment for PTSD and cognitive behavioural therapy for depression and anxiety. Her prognosis for a full recovery was good if she lived in a safe and secure environment, engaged in treatment and was not exposed to further trauma. However, returning to Hungary would expose her to further

trauma and would almost certainly precipitate a re-emergence of severe depressive and PTSD symptoms, causing irreversible psychological and emotional damage.

[119] The Member stated that the Thirlwell Report was based on the Applicant's self-reporting, and on the basis of a single interview. Because of his finding that the Applicant was not credible in certain major respects of her claim on which the facts of the report were based, he gave it little evidentiary weight. The Member then also pointed out omissions and inconsistencies between the background facts in the Thirlwell Report and the evidence before him and found, on the balance of probabilities, that the Applicant only went to the psychiatrist for the purpose of the refugee claim and, more immediately, in support of a stay of the removal of her husband scheduled for the following day. He noted that although she had arrived in Canada in November 2011, the Applicant did not consult with Dr. Thirlwell until August 2012.

[120] It is not the role of this Court to re-weigh the evidence or re-make the decision (*Canada (Citizenship and Immigration) v Ali*, 2016 FC 709 at para 30; *Mantilla Cortes v Canada (Citizenship and Immigration)*, 2008 FC 254 at para 15). Here the Member assessed the report and afforded it little weight because it was based on a factual background provided by the Applicant who he had found not to be credible. He had put his credibility concerns to the Applicant and, therefore, in my view and in these circumstances he was not required to also put them to the Applicant in the specific context of the background to the Thirlwell Report. Further, this Court has previously held that the RPD's credibility findings may extend to all relevant evidence including documentary evidence (*Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at para 22; *Cao v Canada (Citizenship and Immigration)*, 2015 FC 315 at para 20).

[121] Indeed, this matter has similarities to *Sitnikova*. There, in the context of a humanitarian and compassionate decision, the applicant had submitted a psychological assessment which found that she had complex PTSD as well as depression characterized by anxiety and suicidal ideation. It also found that the applicant required treatment with antidepressants, cognitive behavioural therapy, and interpersonal therapy. It concluded that the applicant would suffer irreversible psychological and emotional damage if she were returned to Russia, and would face a serious risk of suicide. The officer afforded the report little weight and the applicant submitted that he erred in doing so based on *Kanthasamy* (at paras 47-48). Justice Zinn did not agree:

> [36] The present case is distinguishable from *Kanthasamy* in that, unlike the officer in that case, the officer in the case at bar did not appear to accept the psychological diagnosis.
>
> [37] In other words, the officer did not impugn Dr. Thirlwell's clinical judgment; she simply found that the story upon which her diagnosis was based not to be credible, and that the applicant's subsequent behaviour was not that of one who is seriously ill and in need of the treatment that Dr. Thirlwell claimed is "required." This is not an unreasonable assessment of the report's evidentiary value.

[122] Similarly, in this case, given his negative credibility findings, I cannot find the Member's assessment of the weight to be afforded to the Thirlwell Report to be unreasonable.

Issue 3: Did the Member exceed his jurisdiction or breach his duty of procedural fairness?

i) Claims of Applicant's Sister and Mother

[123] As to the claims of the Applicant's sister and mother, the Applicant does not take issue with the fact of the Member's consideration of material contained in their claims. In fact, it was the Applicant who raised those claims by way of a post-hearing disclosure in which she stated

that her sister, her sister's children, and her mother have made refugee claims following receipt of written threats. In addition, she disclosed information from her sister's claim. Nor does the Applicant take issue with the weight afforded to the documents, conceding that this was a matter of the Member's discretion. She asserts, however, that the Member went far beyond the parameters of reasonableness and his jurisdiction as he ruled that none of the allegations made by the Applicant's sister and mother were credible and did so without a hearing and despite the fact that the claims were pending before another member of the RPD. The Applicant also asserts that, even if the Member acted within his jurisdiction, this was a breach of procedural fairness owed to the Applicant's sister and mother and that mischief can flow from this as the RPD member seized with the claim of the Applicant's sister and mother can, using Rule 21, reach into the Applicant's file and rely upon the Member's finding that the claims of the Applicant's sister and mother were not credible.

[124] I note that in his decision, the Member described the evidence contained in the Applicant's sister and mother's claim in detail. He also stated that "This panel is not the decision maker for the claims of" the Applicant's sister, her children and mother (at para 511). Rather, that his mandate was to review the evidence before him and any relevance regarding those claims to the Applicant's claim (at para 512). The Applicant had submitted that the claims were relevant to hers as they demonstrated an ongoing interest in her by her agents of persecution in Hungary and the inability or unwillingness of the police to provide adequate protection. In that context, the Member stated that if the Applicant's sister and other family members were living peacefully and safely in Budapest until April 2014 it "begged belief" that they would then choose to relocate to the location which, according to the Applicant's evidence, was most closely

associated with her, her home in Budapest, particularly given her continued allegation of a well-founded fear of persecution from neo-Nazis, and others, in Budapest. On this point he concluded that:

> [522] In my view, it is simply not credible, that if any of the assertions by any of these claimants were true, that any family members of [the Applicant] would choose to relocate to that home.

[125] In conclusion he stated:

> [525] For the foregoing reasons I give little or no weight to any of the assertions made by [the Applicant's sister], or other members of the family in these new refugee protection claims. Based upon the evidence before this panel, including the negative inferences noted, I am unable to determine that any of these new assertions by or about [the Applicant's sister] are credible or trustworthy evidence….

[126] While the Member's choice of wording in this paragraph lacks precision, he had already noted that he was not the decision-maker for the claims of the Applicant's sister and mother and was considering them in the context of their relevance to the Applicant's claim. Viewed in this light, I do not agree with the Applicant's submission that the Member "ruled" that none of the allegations made by the Applicant's sister and mother were credible. Rather, considering all of the evidence before him, including his negative findings concerning the Applicant's credibility, he assigned them little weight as he was unable to determine that they were credible.

[127] In any event, even if the decision-maker considering the claims of the Applicant's sister and mother were to review the Member's decision, to the extent that the Member described his concerns with their evidence in the context of his assessment of the Applicant's claim, that decision-maker would be in a position to raise those concerns with those claimants. I see no

basis for the Applicant's assertion that the Member denied those claimants procedural fairness by failing to raise with them his concerns with their evidence at the Applicant's hearing. In my view, in these circumstances, there was also no breach of the duty of procedural fairness owed to the Applicant.

ii) Claims of Former Employee

[128] As to the alleged Former Employee's claim, when that claim was heard by the RPD, a letter from the Applicant attesting to the alleged Former Employee's work with her was not admitted into evidence. The RPD denied the claims, drawing an adverse inference from the failure to file the letter, and found as a fact that the alleged Former Employee had not been employed by the Applicant. An adverse inference was also drawn from the family's failure to explain why a 2009 attack was not mentioned at the port of entry, and, the RPD found that adequate state protection was available to the family in Hungary. It rejected their claim in February 2011, and leave for judicial review of that decision was denied by this Court in June 2011. In August 2012, this Court dismissed an application for leave to judicially review the RPD's refusal to reopen the claim based on solicitor incompetence for failure to submit the Applicant's letter. However, Justice Russell found that, because the excluded letter dealt with the alleged Former Employee's activities and profile in Hungary, it was relevant to a state protection analysis ([…]). Thus, if it were improperly excluded, the state protection findings could not stand. The family also brought humanitarian and compassionate ("H&C") and pre-removal risk assessment ("PRRA") applications which were denied in January 2014. As disciplinary proceedings had been commenced regarding their former counsel, they sought to have both their PRRA and H&C applications reopened, but both requests were denied by a

senior immigration officer in March 2014. That same month, the family sought to set aside the decision refusing them leave to judicially review the original RPD decision on the basis of the misconduct of their former counsel. That motion was dismissed as the family had not perfected their application.

[129] In the result, and as submitted by the Respondent, when the Member issued his decision on February 2, 2015, the alleged Former Employee's claim had been rejected. Subsequently, on March 2, 2015, the Law Society of Upper Canada found the alleged Former Employee's former counsel to be guilty of professional misconduct. The family then filed an application for judicial review of the prior PRRA and H&C decisions. In May, 2015 this Court quashed the PRRA and H&C decisions on the basis that they had relied heavily on the RPD decision which excluded the Applicant's letter.

[130] However, in my view, the significant issue in the matter, as identified by the Member, was the omission from the Applicant's evidence of any reference to her alleged Former Employee. In that regard, the Member noted that the alleged Former Employee had asserted that he had worked in the Applicant's office between 2004 and 2009 and that his duties included the investigation of complaints and abuses suffered by Hungarian Roma and that he and his family were attacked and faced persecution in Hungary because of that work. The Member acknowledged that the Former Employee had attempted to submit a letter from the Applicant supporting their claim, which was rejected.

[131] The Member noted that in the rejected letter provided by the Applicant, she identified herself as the current director of the Fund of Movement for Desegregation and stated that the alleged Former Employee had worked for her between 2004 and 2009. The Member noted that the Applicant had not mentioned her work with that organization in her PIF. He also noted that the Applicant had been referred to in a September 26, 2014 magazine article about the alleged Former Employee's family describing the alleged Former Employee's involvement with her work and the family's refugee claim in Canada. On November 12, 2014 the Member wrote to counsel for the Applicant providing disclosure of documentation pertaining to the alleged Former Employee's claim both before the Member and this Court, the letter from the Applicant and the magazine article. The Member sought additional written evidence from the Applicant concerning her relationship with the alleged Former Employee. Her November 17, 2014 affidavit in response was received on December 3, 2014. The Member noted that the Applicant testified that the alleged Former Employee had worked for her in Hungary and that she knew of the alleged attack on him and his family by neo-Nazis. However, that there had been no mention of the alleged Former Employee or his problems in the Applicant's PIF. Her explanation for this in her affidavit was that although she did not mention the alleged Former Employee by name, she did state at paragraph 43 of her narrative that her family and colleagues received daily insults and threats during her time as an MEP. She stated that she did not provide further detail about the alleged Former Employee in her PIF because his situation was not a significant consideration underlying her decision to come to Canada two years later. While his case depended largely on his relationship to her, her case did not depend on her relationship to him. Additionally, by the time she came to Canada and prepared her PIF, his case had already been dismissed by the

Immigration and Refugee Board, the Federal Court and a PRRA officer. She gave the same explanation for not mentioning him in her oral hearing.

[132] The Member did not accept this explanation. He found that the Applicant had been represented by experienced counsel and the PIF instructions required all significant events to be described and measures taken against her and her family as well as against similarly situated persons. Further, the mentioning in her PIF of threats or insults as received by colleagues could not be equated to the alleged Former Employee's allegation that he was waylaid by four masked men in black uniforms who rammed their jeep into his vehicle, attacked him and his wife and might have attacked their 18-month-old child had he not tried to protect her by lying on top of her while he was being kicked and hit. The Member noted that the alleged Former Employee claimed that he was targeted specifically because of his association with the Applicant and her work. The Member concluded:

> [499] I reject [the Applicant's] explanation for this omission. I find that it was not a credible nor trustworthy explanation. If any of [the Former Employee's] account were true, then I would expect her to have remembered it and to have used it to support her own refugee protection claims and those of her children. She is legally sophisticated and aware to the extent that she researched Canadian refugee law even before she arrived here.
>
> [500] I also note that the decision for [the Former Employee's] claim drew a negative credibility inference because his wife's CIC Claim notes failed to indicate a physical assault as was alleged in her later testimony, and the CIC notes specified that there was no blood shed.
>
> [501] I find, on a balance of probabilities, that there is insufficient credible and trustworthy evidence that the alleged August 2009 attack on [the Former Employee] and his family by neo-Nazis ever happened.
>
> [502] Moreover, I find that it is singularly unlikely that if it had ever happened, then a well-informed, legally sophisticated person

> like the adult claimant,…, would not have mentioned it in her PIF as an important example of a similarly situated person.
>
> [503] The panel draws a negative inference regarding [the Applicant's] credibility. I find that she provided corroborating evidence, including her Certificate and curriculum vitae,- to support [the Former Employee's] fraudulent refugee claim,- which she knew or should have known was fraudulent. She acknowledged in her affidavit that she continues to support his efforts to stay in Canada by giving off-record press interviews. I find, on a balance of probabilities, that she has been a willing accomplice in the attempt by [the Former Employee] and his family to make a false refugee claim.
>
> [504] I find that this is further support for my conclusion that she is generally lacking in credibility.

[133] Thus, the Member's concern was with a significant omission in the Applicant's PIF and oral testimony. He reasonably pointed out that if the alleged Former Employee had worked for the Applicant and because of this was attacked by neo-Nazis, and the Applicant, as she acknowledged in her affidavit was aware of the attack and that his family planned to leave Hungary because of this, then this was important information that supported her claim. Nor was the Member obliged to accept the Applicant's explanation for the omission (*Jin v Canada (Citizenship and Immigration)*, 2012 FC 595 at para 11; *Fatima v Canada (Citizenship and Immigration)*, 2005 FC 94 at para 6). I cannot find his conclusion and the negative credibility inference drawn from it to be unreasonable.

[134] As to procedural fairness, the Member provided the documentary disclosure to the Applicant, posed specific questions including asking why she had not mentioned the alleged Former Employee in her PIF or at the oral hearing, and provided her with an opportunity to

respond, which she did by affidavit. In my view, the Applicant was not denied procedural fairness in this regard.

[135] As to the Applicant's submission that procedural fairness required that the Member's concerns should also have been put to the alleged Former Employee before he reached his highly prejudicial determinations on their credibility, I see no merit in this submission. The Member was not adjudicating the alleged Former Employee's claim which, when he rendered his decision, had already been rejected.

[136] As to the Member's finding that the Applicant was a "willing accomplice" in the attempt by the alleged Former Employee and his family to make a false or "fraudulent" refugee claim, in view of the Member's many prior negative credibility findings, it was hardly necessary to make this finding. It also fails to acknowledge that in February 2015, the issue of solicitor incompetence in the family's claims was still a live issue and one that the Member appears to have been aware of as he notes that in a September 23, 2014 magazine article, the family were said to be waiting to testify against their former counsel before the Law Society of Upper Canada (at para 488). However, given the status of the alleged Former Employee's claim at the time the Member rendered his decision, I am unable to conclude that it is a perverse or reviewable error. That said, and as discussed below, it is a concern in the context of whether the Member's reasons displayed a reasonable apprehension of bias.

Reasonable Apprehension of Bias

Applicant's Position

[137] The Applicant submits that the Member's decision displays a deep animus against her giving rise to a reasonable apprehension of bias. This is demonstrated by the extraordinary litany of negative credibility findings, not just against the Applicant, but also against those related or connected to her, the errors that characterize the decision under review, and the language used by the Member. The Applicant submits that the decision leaves the impression that the Applicant's advocacy for the Roma and her decision to bring her eldest daughter to Canada offended the Member and made it impossible for him to make an objective and impartial determination.

Respondent's Position

[138] The Respondent submits that the Applicant's failure to raise the allegations of bias at the hearing before the Member precludes her from raising this issue upon judicial review. Further, the Applicant's allegations of bias simply express her dissatisfaction with the Member's finding that she tended to exaggerate and embellish her testimony. The Respondent submits that the Applicant has failed to support her allegations of bias with any material evidence.

Analysis

[139] While it is true that allegations of reasonable apprehension of bias must be raised at the first opportunity and that failure to do so will result in an implicit waiver of the right to invoke such allegations at a later time, here the allegation of bias arises from the Member's written

reasons. Accordingly, waiver does not arise (*Xi v Canada (Citizenship and Immigration)*, 2007 FC 174 at paras 28, 31-33).

[140] The Supreme Court of Canada described the test for reasonable apprehension of bias in *R v RDS*, [1997] 3 SCR 484 ("*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.

[141] The onus is on the Applicant to establish that the Member's actions or reasons demonstrated actual or perceivable bias (*RDS* at para 114). There is a high threshold to be met in this regard. As stated by Justice Shore in *Zhu v Canada (Citizenship and Immigration)*, 2013 FC 1139 at para 2:

> [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].

(Also see also *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20-26).

[142] The Applicant submits that the combination of the numerous errors of the Member in his decision and the extraordinary litany of negative credibility allegations against her and anyone even connected to her give rise to a reasonable apprehension of bias. More specifically, that a review of the decision leaves the distinct impression that the combination of the Applicant's advocacy for the Roma and her unfortunate decision to bring her child with her to Canada when she made her claim for refugee status (contrary to the custody order) so offended the Member

that he was incapable of making an objective and impartial determination of the claim. The Applicant submits that the Member's decision is rife with language and findings that strongly suggest the existence of a deep animus against the Applicant.

[143] The Applicant provides only one reference from the decision as an example of this, which is as follows:

> [406] In addition, I find that the reference to the risk of the New Holocaust for Roma in Hungry in [the Applicant's] testimony is further evidence of her tendency to embellish, and exaggerate. The Holocaust was characterized by a highly organized program of genocide on an industrial scale, where over 10 million people were killed under the Nazi rule in Europe. The aim was to annihilate Jews in Europe, Roma, homosexuals, Slavs, *untermenschen* or people with physical or mental disabilities, and opponents of the Third Reich.
>
> [407] I do not share [the Applicant's] view that the situation of Roma in Hungry, either when she left the country in 2011 or in 2015, is comparable to the horrors of the Third Reich, nor even to the worsening climate of the 1930s Germany.

[144] This comment was made in the context of the Member's consideration of the Applicant's failure to claim refugee protection when she visited the United States in 2010. In his reasons he stated that, at the hearing, he had asked why the Applicant returned to Hungary rather than making a claim in the United States, given her allegations about her fears in Hungary. She replied that she could not let her people die in a country, and that was "my so-called mission" and added "There was little hopes (that) I can still continue to stop the new Holocaust". Further, that she had discussed a possible asylum claim with a counselor at the United States Embassy in Budapest and had been advised that while it was likely her claim would be accepted, she would not be able to talk about Hungarian state secrets or to advocate for human rights because the

United States did not want any diplomatic issues to arise, thus she would be censored. She stated that she did not seek advice while she was in the United States because she did not know any immigration lawyers, she was on a tight schedule and she did not have the courage to question what she had allegedly been told by the counselor at the United States Embassy in Budapest. The Member provided reasons why he did not accept her explanation for not seeking asylum as credible, which finding has not been challenged by the Applicant, and drew a negative inference as to her credibility and subjective fear. It was then that he added the above comment about the Holocaust. While overly editorial, in my view, the crux of the comment was the Member's finding that it was further evidence of the Applicant's tendency to embellish, and exaggerate, which finding is borne out by the record.

[145] That said, I have reviewed the decision in whole in an effort to determine if an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the Member, whether consciously or unconsciously, did or could not decide fairly. In that regard, I have also read the transcripts from each of the hearing dates.

[146] Having done so, I am satisfied that there is no merit to the Applicant's assertion that the Member was offended by her advocacy for the human rights of Roma. The Applicant does not point to anything in the reasons in support of that allegation. And, on my review of the decision and reading of the hearing transcript, I found nothing that would lead to that impression. Nor does the transcript support any suggestion of bias in regard to this issue or otherwise.

[147] However, with respect to the Member's reasons, I was concerned with his focus on, and often unnecessary repeated references to the Applicant's conduct in relation to her abduction of her child from Hungary. In particular, whether the Member's disapproval of the Applicant's actions in connection with the abduction, which as seen from the OCJ decision and the Member's reasons leave little to commend them, tainted his decision in whole. I was also troubled by the Member's use of very strong language when describing the Applicant's conduct.

[148] The Member placed considerable and repeated emphasis on the Applicant's actions pertaining to the abduction such as her allegations of sexually inappropriate behaviour by her ex-husband, which the OCJ found could not be established on a balance of probabilities and the Member found to be false, and her attempts to mislead and unduly influence the child in an attempt to gain a custody advantage as found by the OCJ and the Member. However, in that regard, he also addressed related issues raised for the first time by Applicant at the hearing. For example, the Applicant alleged that the OCL clinical investigator appointed by the OCJ had secretly gone to Hungary and visited her ex-husband which the Member stated implied collusion and bias. The Member found that there was no evidence that this allegation was raised before the OCJ, which could reasonably have been expected. In this regard, he found that there were few limits as to what the Applicant was prepared to say concerning the OCL investigator and the conduct of her ex-husband and that overall her testimony on the abduction undermined his view of the Applicant's overall credibility.

[149] In his inclusion analysis, the Member went on to make other negative credibility findings that were not based on the Applicant's conduct in the removal of the child from Hungary, which are again unchallenged by the Applicant.

[150] For example, he also addressed the Applicant's allegation in the OCJ proceeding that she had a great fear of persecution by neo-Nazis while living in Canada. Her explanation for this was that she had been told in February 2012 by a Hungarian journalist who lives in the United States, but whose name she could not recall, that the core of the Hungarian neo-Nazi organization was in Toronto. The Member noted that there was no corroboration of this and that although the Applicant claimed that she was living in Canada as an unknown person, she had given interviews to the press which had quoted her, used her photograph or referred to refugee claims in which she had involvement such as the alleged Former Employee's family. The Member found this fear of neo-Nazis in Canada to be speculative and further evidence that the Applicant had a "profound propensity" to misrepresent, embellish or exaggerate.

[151] There is no doubt that the Member's reasons included much emphasis on the Applicant's conduct in connection with the abduction of her child which he found to undermine her credibility. However, this was not the sole basis of his findings and, read in whole, I cannot conclude that a reasonable person would think that it is more likely than not that the Member, consciously or unconsciously, did not decide fairly either based on his findings concerning the circumstances surrounding the abduction or otherwise. And, based on the Applicant's evidence overall, it was not unreasonable for him to conclude that she was not credible and prone to embellishment for the purposes of buttressing her positions. While the Member undoubtedly

could and should have stated this in a more neutral manner, adopting a tone such as that of the OCJ, and could and should have limited himself to findings necessary to his decision, ultimately, but not without reservation, I am not convinced that his reasons meet the very high threshold or are cogent evidence demonstrating that his reasons give rise to a reasonable apprehension of bias.

Certified Question

[152] The Applicant submitted that, in the event that her application was dismissed that the following questions be certified:

> i. Does the existence of a multilateral treaty on the civil aspects of international child abduction render the matter of parental child abduction presumptively serious for exclusion purposes under Article 1F(b) of the 1951 Convention relating to the Status of Refugees?
>
> ii. Does Article 1F(b) of the 1951 Convention relating to the Status of Refugees apply if the *actus reus* of the crime occurs after entry to Canada as a refugee claimant, if the *mens rea* existed prior to entry?
>
> iii. Can a person be excluded for child abduction under Article 1F(b) of the 1951 Convention relating to the Status of Refugees if the person's intention in bringing the child to Canada was to claim refugee protection?

[153] The Respondent submitted the following question for consideration:

> In determining whether to exclude a party from refugee protection based on an act for which they have been neither charged nor convicted, to what extent is the decision-maker entitled to use *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473 (at para. 27) to modify the application of the Supreme Court's reasoning in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 (at para. 62) to treat Canada's participation in international conventions that address the subject

> matter of the wrongful act as a relevant contextual consideration in assessing the "seriousness" of the act committed outside of Canada?

[154] Pursuant to s 74(d) of the IRPA, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question. The test to be applied when considering whether a question is suitable for certification is set out in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

(Also see *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at paras 28-30; *Canada (Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11).

[155] As I have determined that the Member's analysis of the Applicant's refugee claim is reasonable, the proposed questions are not dispositive of the appeal in this case. As stated by the Federal Court of Appeal in *Liyanagamage v Canada (Secretary of State)*, [1994] FCJ No 1637 (CA) at paras 4-6, the certification process is not to be used as a tool to obtain from that Court declaratory judgments on fine questions which need not be decided in order to dispose of the

case nor is it to be equated with the references process established by the *Federal Courts Act*, RSC, 1985, c F-7. Accordingly, I decline to certify a question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. In the event that a third party requests a copy of the recording of the hearing of this matter, in view of the Confidentiality Order, the Registry shall, prior to providing a copy, ensure that the names of any persons inadvertently mentioned during the hearing are deleted from the recording.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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