

Federal Court



Cour fédérale

Date: 20240828

Docket: IMM-1822-23

Citation: 2024 FC 1340

Ottawa, Ontario, August 28, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

ROHAT TASDEMIR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

and

FARAH ISSA

Intervener

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Immigration and Refugee Board of Canada's Refugee Protection Division [RPD] dated January 25, 2023. In that decision, the

RPD refused the Applicant's application to reopen his refugee claim, which had previously been declared abandoned.

[2] The Applicant submits that his application should be granted and the decision quashed as there was a breach of natural justice because of his previous counsel's incompetent representation. In the alternative, the Applicant submits that the RPD's decision was unreasonable.

[3] The Intervener, the Applicant's previous counsel, opposed any finding of incompetence and asserted that the Applicant did not meet either the first or the second part of the test required to establish a breach of natural justice due to incompetent representation. The Intervener took no position on the reasonableness of the RPD's decision. The Respondent took no position as to whether the actions of the Intervener constituted incompetence, but asserted that there was no basis to find that the RPD's decision was unreasonable.

[4] For the reasons that follow, I am satisfied that the Applicant has established that incompetence of the Intervener resulted in a breach of natural justice, such that the application for judicial review should be granted.

I. Preliminary Matter

[5] This application for judicial review was heard on March 7, 2024, before a judge who retired from the Court on June 1, 2024. By Order of the Chief Justice dated June 24, 2024, the application was reassigned to me. By letter dated June 25, 2024, the parties and the Intervener

agreed that the application could be determined based on the written record and audio recording of the hearing. However, I convened a brief further hearing of this matter, on August 15, 2024, to address questions that arose upon my review of the post-hearing written submissions.

II. Background

[6] The Applicant, a citizen of Turkey, first entered Canada in March of 2022. Upon entry, the Applicant sought refugee protection, but states that the agents at the border instructed him to attend an eligibility interview on June 8, 2022.

[7] With the help of his uncle, the Applicant found an interpreter, Nurden Gul, who assisted him with completing the paperwork necessary to initiate his refugee claim. The Applicant met with Ms. Gul on March 26, 2022, and she explained to him the information she required to complete the forms, which he provided to her around May 6, 2022. Ms. Gul sent the completed forms to the Canada Border Services Agency [CBSA] before the Applicant's eligibility interview. Ms. Gul then told the Applicant that he should start drafting his basis of claim [BOC] narrative and finish it as soon as possible.

[8] On June 8, 2022, the Applicant attended his eligibility interview. His claim was referred to the RPD and he was provided with a BOC form. The Applicant states he was told he had 15 days to file his BOC form, but was later informed this had been extended to 45 days, resulting in a filing deadline of July 25, 2022.

[9] With the help of Ms. Gul's translation, the Applicant states that he applied to Legal Aid Ontario to assist with the costs of his refugee claim and was found eligible for assistance on June 13, 2022. Around this time, Ms. Gul told the Applicant he would need to work with a lawyer to complete his BOC narrative, but did not suggest a particular lawyer.

[10] Ms. Gul later advised the Applicant to write out his story in Turkish, so that she could translate it and send it to a lawyer, which she would help the Applicant locate. For several weeks, the Applicant corresponded back and forth with Ms. Gul, providing additional information for inclusion in his narrative. On July 19, 2022, the Applicant provided a finalized copy of his narrative in Turkish to Ms. Gul.

[11] On July 25, 2022 (the deadline for the Applicant to file his BOC form), Ms. Gul sent an email to the Intervener stating that the Applicant "needs an extension for his BOC" and that she would "send his narrative draft tomorrow." She attached the Applicant's BOC form, among other documents, to this email. The Intervener responded that same day, stating, "I will request an extension." The next day, Ms. Gul sent the Applicant's draft narrative to the Intervener, as promised.

[12] On August 15, 2022, Ms. Gul informed the Applicant for the first time that the Intervener was his lawyer and that the Applicant would meet with the Intervener on August 23 and 25, 2022.

[13] On August 15, 2022, three weeks after the BOC deadline, the Intervener submitted, by letter, an application for an extension of time to provide a completed BOC form. In this letter, the Intervener stated that: (a) the Applicant only retained him as counsel on August 10, 2022; (b) the Applicant informed him that he was not aware of the deadline for filing the BOC form; and (c) the Applicant does not speak English. The Intervener requested an extension of time until September 14, 2022, to complete the Applicant's BOC form.

[14] On August 16, 2022, the Applicant received a letter dated August 12, 2022, from a Registry Support Assistant at the RPD, enclosing a Notice to Appear pursuant to subsection 168(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. The Notice to Appear stated that a hearing would take place via teleconference on September 7, 2022, at 10:00 a.m. to determine whether the Applicant's claim for refugee protection had been abandoned. The letter noted that the hearing would allow the Applicant to explain why he did not produce his BOC form within the extension period provided. The Notice to Appear provided two telephone numbers by which the Applicant could connect to the hearing, as well as a number the Applicant could call if he had questions or issues connecting. Further, the letter stated that if the Applicant did not appear at the special hearing, the RPD may declare his claim abandoned.

[15] After receiving this letter, the Applicant wrote to Ms. Gul, who told him the Intervener had already requested an extension of time for him to file the BOC form.

[16] The Applicant met with the Intervener for the first time on August 23, 2022, and finalized the BOC form on August 25, 2022. The Intervener submitted the Applicant's BOC form to the RPD that same day, although the RPD records receiving the form on August 29, 2022.

[17] By letter dated August 27, 2022, the RPD denied the Applicant's request for an extension of time, noting that: (a) it was now more than a month after the already extended deadline and a completed BOC form had not yet been received; (b) the application for an extension of time failed to establish that the Applicant was not advised of the requirement to submit his BOC form within set timelines and that he required more than six times the duration set out in the *Immigration and Refugee Protection Regulations* for submitting a completed BOC form; (c) the Applicant was provided with a Turkish interpreter during his intake interview and provided with documents pertaining to his claim, which documents (available in Turkish) clearly set out the requirement to complete the BOC form within the set timeline and the deadline therefor. The letter also reminded the Applicant of the requirement to appear at the abandonment hearing, where he would have an opportunity to explain why he did not produce his BOC form by the required deadline.

[18] On September 1, 2022, the Applicant sent the RPD's letter to Ms. Gul, who in turn talked to the Intervener. Ms. Gul then called the Applicant and relayed to him what the Intervener said to her — namely, that the Intervener would attempt to have this special hearing cancelled in advance of September 7, 2022, but that if he was unable to get it cancelled, the Intervener would “explain everything to the Board Member at that time.”

[19] On September 6, 2022, the Intervener wrote to the RPD to request that the special hearing scheduled to take place the next day be cancelled because the Applicant had completed and submitted his BOC form. However, the hearing proceeded on September 7, 2022.

[20] The Applicant states that the Intervener did not meet with him before the abandonment hearing to discuss what would happen during the hearing or to review what questions the Applicant might be asked.

[21] The abandonment hearing began at 10:00 a.m. on September 7, 2022. The Intervener appeared on behalf of the Applicant, but the Applicant himself did not attend. In his affidavit, the Applicant states that he tried to connect to the hearing, but was unable to do so because he does not have a home computer and was connecting by way of his cell phone. The Applicant further explained that he contacted an interpreter who works with Ms. Gul (who was herself out of the country at that time) for help connecting to the hearing or in getting in touch with the Intervener, but the interpreter was unable to assist. The Applicant noted he received a call at around 10:00 a.m., which he later understood was the RPD attempting to reach him, but he stated that he recalled the phone ringing only once, that he did not answer it in time and that he did try calling back. The Applicant claimed that when he contacted the interpreter and told her about the missed call, she urged him to wait and said they would call him back, but that they never did. The Applicant also stated that the Intervener did not call him or otherwise reach out to him that morning.

[22] At the hearing, the RPD explained that although the Intervener provided submissions on the Applicant's behalf, the Applicant failed to provide evidence, either *viva voce* or in the form of an affidavit, to explain why he was not at the hearing or why his BOC form was late. The RPD rendered an oral decision declaring that the Applicant's claim had been abandoned. In their subsequent reasons for decision, the RPD made the following findings in concluding that the Applicant had not been diligent in pursuing his claim and in declaring his claim abandoned:

- A. The RPD did not accept that the information provided by the Applicant's counsel established that the Applicant, by not speaking English, was somehow unaware that there were processes he needed to follow or actions he needed to take to advance his refugee claim. Rather, the RPD explained that the majority of claimants that appear before the RPD do not speak English and the claims process is designed with this in mind.
- B. In this particular case, the Applicant was provided with a Turkish interpreter during his intake interview, where he was provided with documents pertaining to his claim and the claims process. The cover page on the Applicant's BOC form and the Confirmation of Referral, both of which were provided to the Applicant in June, clearly sets out that the Applicant must submit his completed BOC form within the set timeline.
- C. The RPD found that the Applicant had not provided sufficient reasons to explain why he had taken "somewhere in the neighbourhood of six times as long as the 15 day period set out in the regulations, and more than a month longer than the already extended period that's been provided by way of a Practice Notice from

this Division, which extended the deadline to 45 days.” The RPD noted that the Applicant had submitted his BOC form 80 days after the claim was referred.

D. In light of the findings above, as well as the fact that the Applicant failed to appear at the hearing (despite being sent a Notice to Appear and despite his counsel advising him in advance that it was necessary to attend), as well as the fact that the RPD attempted to contact the Applicant directly from the hearing, the RPD found that the Applicant was in default of the proceedings by not filing his BOC form within the already extended timeline. The RPD also found that he was further in default of the proceedings by failing to appear at the hearing.

[23] On October 7, 2022, the Intervener filed an application to reopen the Applicant’s claim. The application consisted of: (a) an affidavit from the Applicant; (b) a photo of the Applicant’s phone showing his attempt to join the abandonment hearing conference call; and (c) a covering letter.

[24] In his affidavit, the Applicant stated that he made “significant attempts” to connect to the conference call from 9:55 to 10:30 a.m. He stated he received a call at 10:00 a.m., and called back, but there was no answer. He also stated that he communicated with his “friend” (clarified by the Applicant, in his affidavit filed with this Court, to be the interpreter mentioned above) for assistance connecting but he was unable to get through. The Applicant requested that the RPD reopen his refugee claim because he fears returning to his home country.

[25] The screenshot of the Applicant's phone, attached to his affidavit, shows a single outgoing call to +1 (343) 803-4404 at 10:28 a.m. lasting 10 seconds.

[26] The covering letter stated in its entirety as follows:

This is regarding the above-mentioned case. On September 7th, 2022, the claim for refugee protection for my client was declared abandoned mainly because the claimant was not present during the hearing. We rely on the Affidavit of the claimant as well as the supporting documents submitted in support of this Application, which are screenshots of the claimant's phone showing that he made attempts to join the conference call and dialed the number that he was required to dial, but he was unable to join due to technical issues. He has made several attempts to join, and he was available at the date and time of the Abandonment hearing. We ask that you carefully review the Affidavit and attached supporting document corroborating the efforts the claimant has made to join the conference call.

It was never the claimant's intention to not be represent during the hearing. It was due to technical issues that the claimant could not join his hearing. Therefore, given the circumstances, we are sincerely requesting that the claim be re-opened and for the Board to accept the BOC Narrative that was submitted one week before the hearing that was scheduled on September 7th, 2022.

III. Decision under Review

[27] On January 25, 2023, the RPD denied the Applicant's application to reopen his abandoned refugee claim.

[28] The RPD explained that the Applicant's claim was declared abandoned because the Applicant submitted his BOC form more than one month after it was due, failed to provide sufficient explanation for why he did not follow the required timelines and failed to appear at the special teleconference hearing.

[29] The RPD stated that it must not allow an application to be reopened, unless there was a failure to observe a principle of natural justice, as required by Rule 62(6) of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*]. The RPD stated they drew no negative inference from the timing of the reopening application.

[30] The RPD held that the Applicant failed to establish that technical issues prevented him from attending his teleconference hearing on September 7, 2022. Although the Applicant claimed he made “significant attempts” to connect to the hearing, the RPD found that, other than asking a friend for help and repeatedly calling the same number that was not working for him, the Applicant provided little evidence of the “significant attempts.” The RPD further stated that the supporting evidence the Applicant provided contained a photograph of the Applicant’s cellphone showing one call was made in an attempt to connect to the hearing at 10:30 a.m.

[31] The RPD also found that the Applicant did not avail himself of the alternatives available to him in the event he had difficulties connecting to the hearing. The RPD noted that the Notice to Appear, which was sent to the Applicant approximately a month before the hearing, included two different phone numbers the Applicant could have used to connect to the hearing, but there is no evidence he tried the second number. Similarly, the Notice to Appear included a number he could call if he had questions or had issues connecting to the hearing, but the Applicant did not mention calling this number. The RPD found that these factors weighed against allowing the application.

[32] Further, the RPD found that the Applicant had retained counsel who successfully connected to the hearing. However, there is no evidence the Applicant attempted to call his counsel when he had difficulty connecting. The RPD found it was reasonable to expect the Applicant to call, text or email his counsel, and that his failure to do so weighed against allowing his application.

[33] The RPD held that the Applicant received notice of the hearing, but failed to make reasonable efforts or take reasonable actions available to him when he was having difficulty connecting to his hearing. Accordingly, the RPD held that the Applicant failed to establish that there was a failure to observe a principle of natural justice and denied his application to reopen his abandoned claim.

IV. Issues and Standard of Review

[34] The Applicant has raised two issues on this application: (i) whether there was a breach of natural justice resulting from the Intervener's alleged incompetent representation; and (ii) in the alternative, whether the RPD's decision denying the application to reopen was reasonable.

[35] For the reasons that follow, I find that the determinative issue is whether there was a breach of natural justice resulting from the Intervener's alleged incompetent representation. As such, I need not address the Applicant's alternative submission regarding the reasonableness of the decision.

[36] Allegations of incompetent counsel pertain to an applicant's right to fully present their case, which is an issue of procedural fairness [see *Zhou v Canada (Citizenship and Immigration)*, 2022 FC 1046 at para 9, citing *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27; *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 1360 at paras 24-26].

[37] The applicable standard of review with respect to the issue of incompetent representation is that akin to correctness. Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise [...] 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" [see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54]. The duty of procedural fairness is "eminently variable," inherently flexible and context-specific. It must be determined with reference to all the circumstances, including the *Baker* factors [see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77]. A court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances [see *Canadian Pacific Railway Company v Canada (Attorney General)*, *supra* at para 54].

V. Analysis

[38] If established, ineffective or incompetent counsel may be sufficient grounds for a breach of natural justice [see *Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 at para 33].

[39] To succeed in establishing a violation of his right to procedural fairness resulting from incompetent representation, the Applicant must satisfy the requirements of the following tripartite test, by proving that: (i) the Intervener’s alleged acts or omissions constitute incompetence; (ii) there was a miscarriage of justice in that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and (iii) the Intervener has been given a reasonable opportunity to respond [see *Ram v Canada (Citizenship and Immigration)*, 2022 FC 795 at para 12, citing *Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 16].

[40] The standard for establishing incompetent or negligent counsel is very high and will only constitute a breach of natural justice in “extraordinary circumstances” [see *Ram, supra* at para 12; *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at para 56].

[41] To satisfy the first prong of the test, the Applicant bears the onus of establishing that his counsel’s conduct fell outside the range of reasonable professional assistance. However, there exists a “strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance” [see *Aluthge v Canada (Citizenship and Immigration)*, 2022 FC 1225 at para 36, citing *R v GDB*, 2000 SCC 22 at para 27].

[42] To satisfy the second prong of the test, the Applicant must demonstrate that, but for the alleged conduct of the Intervener, there is a reasonable probability that the original result would have been different [see *Aluthge, supra* at para 39]. This test does not require certainty. A “reasonable probability” is one that is “sufficient to undermine confidence in the outcome” and

“lies somewhere between a mere possibility and a likelihood” [see *Singh v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 743 at para 38].

[43] In this case, there is no dispute over the third part of the test, as the Intervener is on notice of the allegations against him and was granted intervener status to participate on this application.

[44] The Applicant submits that the Intervener was incompetent in his representation of the Applicant for the following reasons:

- A. The Intervener failed to file the request for an extension of time to file his BOC form in a timely manner. The Applicant asserts that the Intervener was retained on July 25, 2022, but did not file the request for an extension of time until August 15, 2022. The Applicant asserts that the Intervener never acknowledged his own delay in filing the request for an extension of time in the request itself, at the abandonment hearing or in the application to reopen.
- B. The Intervener misrepresented the nature of his relationship with the Applicant in the request for an extension of time and at the abandonment hearing by stating that he had only been retained in August of 2022, when in fact he had been retained on July 25, 2022.
- C. The Intervener failed to address the applicable test for an extension of time in either his materials requesting the extension of time or before the RPD at the abandonment hearing. The Applicant asserts that in addition, the Intervener failed to highlight key facts to the RPD (such as the Applicant’s continuing intention to assert his refugee claim) and failed to file relevant supporting evidence, such as an

affidavit from Ms. Gul, which would have clearly demonstrated all of the efforts made by the Applicant to move his refugee claim forward.

- D. The Applicant submits that at the abandonment hearing, the RPD had to consider whether a claimant is ready to start or continue the proceedings, as set out in Rule 65(4) of the *RPD Rules*. However, the Applicant asserts that the Intervener failed to address the Rule 65(4) factors and failed to bring to the RPD's attention to information that was relevant in demonstrating that the Applicant was ready to continue the proceedings and had been pursuing his claim since he arrived in Canada, which failures resulted in the RPD concluding that the Applicant had not been "diligent" in pursuing his claim.
- E. The Intervener misrepresented the facts in his request for an extension of time and at the abandonment hearing when he stated the Applicant was not aware of the deadline for filing his BOC form. The Applicant submits that he was always aware of the filing deadline. The Applicant submits that the assertion that the Applicant was unaware of the deadline was a justification conceived of by the Intervener, which was ultimately held against the Applicant as the RPD found that the Applicant had not sufficiently established that he was unaware of the deadline.
- F. The Intervener failed to prepare the Applicant for the abandonment hearing. The Applicant maintains that the Intervener did not meet with him to discuss what would happen at the special hearing or to prepare him for potential questions about why he failed to file his BOC form on time.
- G. The Applicant submits that the Intervener was in a conflict of interest and should never have acted for the Applicant on the application to reopen, given the

Intervener's own errors leading up to the abandonment decision. The Applicant asserts that the Intervener should have either withdrawn from representing the Applicant, or raised the issues himself.

- H. The Intervener filed an incomplete evidentiary record in support of the application to reopen. Specifically, the Applicant alleges that the Intervener failed to mention that: (i) Ms. Gul was out of the country on the day of the abandonment hearing; (ii) the "friend" referred to in his affidavit was not a friend, but a colleague of Ms. Gul's and that the Applicant asked the colleague to put him in contact with the Intervener (as Ms. Gul was his "go-between" to reach the Intervener); (iii) he was using his cell phone to connect to the hearing; (iv) when the Applicant did get a phone call that morning, it only rang once and when he tried answering it, it had stopped ringing; (v) the Applicant tried calling the number back; and (vi) the Applicant was advised by Ms. Gul's colleague that he ought to stay off the phone in case the RPD attempted to call him back. The Applicant states that the Intervener did not mention the Applicant's attempts to contact him through Ms. Gul's colleague when the Applicant was unable to connect to the abandonment hearing, and that the RPD placed significant weight on the Applicant's failure to contact the Intervener in the decision to refuse to reopen his claim.
- I. The Intervener filed deficient written submissions in support of the application to reopen. The written submissions failed to set out the applicable legal test to reopen a refugee claim and to explain why, on the facts of this case, the test was met.

[45] The Applicant asserts that, due to the aforementioned incompetent conduct, he suffered prejudice in that his claim for refugee protection was declared abandoned and his application to reopen his claim was subsequently refused. But for the Intervener's incompetence, the Applicant asserts that there is a reasonable probability that the RPD's decision would have been different.

[46] It is the position of the Intervener that: (a) his conduct was not incompetent and fell within the wide range of reasonable professional assistance; (b) much of the conduct relied upon by the Applicant is irrelevant to the issue before the Court, which is limited to his alleged incompetency on the application to reopen only; (c) for the conduct that is relevant, the Applicant has failed to adduce clear proof of incompetence; and (c) the Applicant has not adduced evidence of a reasonable probability that the outcome of the application to reopen would have been any different but for the alleged acts of incompetence.

[47] Given the dispute between the parties as to what conduct is relevant to the allegation of incompetence, I will begin by considering the conduct that both the Applicant and the Intervener agree is relevant — namely, the Intervener's alleged: (a) failure to file a complete evidentiary record in support of the application to reopen; (b) failure to file proper written submissions in support of the application to reopen; and (c) failure to address his conflict of interest on the application to reopen.

[48] It must be recalled that applications to reopen refugee claims are governed by Rule 62 of the *RPD Rules*, the relevant provisions of which provide as follows:

Application to reopen claim

62 (1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.

[...]

Factor

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

Factors

(7) In deciding the application, the Division must consider any relevant factors, including

(a) whether the application was made in a timely manner and the justification for any delay; and

(b) the reasons why

(i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or

(ii) a party did not make an application for leave to apply

Demande de réouverture d'une demande d'asile

62 (1) À tout moment avant que la Section d'appel des réfugiés ou la Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.

[...]

Élément à considérer

(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

Éléments à considérer

(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :

a) la question de savoir si la demande a été faite en temps opportun et, la cas échéant, la justification du retard;

b) les raisons pour lesquelles :

(i) soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés,

(ii) soit une partie n'a pas présenté une demande

for judicial review or an
application for judicial review

d'autorisation de présenter
une demande de contrôle
judiciaire ou une demande de
contrôle judiciaire.

[49] According to Rule 62, the RPD's power to reopen a refugee claim is very limited. A finding that there has been a failure to observe a principle of natural justice (which this Court has interpreted to also include a breach of procedural fairness) is a necessary condition for allowing such an application. However, depending on other relevant factors (e.g., an unexplained delay in bringing the application to reopen), a failure to observe a principle of nature justice or breach of procedural fairness may not be sufficient [see *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at paras 14-16, 20; *Attalla v Canada (Citizenship and Immigration)*, 2019 FC 771 at paras 11-12; *Hegedus v Canada (Citizenship and Immigration)*, 2019 FC 428 at paras 21-25].

[50] With the applicable legal principles in mind, I will begin by considering whether the Intervener's written representations in support of the application to reopen fell outside the range of reasonable professional assistance.

[51] In their memorandum of fact and law on this application, the Intervener submitted that he "filed a comprehensive application record" and that his materials "appropriately asserted that it would be a breach of natural justice if the Applicant was not afforded a reopening of his refugee claim given his continuing intention to proceed with the claim and that he would lose the opportunity to be heard based on unforeseen and unavoidable technical difficulties." This is an entirely inaccurate description. The application to reopen consisted of an affidavit and a two-paragraph letter, as detailed above. Nowhere in that letter does the Intervener address Rule 62 or

otherwise use the language of Rule 62. Contrary to the Intervener's submission to this Court, the letter makes no reference to a breach of natural justice or to the Applicant's continuing intention to pursue his refugee claim. I find that the written submissions filed by the Intervener in support of the application to reopen fall far short of constituting a competent filing.

[52] Moreover, the evidentiary component of the application to reopen also falls outside the range of reasonable professional assistance. I agree with the Applicant that the evidence prepared by the Intervener in support of the application failed to include numerous important details related to the Applicant's attempts to join the abandonment hearing, all as set out above. Furthermore, the evidence did not address any of the Applicant's continuing efforts to pursue his refugee claim prior to the abandonment hearing. For example, an affidavit from Ms. Gul, like the one filed by the Intervener on this application, could and should have been put before the RPD on the request to reopen. It is unfortunate that the Intervener failed to show the same level of effort he put forward on this application when preparing the materials in support of the application to reopen.

[53] While the Applicant also asserts that the Intervener was in a conflict of interest, I need not address this issue as I am already satisfied that the application to reopen was incompetently prepared.

[54] With respect to the conduct of the Intervener that pre-dates the application to reopen, I am satisfied that, in the particular circumstances of this matter, such conduct is relevant to the application to reopen and can be considered by the Court.

[55] I am sympathetic to the Intervener's argument that the RPD's decision in the application to reopen turned largely on the Applicant's failure to connect to the special hearing. Indeed, the reasons given by the RPD focus almost exclusively on the problems the Applicant had connecting to the hearing. This could create the impression that the Applicant, by asking the Court to consider earlier conduct by the Intervener, is impermissibly asking this Court to judicially review a decision that is not properly before it on this application (the abandonment decision or the refusal to grant an extension of time).

[56] The sole reference in the RPD's decision to anything other than the Applicant's failure to appear at the hearing is the RPD's summary of the history of decisions below, wherein the RPD stated:

The claimant's refugee claim was declared abandoned after the claimant submitted his Basis of Claim form more than one month after it was due, the claimant failed to sufficiently explain why they did not follow the required timelines, and the claimant failed to appear at their special teleconference hearing. The claimant is applying to reopen his abandoned refugee claim because technical issues prevented him from calling in to the teleconference hearing where his claim was declared abandoned. The claimant has provided an affidavit to this effect and has provided a screenshot of a cellphone text message.

The balance of the RPD's reasons, save the excerpt above, focus on the Applicant's failure to connect to the hearing.

[57] However, it is not surprising that the RPD focused almost exclusively on the Applicant's inability to connect to the hearing, in light of the submissions the Intervener prepared on his behalf. The RPD's reasons are responsive to the evidence and issues framed by the Intervener on

the application to reopen — the very evidence and submissions that I find demonstrate the Intervener’s incompetence in this matter. Many of the evidentiary omissions detailed above relate to the Intervener’s own prior conduct in the handling of the Applicant’s refugee claim, which makes the Intervener’s cumulative conduct relevant to the Court’s assessment of the Applicant’s incompetent counsel claim. For this reason, I agree with the Applicant that this Court should consider the Intervener’s cumulative conduct (as further detailed below). Moreover, proceeding this way is consistent with this Court’s role in reviewing issues of procedural fairness, which requires that this Court consider the core question of whether the procedure was fair having regard to all of the circumstances. In this case, one cannot unweave the incompetent conduct of the Intervener on the application to reopen from his prior incompetent conduct dating back to the commencement of his retainer. The totality of the Intervener’s incompetent conduct forms part of the relevant circumstances of the application to reopen.

[58] In that regard, I find that the following conduct of the Intervener also amounted to incompetence:

- A. The Intervener failed to file the request for an extension of time to file the BOC form until August 15, 2022, three weeks after committing to doing so. I reject the Intervener’s assertion that his retainer only commenced on August 10, 2022, a date that logically does not flow from any of the evidence before the Court. Rather, I find that the solicitor-client relationship began on July 25, 2022, when the Intervener agreed to provide legal services by way of seeking an extension of time. Having undertaken to submit a request for an extension, competent counsel would have recognized that time was of the essence and steps had to immediately

be taken (given that the BOC form was due that day) to alert the RPD that a request for an extension of time was forthcoming and then to promptly prepare the extension of time materials.

- B. The materials prepared by the Intervener in support of the request for an extension of time fell far outside the range of reasonable professional assistance. The request was made by way of a six-sentence email, with no supporting evidence, and based on a justification for the delay that I find was inaccurate.
- C. The Intervener failed to explain to the RPD in the application for an extension of time and in subsequent proceedings that the Intervener was responsible for the delay in seeking an extension of time during the period of July 25, 2022, to August 10, 2022. The Intervener should have been well aware of the fact that the decision-maker would focus on the Applicant's explanation for how he was moving his refugee claim forward during the entire period of delay and that any period of delay not attributable to the Applicant was an important fact to highlight.
- D. The Intervener also failed to submit evidence that the Applicant had been diligent in pursuing his refugee claim, including the fact that the Applicant: (i) sought an interpreter (Ms. Gul) after his eligibility interview on June 8, 2022; (ii) applied to Legal Aid Ontario with the assistance of Ms. Gul and was found eligible on June 13, 2022; (iii) corresponded with Ms. Gul over several weeks as he prepared his narrative, during which time Ms. Gul asked for more information; (iv) submitted his draft narrative to Ms. Gul on July 19, 2022 (six days prior to the BOC deadline); (v) followed up with Ms. Gul about the status of his application as the

filing deadline approached on July 25, 2022; and (vi) relied on Ms. Gul to correspond with the Intervener, due to the language barrier.

[59] Turning to the second part of the test, I am satisfied that the failings of the Intervener set out above caused prejudice to the Applicant amounting to a miscarriage of justice. Specifically, I am satisfied that the Applicant has demonstrated that there is a reasonable probability that, but for the incompetence of the Intervener, the result of the application to reopen would have been different [see *Brown v Canada (Citizenship and Immigration)*, 2024 FC 105 at para 56].

[60] At the outset of the RPD's decision on the application to reopen, the RPD acknowledged that the Applicant's refugee claim was declared abandoned because he submitted his BOC form more than one month after it was due, failed to sufficiently explain why he did not follow the required timelines and failed to appear at his special teleconference hearing. The Intervener should have included evidence in the application to reopen acknowledging his own delay in submitting the request for an extension and his omission of important information related to the Applicant's efforts to move his refugee claim forward, both of which would have been critical to establishing that the Applicant had not abandoned his claim.

[61] Importantly, the Intervener also failed to include relevant evidence pertaining to the Applicant's efforts to connect to the special hearing. Most notably, the RPD in their decision on the application to reopen noted that the Applicant "had the assistance of professional counsel, but made no attempts to call, text, or email his counsel at any point" when the Applicant was unable to connect to the hearing. Moreover, the RPD noted that the Applicant "failed to establish that he

made any efforts to contact his counsel when the first phone number was repeatedly not working for him.” [Emphasis added.] However, in his affidavit before the Court, the Applicant explained that he had attempted to reach the Intervener through Ms. Gul’s colleague. As such, there was evidence that could have been clearly set out before the RPD regarding the Applicant’s attempt to reach the Intervener, yet the Intervener failed to include such evidence in the application to reopen.

[62] This Court has held that where a decision-maker specifically refers to a lack of evidence, the failure to submit evidence can cause prejudice to an applicant, particularly where the counsel provides limited submissions [see *Kim v Canada (Citizenship and Immigration)*, 2012 FC 687 at para 24; *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 221 at paras 40-41; *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at paras 25-27, 36]. Such is the case here. I find that the deficient evidentiary record filed by the Intervener, coupled with his deficient legal submissions, prejudiced the Applicant on the application to reopen.

[63] As such, in the particular circumstances of this case, I am satisfied that, but for the Intervener’s alleged conduct, there is a reasonable probability that the result of the application to reopen would have been different [see *Aluthge, supra* at para 39]. In making this determination, I am mindful of the fact that the Applicant did not attend the special hearing and thus his conduct is also a major factor in the outcome of the reopening application. However, the conduct of the Intervener remains a central factor, as it improperly constrained the evidence that was before the RPD and caused the RPD to focus exclusively on the Applicant’s non-attendance.

[64] Accordingly, the application for judicial review shall be granted. The decision of the RPD dated January 25, 2023, is set aside and the matter is remitted to a different panel of the RPD for redetermination.

[65] The parties have proposed no question for certification and I agree that none arises.

JUDGMENT in IMM-1822-23

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the RPD dated January 25, 2023, is set aside and the matter is remitted for redetermination by a different panel of the RPD.
3. There is no question for certification.

“Mandy Ayles”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1822-23

STYLE OF CAUSE: ROHAT TASDEMIR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND AND LABRADOR,
AND TORONTO, ONTARIO

DATE OF HEARINGS: MARCH 7, 2024, AND AUGUST 15, 2024

JUDGMENT AND REASONS: AYLEN J.

DATED: AUGUST 28, 2024

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Adrienne Lei	FOR THE INTERVENER

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