Federal Courts Reports | Recueil des décisions des Cours fédérales

IMM-5445-19

2021 FC 1388

Theivendram Kandiah (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

and

Namunakulan Ponnambalam (*Intervener*)

INDEXED AS: KANDIAH V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Fuhrer J.—By videoconference, October 25; Ottawa, December 9, 2021.

Citizenship and Immigration — Immigration Practice — Judicial review of Immigration and Refugee Board, Refugee Protection Division (RPD) decision refusing applicant's refugee protection claim (Decision) — RPD finding that applicant failed to establish that he no longer had permanent resident status in Switzerland; concluding that applicant was excluded from refugee protection under Immigration and Refugee Protection Act (Act), ss. 96, 97(1) pursuant to United Nations Convention Relating to the Status of Refugees (Convention), Article 1E — Applicant citizen of Sri Lanka — Alleges having fled Sri Lanka during the Sri Lankan civil war, making refugee claim in Switzerland, which claim was accepted — Applicant later became equivalent of permanent resident in Switzerland — Applicant's wife, two children came to Canada, made successful refugee claims — Applicant eventually decided to leave Switzerland — Allegedly returned to Sri Lanka but fled once again — Arrived in Canada, made refugee claim — Retained intervener, immigration consultant, to assist with his refugee claim — Neither applicant, intervener obtained any documentation, in advance of hearing, from Swiss officials regarding applicant's status — Preliminary issue was whether to accept respondent's request for abeyance of judicial review application — Main issues: whether there was breach of procedural fairness or failure to observe principle of natural justice by reason of inadequate representation of applicant's former representative, named intervener in proceeding or by reason of RPD's non-compliance with its own procedures; whether RPD's decision was reasonable — Given lateness of new preliminary issue raised by respondent, consequent prejudice to applicant, respondent's request to hold present matter in abeyance denied — Respondent's request premised on Refugee Protection Division Rules (RPDR), r. 62, Act, s. 72(2)(a) — Rule 62 permitting failed refugee claimants to make application to reopen their claim any time before Refugee Appeal Division (RAD) or Federal Court making final determination in respect of their claim — Act, s. 72(2)(a) providing that application for leave may not be made until any right of appeal that Act may provide exhausted — While abeyance of stay may make sense in some circumstances, onus should be on party making such application to seek abeyance from RAD or Federal Court pending disposition of application to reopen — In present case, there was no evidence that applicant had applied to reopen his claim; further, it was respondent who requested abeyance — Respondent's justification for abeyance here too speculative to be in interests of justice

— Determinative issue in present matter was breach of procedural fairness or natural justice by reason of incompetent counsel — While intervener asserted that procedural fairness also breached by reason of RPD's non-compliance with its own procedures, by RPD's refusal to permit applicant to present written submissions after RPD hearing, this was not established — Intervener's cumulative conduct resulted in substantial prejudice to applicant, affected Decision's outcome — Three-part test for reviewable counsel conduct met here in that (i) intervener's acts or omissions constituted incompetence or negligence; (ii) but for impugned conduct, was reasonable probability that outcome would have been different; (iii) intervener had reasonable opportunity to respond to allegation of incompetence or negligence — Lack of any documentation regarding applicant's immigration status in Switzerland or immigration status generally in Switzerland was tantamount to failure of representative to submit evidence that clearly should have been submitted — Neither intervener's response to allegation against him nor his affidavit dispelled this finding — Was incumbent upon legal representative, after having accepted retainer, to apprise RPD as fully as possible of all key factual elements relevant to applicant's claim — Further, intervener stated that he was unwilling, unprepared to make oral submissions at RPD hearing — Reasonable probability that result would have been different but for intervener's incompetence — Therefore, breach of procedural fairness occurring respecting challenged Decision — Regarding RPD's non-compliance with its own procedures, intervener not precluded from raising this issue nor was issue raised so late in proceeding as to be unfair to parties — Nevertheless, intervener not showing that RPD unfairly relied on LEXpat ("Legal Expat Geneva") document or unfairly refused applicant's request to file written submissions following RPD hearing — RPD not breaching RPDR, r. 33 — Thus, RPD not erring or procedurally unfair in refusing to provide applicant with opportunity to make written submissions after hearing — Decision also not unreasonable — Decision set aside, matter remitted to different panel of RPD for rehearing, redetermination — Question certified involving phrase "any right of appeal" in Act, s. 72(2)(a), whether it involves application to reopen claim determined by RPD — Application allowed.

This was an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) refusing the applicant's refugee protection claim (Decision). It found that the applicant failed to establish that he no longer had permanent resident status in Switzerland and concluded that the applicant was excluded from refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* (Act), pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees* (Convention).

The applicant is a citizen of Sri Lanka. He alleges having fled Sri Lanka in 1983 during the Sri Lankan civil war and making a refugee claim in Switzerland based on his Tamil ethnicity. His claim was accepted and he later became the equivalent of a permanent resident in Switzerland around the year 2000. In the meantime, the applicant's wife and two children came to Canada and made successful refugee claims. Tired of living alone for more than 20 years, the applicant decided to leave Switzerland in 2015 and informed Swiss officials of his plan. He alleges he returned to Sri Lanka in 2016 expecting the country conditions to have improved following the end of the civil war. About two years after his return to Sri Lanka, however, the applicant fled again because army officials believed that he had been supporting the Liberation Tigers of Tamil Eelam (LTTE) financially from Switzerland. He arrived in Canada from the United States and made a refugee claim. Once here, the applicant reunited with this family.

The applicant retained the Intervener, an immigration consultant, early in the process to assist with his refugee claim. The applicant and the intervener were informed of the RPD's belief that Article 1E of the Convention might apply to the applicant's refugee protection claim. The intervener made several requests for postponements but they were denied. Neither the applicant nor the intervener obtained any documentation, in advance of the hearing, from Swiss officials regarding the applicant's status. The RPD stated that it considered all of the evidence submitted and noted that the applicant had not provided any explanation for failing to contact Swiss authorities to obtain documentation confirming that he no longer held permanent residency in Switzerland, despite the IRB's notice and respondent's notice of intent to intervene. Pointing to the inconsistencies in the applicant's basis of claim narrative and other forms and the respondent's credibility concerns, the RPD found that the respondent's intervention established a *prima facie* case that the applicant continued to be a permanent resident in Switzerland and had not lost status as alleged. During the hearing, the RPD provided the intervener with an opportunity to ask questions of the applicant and to

make oral submissions on his client's behalf but he chose not to do so. The intervener's request to make written submissions instead was refused. The RPD thus proceeded to render its decision and reasons orally.

The preliminary issue was whether to accept the respondent's request for abeyance of the judicial review application. The main issues were whether there was a breach of procedural fairness or a failure to observe a principle of natural justice by reason of the inadequate representation of the applicant's former representative, the named intervener in the proceeding, and by reason of the RPD's non-compliance with its own procedures; and whether the RPD's decision was reasonable.

Held, the application should be allowed.

Given the lateness of the new preliminary issue raised by the respondent and the consequent prejudice to the applicant, the respondent's request to hold the present matter in abeyance was denied. The respondent's request was premised on *Refugee Protection Division Rules* (RPDR), rule 62 and paragraph 72(2)(a) of the Act. Rule 62 permits failed refugee claimants to make an application to reopen their claim at any time before the Refugee Appeal Division (RAD) or the Federal Court, as applicable, has made a final determination in respect of their claim. In particular, RPDR, subrule 62(4) contemplates reopening applications involving allegations against counsel and prerequisite steps that must be taken. Paragraph 72(2)(a) of the Act provides that an application for leave "may not be made until any right of appeal that may be provided by this Act is exhausted". The respondent further asserted that the Court had to refuse to consider natural justice arguments or hold the current judicial review application in abeyance until the applicant had pursued an adequate alternative remedy, namely, an application to reopen the Decision based on allegations against the former representative. The respondent did not show how the ability to make successive applications to reopen would result in exhaustion in the same way as an appeal. Further, RPDR, subrule 62(1) acknowledges specifically that a RAD or Federal Court proceeding may be pending already when the application to reopen is made. Nowhere does rule 62 of the RPDR provide for a stay of the Federal Court proceeding (or the RAD proceeding, for that matter) pending the disposition of an application to reopen. An abeyance or a stay may make sense in certain circumstances but the onus should be on the party making such an application to seek abeyance from the RAD or the Federal Court, as the case may be, pending the disposition of the application to reopen. In this case, there was no evidence that the applicant had applied to reopen his claim, and further, it was the respondent who requested the abeyance, based on an outstanding submission on an unrelated matter that the applicant had to "exhaust" the available reopening remedy before bringing an application for leave and judicial review. The respondent's justification for an abeyance in this matter involved too much that was speculative to be in the interests of justice. Further, it was not established that the term "right of appeal" in paragraph 72(2)(a) of the Act includes a right to reopen.

The determinative issue in this matter was a breach of procedural fairness or natural justice by reason of incompetent counsel. While the intervener asserted that procedural fairness also was breached by reason of the RPD's non-compliance with its own procedures and by the RPD's refusal to permit the applicant to present written submissions after the RPD hearing, this was not established. The intervener's cumulative conduct resulted in substantial prejudice to the applicant and affected the outcome of the Decision. The test for reviewable counsel conduct is three-part, and the onus is on an applicant to establish that: (i) the previous representative's acts or omissions constituted incompetence or negligence; (ii) but for the impugned conduct, there is a reasonable probability that the outcome would have been different (in other words, a miscarriage of justice occurred as a result of the conduct); and (iii) the representative had a reasonable opportunity to respond to an allegation of incompetence or negligence. The first part of the test was met because of the intervener's numerous errors and omissions which constituted incompetence. At the very least, the intervener failed to obtain and submit documents that were of high significance to the applicant's case and failed to make any submissions on the sole issue before the RPD, the applicant's status in Switzerland and possible exclusion pursuant to Article 1E of the Convention. The intervener made no serious efforts to obtain the very evidence about the applicant's status that the applicant obtained easily after the RPD hearing and Decision. The record also showed the intervener failed to provide any country specific documentation about immigration status in Switzerland establishing that, after the amount of time the applicant spent abroad, someone in his circumstances no longer would retain permanent resident status and would have no right of re-entry,

and in what circumstances, if any, they might reacquire their permanent resident status. The RPD located a document entitled “Legal Expat Geneva” (LEXpat) and such documentation was disclosed to the intervener during the RPD hearing. The lack of any documentation regarding the applicant’s immigration status in Switzerland or immigration status generally in Switzerland was tantamount to a failure of the representative to submit evidence that clearly should have been submitted. Neither the intervener’s response to the allegation against him nor his affidavit dispelled this finding. It was incumbent upon the legal representative, after having accepted the retainer, to apprise the RPD as fully as possible of all key factual elements relevant to the applicant’s claim. Further, when given the opportunity to make oral submissions at the RPD hearing, the intervener stated that he was unwilling and unprepared. There is little doubt that failing to make submissions on the determinative issue in a decision amounts to incompetence, especially with the knowledge that representations must be made orally at the end of the RPD hearing absent an order to the contrary. A miscarriage of justice occurred in the circumstances here because there was a reasonable probability that the result would have been different but for the incompetence. The determinative issue before the RPD was the applicant’s status in Switzerland and possible exclusion under Article 1E of the Convention. The RPD made this abundantly clear in correspondence prior to the hearing and at the outset of the hearing. Therefore, a breach of procedural fairness occurred in respect of the challenged Decision.

Regarding the RPD’s non-compliance with its own procedures, the intervener was not precluded from raising this issue nor was it raised so late in the proceeding as to be unfair to the parties. Nevertheless, the intervener did not show that the RPD unfairly relied on the LEXpat (“Legal Expat Geneva”) document or unfairly refused the applicant’s request to file written submissions following the RPD hearing. Because the applicant’s application for leave and judicial review alleged a breach of natural justice broadly, it could not be concluded that the issue of whether the RPD relied unfairly on the LEXpat document was entirely new. There was no dispute that the RPD raised the LEXpat document at the hearing before it but the document was not entered as an exhibit. And the respondent was unable to explain why the document was not in the certified tribunal record. However, the applicant’s record contained a copy of the document. Further, the RPD referred to the LEXpat document during the hearing. By disclosing the document to the applicant at the hearing, coupled with the fact of a copy of the document being in the applicant’s record, the RPD did not breach RPDR, rule 33 and, thus, did not err. The Decision turned on the *prima facie* case raised by the respondent and the applicant’s failure to rebut it with evidence about his current status in Switzerland. From the RPD’s perspective, the LEXpat document served to reinforce, rather than rebut, the *prima facie* case. Thus, the RPD did not err or was procedurally unfair in refusing to provide the applicant with an opportunity to make written submissions after the hearing. The applicant had been apprised of the possible Article 1E exclusion issue as early as April 2019 and had plenty of time to prepare submissions, with the knowledge of RPDR, subrule 10(7) that representations must be made orally at the end of the hearing unless the RPD orders otherwise.

The Decision was not unreasonable. The applicant took issue with the manner in which the RPD interpreted the LEXpat document, asserting that the document supported the position that individuals like himself would no longer have a right of return as a permanent resident. However, the applicant’s submissions in this regard were tantamount to a request to reweigh the LEXpat document, which was not the role of the Federal Court on judicial review.

In conclusion, in light of the incompetence of the applicant’s former representative, the intervener, the applicant was denied natural justice and, therefore, the Decision was set aside and the matter was remitted to a different panel of the RPD for rehearing and redetermination. Further, the RPD had to provide the applicant with an opportunity to file evidence regarding not only his immigration status in Switzerland but also any other applicable issues. Finally, a question about the phrase “any right of appeal” in paragraph 72(2)(a) of the Act and whether it involves an application to reopen a claim determined by the RPD was certified.

STATUTES AND REGULATIONS CITED

Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22, r. 18.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 72, 96, 97(1), 98.

Refugee Appeal Division Rules, SOR/2012-257, r. 49.

Refugee Protection Division Rules, SOR/2012-256, rr. 10(7), 33, 34, 62.

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, 189 U.N.T.S. 150, Art. 1E.

CASES CITED

APPLIED:

Canadian Pacific Railway Company v. Canada (Attorney General), 2018 FCA 69, [2019] 1 F.C.R. 121; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, [2020] 2 F.C.R. 299, affg 2018 FC 481, 60 Imm. L.R. (4th) 257; *Al Mansuri v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22, [2007] 3 F.C.R. D-1; *Rezko v. Canada (Citizenship and Immigration)*, 2015 FC 6, 471 F.T.R. 263; *Rendon Segovia v. Canada (Citizenship and Immigration)*, 2020 FC 99, 315 A.C.W.S. (3d) 150; *Guadron v. Canada (Citizenship and Immigration)*, 2014 FC 1092, 468 F.T.R. 153; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, 318 N.R. 365.

DISTINGUISHED:

Adeosun v. Canada (Citizenship and Immigration), 2021 FC 1089.

CONSIDERED:

Reem Yousef Saeed Kreishan, et al v. Minister of Citizenship and Immigration, [2020] 1 S.C.R. xii, 2020 CanLII 17609; *Sabitu v. Canada (Citizenship and Immigration)*, 2021 FC 165, 81 Imm. L.R. (4th) 30, supplementary reasons 2021 FC 300, 81 Imm. L.R. (4th) 113; *Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53, 292 A.C.W.S. (3d) 146.

REFERRED TO:

Chaudhry v. Canada (Citizenship and Immigration), 2019 FC 520, 305 A.C.W.S. (3d) 597; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713; *Lin v. Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81, 80 Imm. L.R. (4th) 171; *Minister of Citizenship and Immigration v. Alabi Adam Sabitu et al.*, (2 November 2021), Ottawa, A-133-21 (F.C.A.); *Li v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 267, 327 N.R. 253; *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51, 1993 CanLII 3026 (T.D.); *Osagie v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368, 262 F.T.R. 112; *Rodrigues v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 77, [2008] 4 F.C.R. 474; *Memari v. Canada (Citizenship and Immigration)*, 2010 FC 1196, [2012] 2 F.C.R. 350; *El Kaissi v. Canada (Citizenship and Immigration)*, 2011 FC 1234, 5 Imm. L.R. (4th) 87; *Pathinathar v. Canada (Citizenship and Immigration)*, 2013 FC 1225, 235 A.C.W.S. (3d) 1040; *Mcintyre v. Canada (Citizenship and Immigration)*, 2016 FC 1351, 275 A.C.W.S. (3d) 833; *Gombos v. Canada (Citizenship and Immigration)*, 2017 FC 850, 284 A.C.W.S. (3d) 157; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *Basharat v. Canada (Citizenship and Immigration)*, 2015 FC 559, 98 Admin. L.R. (5th) 7; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 481 C.R.R. (2d) 234; *Puigdemont Casamajo v. Canada (Immigration, Refugees and Citizenship)*, 2021 FC 774, 336 A.C.W.S. (3d) 444; *Luswa v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 289, 129 A.C.W.S. (3d) 577; *Nguesso v. Canada (Citizenship and Immigration)*, 2018 FCA 145, 297 A.C.W.S. (3d) 157.

AUTHORS CITED:

Canada. Federal Court. *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings*, C.J. Paul Crampton, November 5, 2018.

Canada. Federal Court. *Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*, C.J. Paul Crampton, March 7, 2014.

APPLICATION for judicial review of an Immigration and Refugee Board, Refugee Protection Division decision (*X (Re)*, 2019 CanLII 150845 (I.R.B.)) refusing the applicant's refugee protection claim on the basis that the applicant was excluded from refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* and pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees*. Application allowed.

APPEARANCES

Rebeka Lauks for applicant.

Jocelyn Espejo-Clarke for respondent.

Micheal Crane for intervener.

SOLICITORS OF RECORD

Battista Smith Migration Law Group, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

Micheal Crane, Toronto, for intervener.

The following are the reasons for judgment and judgment rendered in English by

FUHRER J.:

I. Overview

[1] The applicant, Theivendram Kandiah, is a citizen of Sri Lanka. He alleges having fled Sri Lanka in 1983 during the Sri Lankan civil war and making a refugee claim in Switzerland based on his Tamil ethnicity. His claim was accepted and he later became the equivalent of a permanent resident in Switzerland in around 2000. In the meantime, the applicant's wife and two children came to Canada in 1994 and made successful refugee claims.

[2] Tired of living alone for more than 20 years, the applicant decided to leave Switzerland in 2015 and informed Swiss officials of his plan. He alleges he returned to Sri Lanka at the end of May 2016 expecting the country conditions to have improved following the end of the civil war in 2009. About two years after his return to Sri Lanka, however, the applicant fled again because army officials believed that he had been supporting the Liberation Tigers of Tamil Eelam (LTTE) financially from Switzerland. He arrived in Canada in September 2018 (from the United States) and made a refugee claim. Once here, the applicant reunited with this family.

[3] At the conclusion of the hearing held on August 9, 2019 [*X (Re)*, 2019 CanLII 150845 (I.R.B.)], the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) refused the applicant's claim (Decision). Based on the

respondent's intervention, the RPD found the applicant failed to establish that he no longer had permanent resident status in Switzerland. The RPD thus concluded that the applicant was excluded from refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6, 189 U.N.T.S. 150 (Convention).

[4] See Annex "A" below for applicable legislative provisions.

[5] The applicant now seeks judicial review of the Decision and raises two issues. First, the applicant contends there was a breach of procedural fairness or a failure to observe a principle of natural justice by reason of the inadequate representation of his former representative, the named intervener in this proceeding. Regarding this first issue, I am satisfied, that the applicant has complied with prerequisite steps outlined in the court's procedural protocol dated March 7, 2014 and entitled "Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court" (Protocol). Second, the applicant questions the reasonableness of the Decision.

[6] Prior to the hearing of this matter on October 25, 2021, the intervener brought a motion to be added as such to the proceeding. I granted the motion on October 19, 2021, on the terms specified in my order, having regard to the applicant's consent and the respondent's stated lack of opposition to the motion.

[7] Notwithstanding his lack of opposition, however, the respondent suggests a third issue, in the respondent's further memorandum of argument served and filed on October 21, 2021, to the effect that new issues raised late by the intervener are substantively and procedurally unfair to the parties. While the intervener argues that the Decision is procedurally unfair, he does so on a different foundation than that asserted by the applicant. The intervener submits the Decision is based on documentation about Swiss immigration law that the RPD referred to at the hearing but did not receive properly into evidence. The intervener further submits, in particular, that the introduction of such documentation at the hearing was not in accordance with Rule 33 of the *Refugee Protection Division Rules*, SOR/2012-256 (RPDR) and, hence, should have factored into the RPD's consideration of whether to permit the intervener to file written submissions after the hearing.

[8] For the reasons below, I am persuaded that this application for judicial review should be granted because of the intervener's incompetent representation of the applicant, thus resulting in a breach of procedural fairness or denial of natural justice. My analysis below deals with a last-minute preliminary issue raised by the respondent, whether to hold this judicial review in abeyance (which request I denied for the reasons provided), followed by the procedural fairness issues raised by the applicant and the intervener, and finally, the issue of whether the Decision is reasonable.

II. Additional Background

[9] The applicant retained the intervener, an immigration consultant, early in the process to assist with his refugee claim. On April 15, 2019, the IRB sent a letter to Immigration, Refugees and Citizenship Canada (IRCC), on which the applicant and the intervener were copied, informing them of the RPD's belief that Article 1E of the Convention might apply to the applicant's refugee protection claim.

[10] On July 26, 2019, the IRB sent a letter to the intervener requesting information regarding the refugee claims that were made and accepted for the applicant's wife and two children. On July 31, 2019, only ten days before the RPD hearing scheduled for August 9, 2019, the intervener requested a postponement on the basis that more time was needed to gather these documents. The IRB denied the intervener's request on August 6, 2019 because the intervener did not provide any details about the efforts made to obtain the documents, nor did the request provide three alternative dates and times to start the proceeding, as required by the RPDR.

[11] Upon receipt of the IRB's dismissal of the postponement request, the intervener made a further request for postponement on the bases of attempting to obtain evidence of the applicant's status in Switzerland, and of continuing to look for the misplaced refugee claim documents for the applicant's spouse and two children. This second request proposed the requisite three alternative dates and times for the possible rescheduled hearing, but like the first request, also was denied, this time on the basis that the applicant had ample time to gather the necessary documentation related to his status in Switzerland.

[12] In the meantime, on July 30, 2019, the respondent sent the IRB and the intervener (the applicant's former representative) a notice of intent to intervene setting out several credibility concerns and noting the onus on the applicant to address them. Briefly, the credibility concerns involve inconsistent statements regarding the applicant's residency in Switzerland (January 1, 1995 to June 1, 2015—or 1995 to 2015—in various places in his application forms, versus 1983 to May 2016 in his basis of claim or BOC narrative), and doubt about whether he returned to Sri Lanka in 2015 (based on biometric fingerprint information received from United States authorities showing that the applicant submitted an application in Switzerland on March 15, 2016 for a non-immigrant visa to the US) before entering the US in August 2018.

[13] Neither the applicant nor the intervener obtained any documentation, in advance of the hearing, from Swiss officials regarding the applicant's status.

III. Challenged Decision

[14] The RPD hearing took place on August 9, 2021, as scheduled. The RPD refused the applicant's claim for refugee protection, providing reasons orally, at the conclusion of the hearing. The RPD stated that it considered all of the evidence submitted, and noted that the applicant had not provided any explanation for failing to contact Swiss authorities, or the Swiss Consulate or the Swiss Embassy in Canada, to obtain documentation confirming that he no longer holds permanent residency in Switzerland, despite the IRB's notice in April 2019 and notice of the respondent's intent to intervene. Pointing to the inconsistencies in the applicant's BOC and application forms, and the respondent's credibility concerns, the RPD found that the respondent's intervention established a *prima facie* case that the applicant continued to be a permanent resident in Switzerland and had not lost status as alleged.

[15] The RPD further noted that the intervener blamed the family's refusal to cooperate for the failure to obtain the documentation, while the applicant stated that he did not know he had to do so. The RPD found the explanation unreasonable given the facts that the applicant had been represented by legal counsel for "many months," had been notified of the Article 1E issue in April 2019, and they were given notice of the respondent's intervention.

[16] During the hearing, the RPD provided the intervener with an opportunity to ask questions of the applicant and to make oral submissions on his client's behalf, but he chose not to question the applicant and he advised the RPD, both before and after a break (the RPD offered 30 minutes but the intervener took only 15 minutes for the break), that he was not prepared to give oral submissions, preferring instead to make submissions in writing. The RPD refused to accept any written submissions, noting that the intervener had four months to gather necessary documentation on the issue of the applicant's status in Switzerland, and to prepare oral submissions. The RPD thus proceeded to render its Decision and reasons orally.

IV. Standard of Review

[17] 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": *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraph 54. The focus of the reviewing court is essentially whether the process was fair, bearing in mind the duty of procedural fairness is variable, flexible and context-specific: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), at paragraph 77; *Chaudhry v. Canada (Citizenship and Immigration)*, 2019 FC 520, 305 A.C.W.S. (3d) 597, at paragraph 24.

[18] The presumptive standard of review that applies to the merits of the Decision is reasonableness: *Vavilov*, above, at paragraphs 10 and 25. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, above, at paragraph 85. Courts should intervene only where necessary. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov*, above, at paragraph 99. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above, at paragraph 100.

V. Analysis

A. *Preliminary Issue—Respondent's Abeyance Request*

[19] At the outset of the hearing before me, the parties gave their submissions regarding a new issue raised for the first time in this proceeding in the respondent's further memorandum of argument, namely, the possible abeyance of the judicial review application. Given the lateness of the new issue raised by the respondent, discussed in greater detail below, and the consequent prejudice to the applicant, I denied the respondent's request to hold this matter in abeyance and indicated that I would give further reasons when I ruled on the judicial review overall. The following are those reasons.

[20] The applicant's application for leave and judicial review of the Decision (ALJR) was filed on September 6, 2019. Shortly after, the ALJR was placed in abeyance to await the outcome of the application to the Supreme Court of Canada seeking leave to appeal the Federal Court of Appeal decision in *Kreishan v. Canada (Citizenship and Immigration*), 2019 FCA 223, [2020] 2 F.C.R. 299 (*Kreishan FCA*).

[21] As mentioned above, the applicant is a refugee claimant who arrived in Canada from the United States, having family members already in Canada. The applicant thus was entitled to have his refugee status determined by the RPD, but without a right of appeal to the Refugee Appeal Division (RAD) of the IRB. The matter considered by the Federal Court of Appeal in *Kreishan FCA* concerned such claimants, who were referred to in the decision as "STCA-excepted claimants", and the unavailability of a right of appeal to the RAD and a stay pending disposition of the appeal: *Kreishan FCA*, at paragraphs 2–7.

[22] The Federal Court of Appeal dismissed the appeal from this Court's decision in *Kreishan v. Canada (Citizenship and Immigration)*, 2018 FC 481, 60 Imm. L.R. (4th) 257, and, on March 5, 2020, the Supreme Court in turn dismissed the application for leave to appeal the *Kreishan FCA* decision: *Reem Yousef Saeed Kreishan, et al v. Minister of Citizenship and Immigration*, [2020] 1 S.C.R. xii, 2020 CanLII 17609 (S.C.C.). As a result, the unavailability of a RAD appeal and a stay pending disposition remain in place for claimants such as the applicant here, with the appropriate recourse, for challenging the RPD's negative decision, being an application for leave and judicial review to the Federal Court: *Kreishan FCA*, above, at paragraph 7.

[23] The abeyance of this matter, therefore, came to an end. The Court granted the applicant's leave application on June 8, 2021, and the parties were provided with a timeline for completing the remaining steps leading to the judicial review hearing.

[24] In the respondent's further memorandum of argument served and filed just days before the hearing of this matter on October 25, 2021, the respondent raised a new issue regarding a possible second abeyance. The respondent's request is premised on RPDR Rule 62 and paragraph 72(2)(a) of the IRPA. The former permits failed refugee claimants to make an application to reopen their claim at any time before the RAD or this Court, as applicable, has made a final determination in respect of their claim. In particular, RPDR subrule 62(4) contemplates reopening applications involving allegations against counsel and prerequisite steps that must be taken, somewhat similar to those outlined in the Protocol. Paragraph 72(2)(a) of the IRPA provides that an application for leave "may not be made until <u>any right of appeal</u> that may be provided by this Act is exhausted" (emphasis added).

[25] The respondent further asserts that, apart from paragraph 72(2)(a), this Court should refuse to consider natural justice arguments such as those raised here, or hold the current judicial review application in abeyance, until the applicant has pursued an adequate alternative remedy, namely, an application to reopen the Decision based on allegations against the former representative: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at paragraph 42, and *Lin v. Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81, 80 Imm. L.R. (4th) 171, at paragraph 5. If the RPD were to grant the reopening application, then the current proceeding would become moot. On the other hand, if the RPD were to refuse the reopening application, then the applicant could bring a separate application for leave and judicial review, reactivate the current application, and if leave were granted in respect of the second application, request that they be heard together (or, I add, consolidated). Such request would need to be made by way of motion: *Sabitu v. Canada (Citizenship and Immigration)*, 2021 FC 165, 81 Imm. L.R. (4th) 30 (*Sabitu*), at paragraph 27.

[26] At the hearing before the Court, the respondent advised that his submissions regarding this new issue were based on similar arguments the respondent made to the

Federal Court of Appeal in *Minister of Citizenship and Immigration v. Alabi Adam Sabitu et al.* (order dated November 2, 2021), File No. A-133-21 [not reported], appealing the decision of this Court in *Sabitu*. In his supplementary judgment and reasons (2021 FC 300), Justice Annis certified three questions, the first of which is relevant here and, hence, is reproduced below (from paragraph 7 of the supplementary judgment and reasons):

> a. Does the phrase "any right of appeal" in section 72(2)(a) of the IRPA encompass an application to reopen an appeal for failure to observe a principle of natural justice pursuant to rule 49(1) of the *Refugee Appeal Division Rules*, such that applicants are barred from seeking judicial review on that basis where they have not first exhausted their right to request a reopening?

[27] I note that Rule 62 of the RPDR parallels Rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257.

[28] The respondent argues before the Court why he is permitted to raise, and is justified in raising, a new issue in the respondent's further memorandum of argument. In particular, the respondent points to the Court's decision in *Al Mansuri v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22, [2007] 3 F.C.R. D-1, (*Al Mansuri*) and the following non-exhaustive factors the Court may consider in whether to exercise its discretion to entertain a new issue raised for the first time in a party's further memorandum (*Al Mansuri*, at paragraph 12):

(i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?

(ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?

(iii) Does the record disclose all of the facts relevant to the new issues?

(iv) Are the new issues related to those in respect of which leave was granted?

(v) What is the apparent strength of the new issue or issues?

(vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[29] Former Justice Dawson noted that "not every factor will be relevant in a particular case": *Al Mansuri*, above, at paragraph 13.

[30] The Respondent further argues that the Court "may … entertain a new issue 'where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so'" (citation omitted): *Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53, 292 A.C.W.S. (3d) 146, at paragraph 45.

[31] The respondent submits that placing the matter in abeyance does not violate the rights of the applicant, although acknowledges that prejudice could arise from the delay.

[32] The respondent further submits that there are efficiencies in this approach and that seeking to have the claim reopened by the RPD is in line with section 72 of the IRPA. According to the respondent, the nature of the allegations against the former

representative (the intervener) are more appropriate for the RPD to determine and would allow a better or more complete record to be put before the RPD, being the better venue for this issue. If there were an error in the resultant decision, that error could be brought to the Court on judicial review.

[33] In my view, the approach advocated by the respondent would necessitate a second RPD proceeding that could result in a second judicial review application (if, for example, the RPD were to refuse the request or, upon reopening, continue to refuse the claim), as well as a motion for consolidation to have them heard together: *Sabitu*, at paragraph 27. In other words, this approach has the potential to require a claimant such as the applicant to engage in a multiplicity of proceedings resulting in further delay and increased costs, and thus in the end, may not result in any efficiencies, at least from the applicant's perspective.

[34] The respondent submits that the timeframe from the *Kreishan* delay should be excluded because it was optional, in the sense that the applicant had to request abeyance pending outcome of *Kreishan*, and the new delay would be 8–10 months. In my view, the latter estimated timeframe is far from certain, and, as noted above, the respondent acknowledged that the applicant could be prejudiced by a further delay. I also note that prejudice could arise from the potential necessity for a multiplicity of proceedings, as mentioned above. As Justice Annis observed, "[s]uch a protracted mandatory supplementary procedure will likely be to the disadvantage of an applicant whose reopening request is refused": *Sabitu*, above, at paragraph 28.

[35] Further, I am not persuaded that the first delay was entirely optional. Had the ultimate outcome of the *Kreishan* proceedings been that a RAD appeal was available to claimants like the applicant, then the operation of section 72 of the IRPA might have applied to the applicant's situation, thus necessitating a RAD appeal.

[36] In addition, I find the respondent has not shown how the ability to make successive applications to reopen would result in exhaustion in the same way as an appeal. Further, in my view, RPDR subrule 62(1) acknowledges specifically that a RAD or Federal Court proceeding may be pending already when the application to reopen is made.

[37] Nowhere does Rule 62 of the RPDR provide for a stay of the Federal Court proceeding (or the RAD proceeding, for that matter) pending the disposition of an application to reopen. This makes sense because a plain reading suggests that the RPDR subrule 62(1) is permissive, in that the claimant or the Minister may make an application to the RPD to reopen the claim. Further, the onus is on the RPD to make a determination as soon as practicable: RPDR subrule 62(9).

[38] The RPDR also contemplate that more than one application to reopen the same claim can be made: RPDR subrule 62(8). Were it thus the case that the RAD or Federal Court proceeding should be stayed pending the disposition of a claimant's request to reopen their claim, the claimant (or the Minister, for that matter) could frustrate the RAD or Federal Court proceeding with successive applications to reopen the claim, depending on how quickly the RPD could dispose of each application.

[39] An abeyance or a stay may make sense in certain circumstances, however, such as where the outcome of the application to reopen the claim could make the RAD or Federal Court proceeding moot, but the onus should be on the party making such an

application to seek abeyance from the RAD or the Federal Court, as the case may be, pending the disposition of the application to reopen.

[40] In the case before me, there is no evidence that the applicant has applied to reopen his claim, and further, it is the respondent who requests the abeyance, based on an outstanding submission on an unrelated matter (*Sabitu*) that the applicant must "exhaust" the available reopening remedy before bringing an application for leave and judicial review. Not only is the matter unrelated but the respondent advised the Court that the *Sabitu* appeal is moot. The respondent had hoped the Federal Court of Appeal nonetheless would entertain his arguments on this issue. The appeal was dismissed, however, by way of Order dated November 2, 2021 because of mootness; the claimants were granted permanent residence, and the claimants did not respond to the Federal Court of Appeal's invitation to provide submissions about whether it should hear the moot appeal.

[41] In my view, the respondent's justification for an abeyance in this matter involves too much that is speculative to be in the interests of justice. Further, like the Court in *Sabitu*, I am not persuaded that the term "right of appeal" in the IRPA paragraph 72(2)(a) includes a right to reopen: *Sabitu*, above, at paragraphs 38 and 54.

[42] Bearing in mind the *Al Mansuri* factors, I find this late-raised issue to be sufficiently prejudicial to the applicant, and thus also justifies my denial of the respondent's request for abeyance, for several reasons. First, the respondent failed to provide any satisfactory explanation why it waited until his further memorandum of argument to raise the issue, especially when the respondent admitted having "cut and paste" the submissions in such document from the memorandum of fact and law that the respondent filed in Federal Court of Appeal File No. A-133-21 on August 4, 2021.

[43] Second, I agree with the applicant that because the respondent had lots of time (and, I add, opportunity) since August 4, 2021 to raise the issue, and even though it was raised in a discussion between the parties' counsel shortly before the hearing, the applicant was denied sufficient time to respond.

[44] Third, as mentioned above, the matter has been held in abeyance once already, such that the matter has been pending for more than two years as of the date of the judicial review hearing, the ALJR having been filed in September 2019.

B. *Breach of Procedural Fairness or Natural Justice*

[45] In my view, the determinative issue in this matter is breach of procedural fairness or natural justice by reason of incompetent counsel. While the intervener asserts that procedural fairness also was breached by reason of the RPD's non-compliance with its own procedures and by the RPD's refusal to permit the applicant to present written submissions after the RPD hearing, I am not persuaded. I will deal with each of these asserted aspects of procedural unfairness separately below, after addressing the intervener's request about the order in which the issues of breach of procedural fairness and reasonableness should be dealt.

[46] The intervener submitted that the Court should address the issues of the reasonableness of the Decision and procedural fairness on the bases asserted by the intervener. The rationale offered by the intervener is that if either of these issues were determinative, then it would be unnecessary to consider the alleged behaviour of the Intervener who is the applicant's former representative. I disagree for two reasons. First,

the intervener provided no support for this proposition. Second, this matter involves the applicant's ALJR, and the applicant presented the breach of natural justice allegation, in the applicant's further memorandum of fact and law, as one rooted in the intervener's incompetence. The intervener acknowledged rightly, however, that the reasonableness of the Decision otherwise was "off bounds," in so far as the intervener's participation in this proceeding is concerned, because the intervener's position, in my view, did little more than support the applicant's submissions regarding reasonableness: *Li v. Canada (Minister of Citizenship and Immigration),* 2004 FCA 267, 327 N.R. 253, at paragraph 9.

(1) Incompetent Counsel

[47] I am satisfied that the intervener's cumulative conduct resulted in substantial prejudice to the applicant and affected the outcome of the Decision. This Court long has recognized that, in extraordinary circumstances, counsel's behaviour may ground a breach of natural justice allegation, warranting redetermination by the decision maker, including a new hearing, but only if the conduct "falls within professional incompetence [or, negligence] and the outcome of the case would have been different had it not been for counsel's wrongful conduct" (citations omitted): *Rezko v. Canada (Citizenship and Immigration)*, 2015 FC 6, 471 F.T.R. 263, at paragraph 5. See also *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51, 1993 CanLII 3026 (T.D.), at pages 60–61; *Osagie v. Canada (Minister of Citizenship and Immigration),* 2004 FC 1368, 262 F.T.R. 112, at paragraphs 24–27; *Rodrigues v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 77, [2008] 4 F.C.R. 474, at paragraphs 39–40; *Memari v. Canada (Citizenship and Immigration)*, 2010 FC 1196, [2012] 2 F.C.R. 350 (*Memari*), at paragraphs 36 and 64; *El Kaissi v. Canada (Citizenship and Immigration)*, 2011 FC 1234, 5 Imm. L.R. (4th) 87, at paragraphs 15–19 and 33; *Pathinathar v. Canada (Citizenship and Immigration)*, 2013 FC 1225, 235 A.C.W.S. (3d) 1040, at paragraph 38; *Mcintyre v. Canada (Citizenship and Immigration)*, 2016 FC 1351, 275 A.C.W.S. (3d) 833 (*Mcintyre*), at paragraphs 33–34.

[48] The test for reviewable counsel conduct is three-part, and the onus is on an applicant to establish that:

(i) the previous representative's acts or omissions constituted incompetence or negligence;

(ii) but for the impugned conduct, there is a reasonable probability that the outcome would have been different (in other words, a miscarriage of justice has occurred as a result of the conduct); and

(iii) the representative had a reasonable opportunity to respond to an allegation of incompetence or negligence: *Rendon Segovia v. Canada (Citizenship and Immigration),* 2020 FC 99, 315 A.C.W.S. (3d) 150 (*Rendon Segovia*), at paragraph 22; *Gombos v. Canada (Citizenship and Immigration)*, 2017 FC 850, 284 A.C.W.S. (3d) 157 (*Gombos*), at paragraph 17.

[49] There is an initial presumption that counsel conduct falls within a wide range of what is considered reasonable professional conduct: *R. v. G.D.B.,* 2000 SCC 22, [2000] 1 S.C.R. 520, at paragraph 27; *Gombos*, above, at paragraph 17. Further, a formal complaint to the former representative's regulatory body is not necessary; notice of the allegation and an opportunity to respond to it are sufficient: *Guadron v. Canada (Citizenship and Immigration)*, 2014 FC 1092, 468 F.T.R. 153 (*Guadron*), at paragraph

16; *Basharat v. Canada (Citizenship and Immigration)*, 2015 FC 559, 98 Admin. L.R. (5th) 7, at paragraphs 14–15.

[50] I agree with the applicant that the first part of the test has been met because of the intervener's numerous errors and omissions which in my view constitute incompetence: *Memari*, above, at paragraphs 38–39. As particularized below, I am persuaded that, at the very least, the intervener failed to obtain and submit documents that were of high significance to the applicant's case, and failed to make any submissions on the sole issue before the RPD, the applicant's status in Switzerland and possible exclusion pursuant to Article 1E of the Convention*: Mcintyre*, above, at paragraph 34*; Rendon Segovia*, above, at paragraphs 21–31.

[51] The applicant and the intervener disagree as to whose responsibility it was to obtain documentation regarding the applicant's status in Switzerland. I find the record shows, however, that the intervener made no serious efforts to obtain the very evidence about the applicant's status that the applicant obtained easily after the RPD hearing and Decision. Nor is it evident that, in the alternative, the intervener made serious efforts to obtain, or ensure that his former client obtained (or clearly understood who was to obtain, especially given that his former client does not speak English), the documentation establishing the applicant's immigration status in Switzerland. Further, the intervener did not apply to change the date and time of the hearing on the basis of attempting to obtain this documentation until three days before the hearing, the earlier application having been based on ongoing efforts to locate the documentation regarding the refugee claims of the applicant's wife and children.

[52] The applicant's evidence in support of his judicial review application includes the applicant's affidavit attesting to, among other things, his efforts in October 2019 to obtain via email his Swiss immigration status from the Consulate of Switzerland in Montréal. His wife's family lawyer provided the applicant with the email address, following the RPD hearing. With a simple email, the applicant received a response in a matter of weeks providing him with his status which, as of November 7, 2019, was expired with no valid right of residence in Switzerland.

[53] While affidavits authored after the date of the challenged administrative decision generally are not admissible on judicial review, the Court can make an exception where the material is relevant to an issue of procedural fairness or natural justice: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, at paragraph 20; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189, at paragraph 25. I thus am satisfied that at least this portion of the applicant's supporting affidavit detailing his efforts to obtain his status post-RPD hearing, including a copy of the email response from the Consulate of Switzerland, is admissible.

[54] I find that the record also shows the intervener failed to provide any country specific documentation about immigration status in Switzerland establishing that, after the amount of time the applicant spent abroad, someone in his circumstances no longer would retain permanent resident status and would have no right of re-entry, and in what circumstances, if any, they might reacquire their permanent resident status. Notwithstanding the lack of the applicant's specific immigration status, such general documentation could have been obtained, as shown by the RPD at the hearing before it, and could have been of assistance in making oral submissions before the RPD.

[55] The transcript of the RPD hearing, together with the applicant's supporting affidavit, disclose that, through its own research regarding different types of status in Switzerland, the RPD located a document entitled "Legal Expat Geneva" (LEXpat), and that such documentation was disclosed to the intervener during the RPD hearing. The LEXpat document is absent from the certified tribunal record (CTR) sent to the Court in respect of this matter but it is an exhibit to the applicant's supporting affidavit. For the same reason as above, I find this evidence is admissible.

[56] In short, I find the lack of any documentation regarding the applicant's immigration status in Switzerland or immigration status generally in Switzerland is tantamount to "a failure of the representative to submit evidence that clearly should have been submitted and for which logic defies failure to submit that evidence": *Guadron*, above, at paragraph 25. Neither the intervener's response to the allegation against him nor his affidavit in support of his motion to intervene in this matter goes any way in dispelling my finding in this regard. In my view, "[i]t was incumbent upon the legal representative, after having accepted the retainer, to apprise [the RPD] as fully as possible of all key factual elements relevant [to the Applicant's claim]": *Guadron*, above, at paragraph 27.

[57] Further, instead of pointing to inconsistencies in the applicant's BOC narrative and application forms (without any evidence of having tried to understand or reconcile them) or alleging an uncooperative client and family (in the intervener's response to the allegation against him, for example), I find the following observations of Justice Diner particularly apt here: "…it was the representative's responsibility to make reasonable attempts to seek out crucial information required for the Applicant to overcome the [respondent's *prima facie* case]. It is not good enough to state that the Applicant (or [his] family) did not volunteer it. That approach undermines the reason for hiring a licensed representative, be it a lawyer, or a consultant in this case. To find otherwise would posit the question as to why one would bother to hire a professional in the first place": *Guadron*, at paragraph 29.

[58] Further, when given the opportunity to make oral submissions at the RPD hearing, the intervener stated that he was unwilling and unprepared. As in *Rendon Segovia,* the intervener should have known that the applicant's Swiss status was a central issue in the hearing, given the IRB's April 15, 2019 letter to the IRCC and the respondent's July 30, 2019 notice of intent to intervene. In my view, these actions and omissions rise above, not only the respondent's assertion that this is no more than a "he said, he said" situation, but also any suggestion that they were revealed with the benefit of hindsight: *Guadron*, above, at paragraph 36.

[59] There is little doubt that failing to make submissions on the determinative issue in a decision amounts to incompetence, especially with the knowledge that representations must be made orally at the end of the RPD hearing absent an order to the contrary: *Rendon Segovia*, above, at paragraph 25; RPDR subrule 10(7). As Justice Diner further states (in *Rendon Segovia*, at paragraph 25): "this is particularly the case when the … tribunal reminds the representative of the key issue in the decision being challenged[; …] this is not a situation where the immigration consultant's actions would be covered by the usual presumption of a 'wide range of reasonable professional assistance' with the benefit and 'wisdom of hindsight' (*GDB* at para 27)."

[60] I also am persuaded that a miscarriage of justice occurred in the circumstances here because there is a reasonable probability that the result would have been different

but for the incompetence: *Rendon Segovia,* above, at paragraph 31. The probability of a different result, but for the failure to obtain the Swiss immigration status, is made clear from the RPD's repeated comments in both the RPD transcript and reasons.

[61] For example, the Decision states:

> "…I find that you have failed to establish that you are no longer a permanent resident in Switzerland. I say this because both you and your counsel were given written notice from the Board on April 15, 2019 indicating that your status in Switzerland would be an issue at this proceeding[; … t]o date, you have failed to provide any documents in support of your position that you no longer have status in that country [; … w]hen I asked you, why you did not obtain the documents from Swiss authorities, you replied you did not know that you had to. I find this explanation to be unreasonable, given the fact that you have been represented by legal counsel for many months." (Emphasis added.)

[62] The determinative issue before the RPD was the applicant's status in Switzerland and possible exclusion under Article 1E of the Convention. The RPD made this abundantly clear in correspondence prior to the hearing, and at the outset of the hearing. The transcript of the RPD hearing shows the Board Member stated the following:

> So, Counsel, the issues in this claim are identity, credibility, re-availment, failure to claim in the United States, delay in filing a claim in Canada. But before we discuss any of those, we need to discuss a preliminary issue of exclusion under Article 1E of the Convention. And my plan for this hearing is to focus on that issue and, and it's possible that we won't get to the merits of the claim. It's possible that we will, but the focus for this hearing will be the exclusion issue.

[63] As this Court previously has held, the RPD would not have sent this message if it did not believe that a serious omission had occurred: *Rendon Segovia*, above, at paragraph 32; *Mcintyre*, above, at paragraph 37. In my view, there is a reasonable probability that had the intervener submitted evidence of the applicant's actual immigration status in Switzerland or other evidence showing that in the applicant's circumstances permanent residency in Switzerland was lost, thus rebutting the respondent's *prima facie* case, the RPD would have considered the merits of the applicant's claim and made a different decision. Without any consideration by the RPD of the other issues applicable to the applicant's claim as mentioned above, the Court cannot assess reasonably what the outcome might have been, let alone with reasonable probability. In my view, the best that can be said in the circumstances is that if the applicant's loss of Swiss residency had been established to the RPD's satisfaction, the outcome would have been different, in that exclusion no longer would have been the determinative issue.

[64] In light of the foregoing, I am satisfied that:

(i) the cumulative effects of the intervener's conduct amounted to incompetence,

(ii) incompetent conduct resulted in a miscarriage of justice, and

(iii) the intervener had the opportunity to respond and provide his perspective.

I therefore find that a breach of procedural fairness occurred in respect of the challenged Decision.

(2) RPD's Non-compliance with its Own Procedures

[65] I am not persuaded that the intervener is precluded necessarily from raising this issue, nor that it was raised so late in the proceeding as to be unfair to the parties. I find, however, that the intervener has not shown the RPD unfairly relied on the LEXpat document or unfairly refused the applicant's request to file written submissions following the RPD hearing.

[66] Because the applicant's ALJR alleges breach of natural justice broadly, that is without any details or limitation, and because the applicant complains about the RPD's treatment of the LEXpat document (albeit in the context of the reasonableness of the Decision), I cannot conclude that the issue of whether the RPD relied unfairly on the LEXpat document is entirely new: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 481 C.R.R. (2d) 234, at paragraph 28. *Puigdemont Casamajo v. Canada (Immigration, Refugees and Citizenship),* 2021 FC 774, 336 A.C.W.S. (3d) 444, at paragraph 9.

[67] I also disagree with the respondent that this issue was raised so late that it was unfair to the parties. From a timing perspective, I note that the intervener raised the procedural fairness issue in his motion to intervene more than two weeks in advance of the hearing before me. I contrast this with the abeyance issue raised by the respondent only four days before the hearing, including a weekend. Although the respondent made no specific submissions regarding the timeliness of the abeyance issue, I take it as implied in the fact that the respondent raised such issue for the first time (from the Court's perspective) in the respondent's further memorandum of argument. In the circumstances, I find that the respondent's position regarding the lateness of the intervener's procedural fairness issue is inconsistent and not sustainable.

[68] There is no dispute that the RPD raised the LEXpat document at the hearing before it but that the document was not entered as an exhibit. The respondent was unable to explain, at the hearing before me, why the document was not in the CTR. The applicant's record, however, contains a copy of the document. Further, I am satisfied that the RPD referred to the LEXpat document (although not by name) during the hearing as follows: "… I'm going to disclose some documents to you[; t]his is just from a law firm in Geneva that talks about the different types of status in Switzerland and the rights and obligations you have and how to lose it, how to get it, those kinds of things."

[69] The intervener argues that the RPD breached the RPDR Rule 33 by not providing the document to the applicant either five or ten days in advance of the hearing. I disagree. Referring to Rules 33 and 34 reproduced in the intervener's memorandum of argument, I note that subrule 34(3), which mentions these time periods, applies to the use of documents in a hearing by a party. Subrule 33(1), on the other hand, covers the use of a document at a hearing by the RPD, and simply stipulates that the RPD must provide a copy of the document to each party. It is silent about when that must occur. Further, there is no equivalent of subrule 34(3) in Rule 33. I am satisfied that by disclosing the document to the applicant at the hearing, coupled with the fact of a copy of the document being in the applicant's record, the RPD did not breach the RPDR Rule 33 and, thus, did not err. If I am incorrect, however, I find it was not material to the result (in the sense that it would not have changed the outcome), for the following reason, and does not justify setting aside the Decision on that basis: *Luswa v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 289, 129 A.C.W.S. (3d) 577, at paragraph 20.

[70] Contrary to the respondent's assertion that the reasons are silent regarding the LEXpat document, I am satisfied that the RPD referred to it again as follows: "In addition, as indicated in the disclosed material, simply travelling away from Switzerland does also not automatically cancel a person's permanent residency status." (Emphasis added.)

[71] I am not persuaded, however, that the RPD based the Decision solely on such document. Rather, the RPD found the applicant had not satisfied his burden to rebut the respondent's *prima facie* case that the applicant was excluded from refugee protection under Article 1E of the Convention. In my view, this is evident from the several observations and conclusions in the reasons. For example, the RPD observed that, "in their notice to intervene dated July 29, 2019, the Minister of Citizenship and Immigration made a *prima facie* case to establish that you are currently a permanent resident in Switzerland and have not lost that status as you allege," and further, "there does not appear to be a reason the Claimant cannot request the documentation from Swiss authorities to settle the matter of the possible 1E exclusion."

[72] The RPD concluded as follows:

> …where the Minister raises a *prima facie* case that the claimant is excluded under article 1E, the burden is on the claimant to rebut it.
>
> I explained to you at the hearing today that you had to provide me with evidence that you lost your permanent residency status in Switzerland. I find that you have failed to satisfy that burden. Simply handing over a permanent residency card to a friend does not automatically cancel your status in that country. … In summary, I find that you have failed to establish that you no longer have permanent resident status in Switzerland.
>
> (The ellipsis represents the place in the Decision where the above quote in paragraph 70 falls.)

[73] In my view, the Decision turned on the *prima facie* case raised by the respondent and the applicant's failure to rebut it with evidence about his current status in Switzerland. From the RPD's perspective, the LEXpat document served to reinforce, rather than rebut, the *prima facie* case. I thus am not persuaded that the RPD erred or was procedurally unfair in refusing to provide the applicant with an opportunity to make written submissions after the hearing. The applicant had been apprised of the possible Article 1E exclusion issue as early as April 2019, some four months before the hearing, and had plenty of time to prepare submissions, with the knowledge of the RPDR subrule 10(7) that representations must be made orally at the end of the hearing unless the RPD orders otherwise.

C. *Reasonableness of the Decision*

[74] I am not persuaded that the Decision is unreasonable.

[75] The applicant takes issue with the manner in which the RPD interpreted the LEXpat document and asserts the document supports the position that "persons in Mr. Kandiah's situation (i.e. more than six months abroad) would no longer have a right of return as a permanent resident. He would be subject to the same entry requirements as all foreigners."

[76] The LEXpat document simply states the following, however: "The C permit expires after 6 months spent outside Switzerland, however an authorization of absence

can be requested in some cases to suspend a C permit for a period of maximum 4 years while living abroad."

[77] In my view, the applicant's submissions in this regard are tantamount to a request to reweigh the LEXpat document which is not the role of the Court on judicial review.

VI. Conclusion

[78] For the above reasons, I therefore grant the applicant's application for judicial review. In light of the incompetence of the applicant's former representative, the intervener, I find that the applicant was denied natural justice and, therefore, the Decision is set aside and the matter is to be remitted to a different panel of the RPD for rehearing and redetermination. Further, the RPD must provide the applicant with an opportunity to file evidence regarding not only his immigration status in Switzerland but also any other applicable issues.

VII. Proposed Question for Certification

[79] In connection with the preliminary issue regarding possible abeyance of this matter, the respondent proposed the following question for certification, further to Rule 18 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22:

> Must applicants first seek reopening to the RPD on natural justice issues before requesting this Court to review the decision on those grounds?

[80] I provided both the respondent and the applicant with the opportunity to make brief submissions regarding the proposed question following the hearing of this matter. For the reasons below, I am prepared to grant the respondent's request to certify a question.

[81] The parties agree, as do I, that the appropriate test for this Court to apply in considering whether to certify a proposed question is at least four-fold:

(i) is the question a serious one that is dipositive of the appeal;

(ii) does the question transcend the parties' interests;

(iii) does it raise an issue of general importance; and

(iv) has the question arisen from the case and been dealt with by the Court (*Lunyamila* criteria): *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674 (*Lunyamila*), at paragraph 46.

[82] The threshold for certification is whether the question is dispositive of the appeal: *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, 318 N.R. 365 (*Zazai*), at paragraph 11. The corollary of the threshold is that the question must have been raised and decided by the lower court: *Zazai*, at paragraph 12; *Lunyamila*, above, at paragraph 46.

[83] I disagree with the applicant that my oral ruling on the issue is one that can be characterized as a judge deciding that it need not be dealt with. Instead, after hearing

the parties' submissions on the respondent's late-raised request to hold the judicial review in abeyance, and after taking a short break to consider the matter, I dealt with the issue. I denied the respondent's request and indicated that I would give further reasons when deciding the judicial review overall. Those further reasons are provided above. I add that in my view, it was necessary to decide the issue at the outset of the hearing because, had I been persuaded to grant the respondent's request, then it would not have been in the interests of justice nor a good use of judicial resources to continue with the hearing on the other issues. Further, I note that the Federal Court of Appeal in *Zazai*, sent the matter back to the lower court to determine the issue (i.e. the certified question) that in the appeal court's view had not been dealt with by the applications judge: *Zazai*, at paragraph 13.

[84] I am satisfied that the proposed question arises from the case. Further, because the question was the basis for the respondent's request for abeyance, and because I examined it in these reasons, I also am satisfied that in the circumstances, the question would be dipositive of the appeal, were an appeal taken, notwithstanding my findings regarding the incompetence of the applicant's former representative: *Nguesso v. Canada (Citizenship and Immigration)*, 2018 FCA 145, 297 A.C.W.S. (3d) 157, at paragraph 21.

[85] In my view, the question is serious and I agree with the respondent that it transcends the interests of the parties and raises an issue of broad significance or general importance.

[86] I do not agree with the applicant's position that the proposed question should not be certified. The applicant objected, in its post-hearing submissions, to the timing of the certified question because the respondent did not notify opposing counsel of his intention to certify a question at least five days before the hearing in accordance with the Court's "Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings" dated November 5, 2018: *Adeosun v. Canada (Citizenship and Immigration)*, 2021 FC 1089 (*Adeosun*), at paragraph 76. I find *Adeosun* distinguishable, however, because Justice Little's first consideration about whether to decline to entertain a proposed question for certification was driven by the nature of the application in that case: *Adeosun*, at paragraph 77. The applicant here acknowledges that the circumstances of the matter before me are somewhat different. I find that the applicant otherwise has provided little justification for his position.

[87] I thus am prepared to certify a question along the lines proposed by the respondent. Having given the question further consideration, however, I believe it must be reformulated. First, the dispositive question in this case involves not just any RPD decision but only those where the claimant does not have a right of appeal to the RAD. In my view, this is the only basis on which a right to reopen a claim before the RPD might be considered an adequate alternative remedy or a right of appeal pursuant to paragraph 72(2)(a) of the IRPA.

[88] In the circumstances, I therefore certify the following serious question of general importance:

> Does the phrase "any right of appeal" in paragraph 72(2)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 include an application to reopen a claim determined by the Refugee Protection Division, where the applicant does not have a right of appeal to the Refugee Appeal Division, for failure to observe a principle of natural justice, pursuant to subrule 62(1) of the *Refugee Protection Division Rules*, or alternatively,

is the availability of an application to reopen a claim an adequate alternative remedy, such that in either case the applicant first must seek to exhaust the right to reopen the claim on natural justice grounds before the applicant can seek judicial review?

JUDGMENT in IMM-5445-19

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is allowed.

2. The Refugee Protection Division's August 9, 2019 decision is set aside and the matter will be remitted to the RPD for rehearing and redetermination by a different panel.

3. The RPD will provide the applicant with an opportunity to file evidence regarding not only his immigration status in Switzerland but also any other applicable issues.

4. The following serious question of general importance is certified:

   Does the phrase "any right of appeal" in paragraph 72(2)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 include an application to reopen a claim determined by the Refugee Protection Division, where the applicant does not have a right of appeal to the Refugee Appeal Division, for failure to observe a principle of natural justice, pursuant to subrule 62(1) of the *Refugee Protection Division Rules*, or alternatively, is the availability of an application to reopen a claim an adequate alternative remedy, such that in either case the applicant first must seek to exhaust the right to reopen the claim on natural justice grounds before the applicant can seek judicial review?

ANNEX "A": RELEVANT PROVISIONS

United Nations Convention Relating to the Status of Refugees, 28 July 1951, [1969] Can. T.S. No. 6, 189 U.N.T.S. 150

ARTICLE 1

Definition of the Term "Refugee"

…

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Application for judicial review

72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.

Application

(2) The following provisions govern an application under subsection (1):

(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;

…

Convention refugee

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,

(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

(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.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality … would subject them personally

…

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Exclusion — Refugee Convention

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

Refugee Protection Division Rules, SOR/2012-256

Oral representations

10 (7) Representations must be made orally at the end of a hearing unless the Division orders otherwise.

Disclosure of documents by Division

33 (1) Subject to subrule (2), if the Division wants to use a document in a hearing, the Division must provide a copy of the document to each party.

Disclosure of country documentation by Division

(2) The Division may disclose country documentation by providing to the parties a list of those documents or providing information as to where a list of those documents can be found on the Board's website.

Disclosure of documents by party

34 (1) If a party wants to use a document in a hearing, the party must provide a copy of the document to the other party, if any, and to the Division.

…

Time limit

(3) Documents provided under this rule must be received by their recipients no later than

(a) 10 days before the date fixed for the hearing; or

(b) five days before the date fixed for the hearing if the document is provided to respond to another document provided by a party or the Division.

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.

…

Allegations against counsel

(4) If it is alleged in the application that the claimant's counsel in the proceedings that are the subject of the application provided inadequate representation,

(a) the claimant must first provide a copy of the application to the counsel and then provide the original application to the Division, and

(b) the application provided to the Division must be accompanied by a written statement indicating how and when the copy of the application was provided to the counsel.

…

Subsequent application

(8) If the party made a previous application to reopen that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

Other remedies

(9) If there is a pending appeal to the Refugee Appeal Division or a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of a claim, or dismiss the application.

Refugee Appeal Division Rules, SOR/2012-257

Application to reopen appeal

49 (1) At any time before the Federal Court has made a final determination in respect of an appeal that has been decided or declared abandoned, the appellant may make an application to the Division to reopen the appeal.

Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22

Disposition of Application for Judicial Review

18 (1) Before a judge renders judgment in respect of an application for judicial review, the judge shall provide the parties with an opportunity to request that he or she certify that a serious question of general importance, referred to in paragraph 22.2(d) of the *Citizenship Act* or paragraph 74(d) of the *Immigration and Refugee Protection Act*, as the case may be, is involved.

(2) A party who requests that the judge certify that a serious question of general importance is involved shall specify the precise question.