Federal Court  Cour fédérale

Date: 20160414

Docket: IMM-3346-11

Citation: 2016 FC 415

Ottawa, Ontario, April 14, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

RADEK BALAZ, BOZENA KRISTOFOVA, KAROLINA BALAZOVA and LAURA BALAZOVA

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review concerns a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD) dated April 28, 2011 (Decision) which refused the claim of the Applicants under sections 96 and 97 of the

Immigration and Refugee Protection Act, SC 2001, c 27 (Act). The application is brought under section 72(1) of the Act.

[2] The Applicants are a wife, her husband and two minor children, both girls. The wife acted as principal claimant. They are all citizens of the Czech Republic and are Roma, which was not disputed.

[3] The Applicants allege the RPD ignored pertinent evidence with respect to the inadequacy of state protection and erred in relying on the June, 2009 issue paper of the Immigration Review Board. In the written submissions there was a lengthy argument as to an apprehension of bias, but I was advised at the outset of the hearing that the issue was resolved between the parties and would not be canvassed before me. I therefore have not considered those arguments.

II. **Background**

A. *The Applicants' Claim*

[4] The Applicants made a claim for refugee protection based on fear of right-wing extremists, skinheads, and the Czech people (white persons) because of the following:

- the way the children generally were treated in school and were placed in a special needs school when that was not required;
- the wife losing her job, without explanation, to someone who was not a Roma;
- an attack on January 10, 2008 on the husband by extremists when the family was shopping for which he required medical intervention;
- two attacks on the wife, one of which bruised her back and a later one that bruised her leg; and,
- the fact that racial slurs were directed at the Applicants during the physical attacks and at the children's school and because, generally, "any place you go you are the object of slurs; people do faces – make faces at you; you are just in the center [sic] of those".

B. *The Impugned Decision*

[5] The RPD identified credibility, discrimination versus persecution and state protection as the determinative issues. Both "State Protection" and "Discrimination vs. Persecution" were discussed separately after the allegations were listed.

(1) Credibility Findings

[6] The RPD said credibility was one of the determinative factors. In the Decision they expressed some credibility concerns in particular with respect to a late document submitted by the Applicant relating to the special needs school. The transcript of the hearing shows the RPD did accept that the children attended a special needs school. Also, after questioning by the RPD, the principal Applicant said she was told she lost her job at the supermarket because the new employee had a higher education. The RPD made no further comment than that clarifying statement.

[7] The only negative credibility finding was the rejection of the late evidence of a document about the special school. There is no finding of credibility (or no credibility) either about the job loss or that the wife said she reported one attack to the police but that was omitted from her PIF.

[8] The physical attacks on the husband and the wife were accepted as occurring, including the medical intervention, but the lack of witnesses was noted as going to the issue of state protection. There was no rejection of the fears expressed by the Applicants although it was found they did not rise to the level of persecution.

[9] There is no finding that the allegations made by the children when they returned from school saying they were unnecessarily scowled at, punished, and yelled at by their teachers was not credible.

[10] In the concluding remarks at paragraph 31 of the Decision, the RPD says "there were some credibility concerns regarding submission of corroborative evidence." Presumably this is a reference to the rejected late documentation (a letter) about the special school as no other document was mentioned.

(2) State Protection Findings

[11] The RPD began the state protection analysis by discussing the fact that the principal Applicant received a letter about transferring her children to a "special" school dated June 31, 2008, when there are only 30 days in June and that the applicant was confused when questioned about it. From there they found the late disclosure letter regarding a special school would not be accepted. They reviewed that the supermarket job was given to someone with a higher education and then examined the physical assaults.

[12] The RPD noted the physical assault on the husband by skinheads required medical attention and the medical report was taken to the police but no investigation could occur because there were no witnesses.

[13] With respect to the attack on the principal Applicant on September 30, 2008, she claimed there were "white" witnesses who did not help. At the hearing she said she went to the police but that information was not in her Personal Information Form (PIF) so the RPD found that

omission "cast doubt" on her testimony that she went to the police. Once again it was noted that "in the absence of witnesses the police would not have been in a positon to investigate".

[14] Regarding the January 10, 2009 attack, the RPD said the principal Applicant did not go to the police in the absence of witnesses.

[15] Counsel in submissions at the hearing said there were no witnesses because "only 'white' people were on the scene and they would not come forth to testify". The RPD rejected this for two reasons. One reason was that the principal Applicant was unable to identify the perpetrators. The other reason was that there was no evidence adduced that witnesses had not come forward, but rather it was that the claimants could not provide identification of the perpetrators to the police.

[16] Based on the foregoing, the conclusion drawn under this heading of "State Protection" was as follows at paragraphs 17 to 20 of the Decision:

> [17] . . . These incidents, as unfortunate as they may have been, were such that the claimants could not provide identification of the perpetrators to the police.
>
> CONCLUSION
>
> [18] The claimants are expected to have approached the state authorities on the alleged threats and attacks experienced by them at all levels available to them in the Czech Republic. The claimants made some effort, but, in the absence of identification, how could the police investigate? The fact that police cannot prevent a crime does not suggest that they are unwilling or unable to offer protection. No police force can be expected to solve all crimes. In the absence of identification, but simply indicating to the police that some skinheads attacked them, is insufficient evidence upon which the police would be able to make arrests.
>
> [19] As stated in *Kallai, Nikoletta,* the RPD had determined that the applicant had not discharged her burden of rebutting the presumption of state protection, given the fact that it would be

> difficult for the police to make arrests in the absence of the identity of her assailants.
>
> [20] In light of the foregoing, the claimants have not provide [sic] any "clear and convincing" evidence of the state's inability to protect them. The onus is on them to do so, and they have, therefore, not rebutted the presumption of state protection.
>
> (All underlining is my emphasis)

(3) Discrimination versus Persecution Findings

[17] The entire reasoning and analysis of whether the allegations of the Applicants, none of which were found not credible, amount to persecution is contained in the following two paragraphs:

> [21] Does the discrimination suffered by this claimant amount to persecution when considered singularly or cumulatively? To be considered persecution, the mistreatment suffered or anticipated must be serious. In order to determine whether a particular mistreatment would qualify as "serious", one must examine what interest of the claimant might be harmed; and to what extent the subsistence, enjoyment, expression or exercise of that interest might be compromised. "Persecution", for example, undefined in the Convention, has been ascribed the meaning of sustained or systemic violation of basic human rights in a fundamental way.
>
> [22] I find that these incidents do not rise to the level of persecution when considered individually and I also find that they do not rise to the level of persecution when they are considered cumulatively.

[18] Following that determination, the RPD next considered in paragraph 24 whether the principal Applicant would face a serious possibility of persecution simply because she was Roma. The RPD had noted in paragraph 23 various aspects of the documentary evidence on country conditions in the Czech Republic including the following findings:

- The Roma people are discriminated against and although violent attacks had declined since 1990's there is new evidence that racially motivated attacks on minorities in the Czech Republic is [sic] on the rise;

- The Roma are vulnerable people in the Czech Republic subjected to ill-treatment from police, and courts do not deal with racially motivated crime harshly enough; and,
- There is evidence the state does not condone and, for the most part, does not acquiesce to racial discriminatory behaviour, particularly by extremist skinheads

[19] The RPD in paragraph 25 went on to state the presumption in favour of state protection and the various explanations and qualifiers that have been layered on over the years through the jurisprudence in this area. At paragraph 26 they found the probative evidence was not clear and convincing that the Czech state is unwilling or unable to provide adequate state protection. In doing so the RPD provided examples from the documentary evidence including that:

- In the mid-1990's the Ministry of the Interior launched an initiative to combat extremism, allowing for police monitoring of extremist group activities and trends;
- The government may prohibit gatherings, concerts, activities or speech which incite hatred and did so throughout 2008;
- In January 2008 police arrested 30 neo-Nazis in the Prague city center [sic];
- In October 2008 police countered a rally of rightist extremists who had arrived at a Romanian settlement in Litvinov;
- In May 2008 police successfully prevented a major clash between anarchists and neo-Nazis in Brno expelling them from the city;
- At the November 2008 Workers Party march in Litvinov police were able to break up the demonstrations; and,
- In December 2008 the police prevented the far-right National Party from holding demonstrations in Brno.

[20] Counsel for the Applicants put forward documentary evidence to show the risk of serious harm to the Applicants. At paragraph 27, the RPD said it had considered that evidence but provided no extracts from it and did not refer to any specific document. They did footnote that the evidence submitted can be found as Exhibit C-4. The RPD then stated:

> [27] . . . The Board has considered the submissions along with counsel's documentary evidence. While there are concerns from some groups that there is impunity for racially-motivated attacks and the responses are not sufficient, the preponderance of evidence

> indicates that the state is taking action against extremists and does not condone or acquiesce to extremist actions, and those actions are effective. Police cannot be solely responsible for changing people's attitudes as this requires a network of social agencies and institutions, but it is clear that police intervened to offer protection when required.

[21] The RPD noted at paragraph 28 that:

> Discrimination is prevalent but there is evidence that the Czech Republic is taking steps to assist the Roma in several ways to ensure they will be able to participate in Czech society.

[22] Later in paragraph 28, reference was made to those steps as including the establishment of an agency for social inclusion of Romani communities whose aim is to improve the socio-economic conditions of Roma. Reference was also made to assisting Roma in finding employment including placing Romani representatives on the commission for all Romani community affairs. The RPD concluded that area of fact-finding by saying at the end of paragraph 28:

> In this case discrimination faced by the claimant, even cumulatively, does not rise to the level of persecution. However, she is Roma and there is documentary evidence of persecution of Roma in the Czech Republic and the rise of the right-wing and neo-Nazis who advocate a solution to the Roma problem even by force if necessary. The question becomes one of what the state is doing to protect the Roma against such harm.

[23] The RPD went on to note at paragraph 29 there are "many signs of change specifically within the educational system in the Czech Republic" and it gave examples such as there is a secondary institution specially designed for Romani students and there are seven branches throughout the country with a total of 600 students. The government also offered to cover the cost of nursery school for parents who could not afford it.

[24] At paragraph 30, the RPD said "[the judiciary has prosecuted hate crimes committed against the Roma on several occasions" concluding that paragraph with:

> The preponderance of the documentary evidence indicates that the Czech Republic government is making very serious efforts to provide protection to the Roma whether as victims of hate crime, assist in obtaining healthcare or education or inclusion in Czech society. As noted above, there is discrimination against the Roma in various aspects of their lives. However the Czech government is making very serious efforts to overcome this discrimination. (my emphasis)

[25] The conclusion at paragraph 31 was that the principal Applicant has not rebutted the presumption of state protection and that it applied equally to both sections 97 [sic] and 97 of the Act.

III. **Issue**

[26] In addition to the usual issue of what is the appropriate standard of review, the only issue is whether the Decision should be set aside as requested in the Notice of Application.

IV. **Analysis**

A. *Standard of Review*

[27] There are only two standards of review: correctness and reasonableness. Where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. See *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57 [*Dunsmuir*].

[28] The correctness standard involves a determination of whether the decision-maker arrived at the right conclusion. No deference is shown to the decision maker's reasoning process. If the

reviewing Court comes to a different conclusion the court will substitute its own view and provide the correct answer, see *Dunsmuir* at paragraph 50.

[29] The reasonableness standard requires the reviewing court to show deference to the decision-maker. This means the court will give due consideration to the determinations made by the decision maker, respecting the legislative choice to leave some matters in the hands of administrative decision makers. Reasonableness review focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", see *Dunsmuir* at paragraphs 47 and 49.

[30] The standard of review for whether the treatment of the Applicants amounted to persecution has been determined in *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004. In that case Chief Justice Crampton determined there are two distinct questions each of which was reviewable on a different standard. He held that with respect to articulating the test for either state protection or persecution as existing jurisprudence has established a clear test for each of them it is not open to the RPD to adopt a different interpretation of those terms. And, as a result, the articulation by the RPD of the tests is a question of law, reviewable on the standard of correctness. The ensuing and fact specific determination of whether the Applicants have established a well-founded fear of persecution or rebutted the presumption of state protection is reviewable on a standard of reasonableness as they are mixed questions of fact and law, see paragraphs 20 to 22.

[31] The application of the tests to the facts is a question of mixed fact and law, reviewable on a standard of reasonableness, see *Dunsmuir* at paragraph 47.

B. *Should the Decision be Set Aside?*

(1) State Protection

[32] In considering whether the Decision should be set aside I will start with the state protection analysis found under the heading "State Protection" (set out in detail at paragraph 17 of these Reasons) and then the analysis later under the heading "Discrimination vs. Persecution".

[33] In arriving at the conclusion that the Applicants had not rebutted the presumption of state protection, the RPD erred at paragraph 18 with respect to the application of the test for state protection when they found the claimants were expected to "have approached the state authorities at all levels available to them in the Czech Republic". This is not a requirement when the discrimination involves acts of criminal violence such as the assaults on the Applicants by skinheads, see *Molnar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1081; *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429; *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012.FC 1326.

[34] The RPD also found at paragraphs 18 and 19 that telling the police that skinheads attacked them, without providing a better description was "insufficient evidence upon which the police would be able to make arrests". What is troubling about this statement is the reference to the test being that police need to be able to *make arrests*. While, in a functioning democracy, the state is presumed to be able to provide protection for people it is not the case that protection includes making arrests. Actions such as taking a report or conducting an investigation with a view to making an arrest show a level of adequacy, not the actual making of an arrest. For example, even if there are no witnesses this court has held the police could canvass the area for possible witnesses, see *Biro v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1120.

[35] The analysis of state protection early in the Decision is also scant. The focus is on "arrests" and "witnesses". There is no discussion of whether the state protection is adequate as the focus is on the foregoing and whether the Applicants "approached state authorities . . . at all levels available to them." What is meant by approaching other levels of state authorities in unclear. It seems to suggest either higher levels of police authorities or other organizations put in place by the state to assist Roma. In either case, given the physical assaults that took place, the police force is the main institution put in place to protect citizens, and other government or private institutions have neither the mandate nor the means to provide protection to citizens, see *Graff v Canada (Citizenship and Immigration*), 2015 FC 437 at paragraph 24.

[36] The foregoing applications of the test are reviewable on a standard of reasonableness. I find that the cumulative weight of the errors in the analysis as stated above render the determinations made by the RPD unreasonable.

[37] Later in the Decision, after the analysis with respect to discrimination versus persecution, the RPD again considers the state protection test. In deciding the Applicants had not rebutted the presumption, the RPD looked at "many signs of change", "very serious efforts to provide protection", and "very serious efforts to overcome this discrimination". This misstates the test of operational adequacy. In *Dawidowicz v Canada (Citizenship and Immigration*), 2014 FC 115 Mr. Justice O'Keefe reviewed recent jurisprudence of this court dealing with the interpretation of state protection. He summed it up at paragraph 28: "[i[t is of little comfort to a person fearing persecution that a state has made an effort to provide protection if that effort has little effect. For that reason, the Board is tasked with evaluating the empirical reality of the adequacy of state protection." This misstatement of the test is an error of law requiring return of the Decision.

(2) Discrimination vs. Persecution Finding

[38] The RPD identified the correct test for determining whether persecution exists in that it means "sustained or systemic violation of basic human rights in a fundamental way" and that they were to consider both the individual and the cumulative acts of discrimination. Unfortunately, without any analysis at all, the RPD then stated at paragraphs 21 and 22 its conclusion that the incidents complained of "do not rise to the level of persecution when considered individually and . . . [t]hey do not rise to the level of persecution when they are considered cumulatively."

[39] In *Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796, the Federal Court of Appeal at paragraph 3 described what is required of a decision-maker when determining whether acts of violence amount to persecution or discrimination:

> It is true that the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution. It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved. It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein, and the intervention of this Court is not warranted unless the conclusion reached appears to be capricious or unreasonable. (my emphasis)

[40] Here there is a complete lack of analysis by the RPD to the point that it is not possible to determine *how or why* they reached the conclusion they did on persecution. There is no individualized assessment of the risks recounted by the Applicants. There is no weighing and balancing of any kind to allow me to know what caused the RPD to come to its conclusion. The

decision-making process lacks transparency and is unintelligible with respect to this conclusion. It is unreasonable.

(3) Credibility

[41] The RPD said one of the determinative issues was credibility. In addition to conducting no analysis of discrimination versus persecution, the RPD made no concrete credibility findings for or against the Applicants other than that they are Roma and the children did attend a special school, although the RPD rejected the late evidence letter. As already stated, the RPD cast some doubt on various aspects of the Applicants' evidence but it drew no distinct credibility conclusions. The reasons for the Decision are not transparent or intelligible with respect to credibility as it is not known what the comments about "doubt" mean or whether they formed any part of the actual decision-making process. Nor is it possible to say what credibility issue or issues, if any, were found to be determinative.

C. *Conclusion*

[42] The RPD identified all three issues – credibility, discrimination vs. persecution, and state protection – as determinative. Given the number of aspects of the Decision that are either not transparent or are unintelligible, coupled with the application of the wrong test for state protection, the Decision cannot stand. It is impossible to follow the reasoning process to determine how or why the RPD conclusions were reached. The *Dunsmuir* criteria have not been met. The Decision must be set aside and returned for redetermination by a differently constituted panel.

[43] Given this disposition, there is no serious question of general importance to the legal system to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is sent back to be re-determined by a differently constituted panel of the RPD.

2. No serious question of general importance suitable for certification arises.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3346-11
STYLE OF CAUSE:	RADEK BALAZ, BOZENA KRISTOFOVA, KAROLINA BALAZOVA and LAURA BALAZOVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 16, 2015
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	APRIL 14, 2016

APPEARANCES:

Rocco Galati	FOR THE APPLICANTS
Marie-Louise Wcisco	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rocco Galati Law Firm Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT