

Federal Court



Cour fédérale

Date: 20161202

Docket: IMM-3-16

Citation: 2016 FC 1338

Ottawa, Ontario, December 2, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**RUSLAN IHOROVYC SOMYK, OLHA
KLYM'YUK, MARTA SOMYK AND
YAROSLAV SOMYK**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD or Board], dated December 7, 2015 [Decision], wherein the RPD determined that Ruslan Ihorovyc Somyk [Principal Applicant], Olha Klym'yuk

[Female Applicant], Marta Somyk, and Yaroslav Somyk [Minor Applicants] were not Convention refugees or persons in need of protection under ss 96 and 97 of the Act.

I. BACKGROUND

[1] The Applicants are citizens of Ukraine. The Principal Applicant is of mixed heritage; his mother is Roma and his father is Ukrainian. He and his wife, an ethnic Ukrainian, have two children together. The Applicants entered Canada on August 28, 2015 and sought refugee protection on September 4, 2015.

[2] The Applicants claim they have been persecuted in Ukraine due to their Roma heritage, noting six particular incidents. The Principal Applicant was physically attacked twice, on November 2, 2014 and July 5, 2015, with both incidents resulting in hospitalization. He also lost two employment positions based on his Roma ethnicity. The Minor Applicants experienced incidents related to their Roma ethnicity while at school in March and April 2015.

II. DECISION UNDER REVIEW

[3] On December 7, 2015, the RPD denied the Applicants' claim for refugee protection.

[4] The RPD found that the Principal Applicant had failed to provide sufficient credible or trustworthy evidence to establish his personal identity as a Roma. The Principal Applicant did not present any identity documents and the RPD was not convinced that his personal appearance was sufficient to identify him as Roma, particularly since he does not speak the Romani language

or practice any cultural customs associated with the Roma. The RPD noted that unlike most Roma in Ukraine, the Principal Applicant had not been denied access to government-issued identification, healthcare, or employment. Further, the RPD noted that despite experiencing alleged discrimination, the Principal Applicant was not aware of any organizations that worked with the Roma.

[5] The RPD also found that the Principal Applicant was not credible. Although a claimant's sworn testimony is presumed to be true, the RPD felt the presumption was rebutted by the failure of the documentary evidence to mention what is normally expected to be mentioned. The RPD noted that although the Applicants had access to the Schengen zone after the persecutory incidents, they traveled to Poland, a designated safe country, yet did not seek protection there. The RPD described this as "asylum shopping" since there were no credible reasons why the Applicants did not seek the protection of any of the 26 countries in the Schengen zone. Since identity was not established, the RPD did not further analyze the evidence and claim.

III. ISSUES

[6] The Applicants submit that the following are at issue in this application:

1. Was the RPD's determination of credibility unreasonable by reason of:
 - (a) Failing to apply the presumption of truthfulness to the Principal Applicant's testimony;
 - (b) Ignoring the evidence corroborating the central contention that the Principal Applicant is readily identifiable as a person of Roma ethnicity;
 - (c) Overlooking evidence of discrimination?
2. Did the RPD err in finding that the claim had no credible basis?

IV. STANDARD OF REVIEW

[7] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, 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. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[8] The standard of review of the RPD's credibility findings and assessment of the evidence is reasonableness: *Yang v Canada (Citizenship and Immigration)*, 2016 FC 543 at para 8; *Ebika v Canada (Citizenship and Immigration)*, 2016 FC 582 at para 10.

[9] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in

the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

V. STATUTORY PROVISIONS

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 themselves 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 or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on

Définition de réfugié

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s’il y a des

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(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 themselves 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.

(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.

motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. ARGUMENTS

Issue 1a – The Presumption of Truthfulness

(1) Applicants

[10] The sworn testimony of a refugee claimant is presumed to be true unless there is a good reason to doubt it: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) at 305. In the Decision, the RPD stated that the presumption was sufficiently rebutted by a lack of acceptable documents to establish identity. However, the RPD acknowledged the difficulty in furnishing such documents since the Ukrainian authorities do not identify ethnicity in official documentation. Furthermore, although the RPD suggested acceptable identification documents could include letters from the Principal Applicant's relatives that confirmed his Roma ethnicity, the RPD rejected the submitted photographs of the Principal Applicant with his Roma relatives on the basis that they did not distinguish the relatives as Roma. Thus, the Applicants submit that the RPD's rejection of the Applicants' sworn testimony due to a lack of supporting documentation is unreasonable.

(2) Respondent

[11] There was no failure to accord the benefit of the presumption of truthfulness to the Applicants' evidence because the RPD identified sufficient reasons to rebut the presumption.

Issue 1b – Treatment of Corroborating Evidence

(1) Applicants

[12] The RPD ignored the evidence corroborating the central contention that the Applicants are readily identifiable as persons of Roma ethnicity. Several documents were submitted to support the claim that they faced persecution because of their Roma ethnicity, including the Principal Applicant's medical book, letters from the police, and a certificate issued by the Officer of the Children's Psychotherapist; however, none of these documents were mentioned in the Decision. In particular, the police reports demonstrate the presence of anti-Roma racism within the police force, and not that the police simply did not believe the Principal Applicant's assertion that the attack was based on racism. The Applicants submit that the failure to mention these important documents means they were erroneously ignored, which results in a reviewable error.

[13] Additionally, the Applicants contend that the RPD's finding that the Principal Applicant's appearance did not distinguish him as Roma on the basis of a comparison with an ethnic Ukrainian at the hearing is pure speculation. The RPD is not an expert in the appearance of ethnic Ukrainians and cannot presume to know what agents of persecution would know or think regarding the Principal Applicant's appearance.

(2) Respondent

[14] The Respondent argues that the supporting documents do not constitute corroborative evidence of persecution based on Roma ethnicity; rather, the documents only confirm that the

Principal Applicant believes he is identifiable as Roma in Ukraine. For instance, the medical book only reiterates the Principal Applicant's allegation that the attack was based on the grounds of ethnicity. Similarly, the police reports only demonstrate that the police did not open a file or investigate the assaults, likely because the Principal Applicant's contentions were not believed. The second police report implies that the police officer did not even identify the Principal Applicant as a person of Roma ethnicity until learning that the attack was believed to be ethnically-motivated. Rather than confirm the allegations of persecution, the medical and police reports suggest the opposite since members of the public provided assistance and the attackers fled, likely due to fear of reprisal or prosecution.

[15] The certificate from the Office of the Children's Psychotherapist is the only document that corroborates the contention that the Applicants are identifiable as Roma. Aside from this document, there is a paucity of evidence that suggests the Applicants are recognizable as Roma. As a result, the RPD was entitled to consider that the Applicants failed to claim asylum in any of the Schengen countries in which they had access and to make comparisons between the physical appearances of the Principal Applicant and an ethnic Ukrainian present at the hearing. The RPD examined the Principal Applicant's appearance because he is not identifiable as Roma from his dress, address, language, customs, or any other possible indicator. Thus, the Respondent submits that the RPD did not ignore corroborating evidence in the Decision.

Issue 1c – Evidence of Discrimination

(1) Applicants

[16] In finding that the Applicants were not perceived as Roma, the RPD overlooked the submitted evidence that the Principal Applicant was forced to resign his job by an ultra-nationalist boss and the accusation of theft faced by the one of the Minor Applicants at school. Instead, the RPD relied on the Applicants' access to healthcare and country documentation as demonstrative of a lack of discrimination. However, the evidence does not establish that Roma never have access to university education or medical treatment.

[17] Furthermore, the Applicants' travel to Poland without claiming protection should not be used against them since they were advised not to claim asylum on the basis that the treatment of Roma in Poland is not unlike the situation in Ukraine. Similarly, the Applicants' decision not to travel and claim protection in the Schengen countries should not be inferred as a lack of fear of persecution. There is no authority that requires a refugee claimant to make a claim in a country they have never visited simply because they have permission to travel there. Thus, the Applicants submit that the RPD ignored the independent and credible evidence capable of supporting a positive determination of their claim.

(2) Respondent

[18] The evidence does not support that the Principal Applicant was forced to resign from his job due to discrimination against his Roma ethnicity as claimed. There is no evidence that the

Principal Applicant sought assistance from anyone in connection with his situation, no evidence as to how the new boss could actually ruin his employment prospects, and no evidence that others in the company shared the new boss' views. Thus, there is no explanation as to why the Principal Applicant concluded that the only available response to the situation was to resign.

[19] While the author of the psychotherapist's report appears to support the Applicants' claims of discrimination, the report is not sufficient to overwhelm the totality of the evidence against the claims, which includes the Applicants' failure to flee persecution despite the immediate availability of protection all around them in Europe. Although the Applicants state that the situation in Poland would not have provided protection, the fact that they did not visit another country in the Schengen zone indicates they lacked a subjective fear of persecution. Additionally, the RPD reasonably inferred that the Principal Applicant did not experience much discrimination in Ukraine as a Roma due to his ability to obtain a university education, steady employment, and medical treatment when required.

Issue 2 – No Credible Basis

(1) Applicants

[20] The RPD could not have validly made a finding of no credible basis because there was independent and credible evidence in the form of the medical and police documentation capable of supporting a positive determination of the claims, which was not mentioned in the Decision.

(2) Respondent

[21] There was no error in the assessment of the credibility of the evidence and, accordingly, no serious issue with the RPD's findings is raised.

VII. ANALYSIS

[22] The Applicants have raised several grounds for review and I will address each in turn.

A. *Failure to Apply Presumption of Truth*

[23] The Applicants complain that the RPD rejected their claim because the Principal Applicant failed to produce documentation to support his claim of having a Roma identity, but the RPD did not say what identity documents the Principal Applicant could have presented.

[24] The RPD does, in fact, suggest that the Principal Applicant could have presented letters from family members to support his personal identity. The Applicants now argue that the RPD dismissed the photographs provided, so that "it is difficult to accept that the RPD would have believed that the proposed letter writers (a) were themselves Roma; or (b) were related to the applicant." This argument is not persuasive. In themselves, the photographs do not establish that anyone depicted in them is Roma. Had they been accompanied by written explanations and testimonials about how the Principal Applicant identifies as a Roma and is perceived as Roma, this would have provided a basis for the claim. The Principal Applicant claimed that he is half

Roma because his mother was Roma. Hence, it could be expected that he would provide documentation (letter and/or birth certificate) to establish who his mother is and that she is Roma. The Applicants failed to produce any such documentation.

[25] Nor was the Principal Applicant's sworn testimony uncontradicted. As the RPD points out, the evidence revealed that the Principal Applicant had led a life that did not suggest the discrimination, persecution or personal risk suffered by Roma people as described in the documentary evidence. He had not been denied government issued identification, healthcare, educational opportunities or employment in the past. Also, he had experienced no difficulties in travelling outside of Ukraine or returning. He also had no knowledge of, or interaction with, Roma organizations in Ukraine, and his own testimony was that he was only half Roma and had not been brought up with any Roma traditions or within a Roma community. As the RPD also points out, he "attended school, completing post-secondary school, and travelled on a passport outside the Ukraine for multiple years." The Principal Applicant didn't present the kind of profile to support his basic claim that he would be perceived as Roma by others and would suffer persecution and risk as a result. The RPD weighs all of the evidence and makes a credibility finding at paragraph 23 of the Decision:

Counsel's submission is that these claims rely upon the credibility of the claimants and as they testified in a straightforward manner, with no omissions or embellishments, they were credible witnesses, thus the panel should accept the claimant's personal identity as a Roma. The panel does not agree since the claimant alleges persecution due to his Roma heritage, acceptable documents establishing his Roma heritage would be an essential element of the claim. The panel finds, on a balance of probabilities, that the claimant has failed to provide persuasive documents to corroborate that he has Roma heritage nor did the panel find [sic] the claimant's testimony as it relates to his perceived ethnicity credible.

[26] This Decision involves the weighing of all of the evidence presented and notes the absence of acceptable documentary evidence to establish that the Principal Applicant has been perceived, or would be perceived, as Roma: “While it is possible that the claimant’s story is true, the panel finds on a balance of probabilities that it is not” (at para 28).

B. *Corroborative Documents*

[27] The Applicants did provide documentation related to their recent experiences including:

- a) An excerpt from the Principal Applicant’s medical book related to the alleged assault in November 2, 2014;
- b) A letter from the police refusing to open an investigation into the November 2, 2014 assault;
- c) A certificate issued by the Office of the Children’s Psychotherapist for Marta;
- d) An entry in the Principal Applicant’s medical book related to the alleged attack on July 5, 2015;
- e) The police refusal to open a criminal investigation into the July 5, 2015 attack.

[28] Apart from the medical certificate for the Minor Applicant, Marta, which I deal with below, all of this documentation uses words such as “according to him,” “allegedly caused by your ethnicity,” and “according to his words.” There is no indication that the medical or the police documentation accepted the Principal Applicant’s Roma identity. In fact, the word “Roma” is never used and the fact that the documentation consistently makes it clear that “ethnicity” is no more than an allegation suggests that the Principal Applicant was not identified as being Roma.

[29] The Applicants complain that “none of these documents was mentioned, let alone considered by the RPD.” This documentation is not mentioned because it provides no evidence that the Principal Applicant was perceived, or would be perceived, as Roma. In fact, the documentation makes it clear that the allegations of ethnicity and nationalism came from the Applicants, and, as the RPD points out, the Principal Applicant’s past does not suggest a Roma profile.

[30] In my view, then, it cannot be said, using *Cepada* principles, that the Court should assume that this documentation was overlooked by the RPD: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425. The Principal Applicant points out that he provided specific evidence of ethnicity in his Basis of Claim form and his oral testimony, but the RPD finds that his narrative is not true, on a balance of probabilities, because he failed to provide acceptable documents establishing his Roma ethnicity or “a reasonable explanation of why there are no documents.”

C. *Appearance*

[31] The Applicants complain about the RPD’s reliance upon appearances. They argue as follows:

18. The RPD proceeded to find, further, that the applicant’s testimony about his “perceived ethnicity”, was not credible. The RPD did so, first, on the basis that the applicant’s appearance apparently did not distinguish him as Roma.

19. It is submitted that there are serious problems with this analysis. The RPD could not, as it apparently believed it could, assume what the agents of persecution would think or know, based on its own perceptions of the applicant’s appearance. The applicant testified that his complexion appeared dark in contrast to that of

most Ukrainians. The RPD, clearly, was not expert in the average complexion of ethnic Ukrainians, nor was it qualified to compare the appearance of the applicant's brother-in-law, with that of such persons. In the absence of such expertise it is submitted that the RPD's view that the applicant had not established he was Roma based on his appearance, and/or would not be recognized as Roma on that basis, was pure speculation.

[references omitted]

[32] It was the Principal Applicant who raised his dark "appearance" as the principal reason he would be perceived as Roma. The RPD may be no "expert in the average complexion of ethnic Ukrainians," but it does not take expert knowledge to compare the Principal Applicant's appearance with that of his brother-in-law, an ethnic Ukrainian, and observe that "the claimant did not appear to be any darker in hair colour or complexion than the observer in the room, the female claimant's Ukrainian brown brother, Roman Klymyuk." The onus was on the Principal Applicant to establish that his appearance would identify him as Roma. There was insufficient evidence to do so.

D. *Forced to Resign Job*

[33] The Applicants also take issue with the RPD's profile findings:

21. The RPD, next, drew the inference that the applicant was not perceived as Roma because he did not suffer what it found to be the discrimination experienced by Ukrainian Roma.

22. The first error in this analysis, it is submitted, arose from the RPD's statement that the applicant had been able to maintain employment

...save during the time that he resigned his employment.

23. This statement overlooked the applicant's evidence that he had been *forced to resign his job by an ultra-nationalist boss*, who threatened that, if he didn't do so, the boss would make an entry in the applicant's work book that would prevent him from even obtaining decent employment again. It is submitted that this was an excellent example of the kind of discrimination described in the documentary evidence, yet the RPD ignore it entirely.

[references omitted, emphasis in original]

[34] The employment issues raised by the Applicants were part of the narrative that, on a balance of probabilities, the RPD found not to be true. As with the rest of their narrative, this aspect of the claim was rejected because the Principal Applicant could not establish his Roma identity through documentary evidence, and could not provide a reasonable explanation of why there were no documents.

[35] A reading of the Decision as a whole makes it clear that the RPD found the specific allegations of Roma discrimination and persecution against the Principal Applicant to be unconvincing because of other stronger evidence that he had been able to lead his life in a way that the general documentation says does not fit the profile of someone identifiable as being Roma, and because of the failure to provide a reasonable explanation for not providing documentary evidence. If the Principal Applicant is unable to establish Roma ethnicity, then the RPD does not have to accept that he was forced to leave his job for reasons of ethnic discrimination, particularly when he was able to secure the job in the first place and appears to have resigned the position.

E. *Marta's Experience*

[36] Marta's experience is set out in detail in the Decision:

[12] The claimant's daughter Marta inherited her father's dark looks and in the beginning of March 2015, she came home one day because there was a theft in her class. The teacher and other children accused her. Several days after the real culprit was found but no one apologized to his daughter. The claimant went to speak with the principal and the principal became aggressive and he was told that Roma children were known to create problems in class.

[37] The Applicants' point is that, as with the new boss incident, this shows that Marta, like her father, is perceived to be Roma. But, once again, it is put forward as an isolated incident so that, for the RPD, it does not establish Roma identity when the documentation suggests that, if Marta was perceived as Roma, she would have experienced far greater discrimination than this, and because it is part of a narrative that is not believed because of a lack of documentation on the Principal Applicant's profile as someone who would be perceived as Roma. Marta's situation was not overlooked. The RPD found that it did not provide sufficient evidence of discrimination, when viewed with the evidence as a whole, to support that the Principal Applicant would be generally perceived as Roma and would suffer s 96 persecution or s 97 risk.

F. *The Documentary Evidence*

[38] The Applicants also say that the RPD makes a reviewable error in the way it uses the documentary evidence to deny the Principal Applicant a profile as a recognizable Roma:

26. It is submitted further that there was no basis for the RPD's conclusion that *all* Roma are denied passports, health care and education. The fact that the applicant had a passport and accessed healthcare, could not rationally lead to the conclusion that he was

not attacked by racists on the basis of his ethnicity. In that regard, the RPD, again, overlooked the applicant's evidence that anti-Roma racism escalated during his last few years in Ukraine, and that was why his situation and that of his family deteriorated markedly during that time.

[emphasis in original]

[39] As the Decision makes clear, the RPD doesn't say that "all" Roma are denied passports, healthcare and education:

[26] The panel has reviewed the documentary evidence in the Board's country condition documents and documents submitted by Counsel that suggest that Roma are discriminated against in Ukraine. They are routinely denied access to government issues identification, health care, educational opportunities and employment. The panel notes that the claimant has had no difficulty obtaining a passport, health care and has always maintained employment save during the time that he resigned his employment. He had no difficulties travelling outside of the Ukraine or returning to the Ukraine.

[27] The panel finds it reasonable to expect if the claimant was perceived to be Roma, he would have experienced the discrimination alleged in the documentary evidence. The claimant was asked about organizations that work with the Roma population in the Ukraine, he testified that there was the Red Cross but when asked about specific organizations that work with the Roma the claimant testified he never heard of them. The documentary evidence states there are about 90 non-governmental Romani organizations in the Ukraine. The panel notes that any knowledge of these organizations in itself does not establish one's ethnicity; however, these organizations work with the Roma population, and these organizations would be the ones to approach for aid, for example, to liaise with the police or obtain documentation or assistance with government bodies. The panel notes the claimant testified that he did not grow up with any Roma customs or traditions, nor was he raised in a Roma settlement. Though he indicated in his BOC he spoke some Roma, he testified that he only understood a few words. The panel notes the claimant attended school, completing post-secondary school, and travelled on a passport outside of Ukraine for multiple years. The panel does not find that the claimant would be perceived Roma based on his appearance. Nor does the panel find the claimant's personal profile

one that would establish him as Roma, based on the documentary evidence.

[footnotes omitted]

[40] It is clear here that the RPD does not simply rely upon the general documentation of discrimination against Roma in Ukraine. The fact that the Principal Applicant had not been discriminated against in any of the routine ways is only one of the factors that the RPD weighs in coming to its conclusion that he has failed to establish that he would be perceived as Roma.

G. *Re-Availment and Failure to Leave*

[41] The Applicants criticize the RPD's re-availment findings as follows:

27. The RPD held it against the applicants that they travelled to Poland but returned to Ukraine without claiming asylum, and did not claim asylum in any of the other countries to which their Schengen visas allowed them entry.

28. The RPD stated the applicants were "safe in a second country" (Poland) but elected rather to return to Ukraine. It is submitted however that the evidence was that Poland was not "safe" for the applicants. They said that they expressly asked Ruslan Somyk's relatives in Poland about claiming asylum there, but were told that the situation for Roma there was the same as it was in Ukraine. Contrary to the RPD's view, it would therefore have made no sense for the applicants to have claimed asylum in Poland.

29. For the rest, it is submitted that the applicants never visited any other European country. While a claimant may be questioned on his or her failure to claim in a country he or she has physically visited, there is no authority whatever [sic] for requiring a claimant to go to a particular country to claim protection merely because they have a visa to enter that country temporarily. There was simply no basis for the RPD's inference that the applicants lacked subjective fear or an objective basis to such fear, because they chose to claim in Canada rather than in any of 25 countries they had never set foot in.

[references omitted]

[42] The RPD goes into this matter in considerable detail:

[29] As it relates to credibility, the panel finds that though there were no material contradictions between the BOC and their testimony, the panel finds that the claimant and the female claimant were not credible as it relates to their re-availment. The 'presumption' that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention.

[30] The claimant and his family travelled outside of Ukraine during the incidents, prior to [the] July 2015 incident but after the loss of employment in June 2014, after the assault in November 2014, and after the threats in both November and February 2015. The family had the means to leave the country well before their August 2015 departure in that they had Schengen visas valid travelling to the Schengen area, specifically Poland. The claimant had multiple Schengen visas the last to expire in 2016. Yet at no time did the claimant seek protection in any of the 26 Schengen countries, his explanation was that his relatives told him that Roma were treated badly in Poland and elsewhere in the Schengen area. The claimant testified he saw it on television or on the internet. The female claimant testified to the same. However, the panel cannot agree. The fact that the claimants were safe in a second country, but elected to return not once but several times back to Ukraine is telling. Particularly, as they returned to the same area, same apartment where they were facing threats, where the minors were being discriminated against in school and the claimant was denied employment and assaulted.

[31] The panel finds these actions go to the claimant's subjective and objective fear. The family had the ability to leave the Ukraine and did so but returned. The explanation of why he did not seek protection in Poland, is that he had heard from relatives that it was not that good in Poland or elsewhere in Europe for Roma. He had seen on television and the internet that this was true. The panel does not find this the case, perhaps his relatives had negative experiences in Poland however, there are 26 countries in the Schengen area and he had the ability to go to any of them and elected not to but returned to the Ukraine and remained there until August 2015. The panel finds this asylum shopping, there were no credible reasons why he could not or would not seek the protection

of any of the other 25 countries in the Schengen area. The Supreme Court of Canada has established that a successful refugee claim must meet both subjective and objective components. The panel finds that in the *Ilie* decision, the Federal Court held:

The tribunal was entitled to consider the applicant's failure to claim refugee status in other countries, and to consider how the applicant's evidence was to be weighed in light of that failure[.]

[32] The panel considered the jurisprudence about failure to claim refugee status elsewhere. In the *Gomez Bedoya* decision, the Federal Court held:

[T]he fact remains that the U.S. has ratified the *United Nations Convention Relating to the Status of Refugees*, and there is no reason to believe it does not abide by its obligations. The fact that the rate of successful applications may be lower there than in Canada does not justify the applicants' failure to seek refugee protection in the U.S. The Board could certainly take that factor into consideration in assessing Mrs. Bedoya's subjective fear: *Breucop v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 117; *Pissareva v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 2001 (F.C.T.D.).

[33] Similarly, in the Case of *Assadi*, the Court held:

Failure to immediately seek protection can impugn the claimant's credibility, including his or her testimony about events in his country of origin.

[34] The panel finds it reasonable if [*sic*] the claimants to have sought protection if they genuinely had a fear for their life, particularly the claimant who had travelled outside of Ukraine multiple times before the July 2015 incident but after the November 2014, and after the threats in February 2015. Furthermore, the panel finds that the claimants' allegedly self-endangering actions of returning to the Ukraine to the same home belie their fear and make their motivations suspect. The panel finds that the claimants are not credible as it relates to the failure to claim elsewhere. Their ability to leave the Ukraine but return to the same address, same town where they faced violence and threats, putting themselves and their children back into the dangerous situation. The panel finds this fatal to their claim of persecution.

[references omitted]

[43] The Principal Applicant didn't think he would be any better off in Poland or any other Schengen country, yet he provided no evidence of having been discriminated against or persecuted in Poland. The Applicants' relatives might have told them that Roma are treated badly in Poland and elsewhere in the Schengen area, but there was no evidence that the Principal Applicant had been treated badly in any of these countries or that he would be perceived to be Roma if he went there. With no evidence of discrimination or persecution in a second country, the Applicants elected to return from Poland to the "same area, same apartment where they were facing threats, where the minors were being discriminated against in school and the claimant was denied employment and assaulted."

[44] The Applicants say that the RPD was in error to fault them for "asylum shopping" and that "there were no credible reasons why he could not or would not seek the protection of any of the other 25 countries [i.e. other than Poland] in the Schengen area." I agree with the Applicants that the jurisprudence cited by the RPD on this issue deals with applicants who go to other countries but who fail to claim protection in those countries before coming to Canada to make a claim. In the present case, the Applicants only went to Poland within the Schengen area. However, the RPD also points out that there was no need to wait for an August 2015 departure because, if they really were in danger they could have departed earlier as they had visas and could travel to countries in the Schengen area. I do not think, however, that the RPD's "asylum shopping" mistake was material enough to possibly change the Decision. The RPD lays particular emphasis on the Applicants' "self-endangering actions of returning to the Ukraine to the same home" that "belie their fear and make their motivations suspect":

Their ability to leave the Ukraine but return to the same address, same town where they faced violence and threats, putting themselves and their children back into the dangerous situation. The panel finds this fatal to their claim of persecution.

Also, the RPD points out that they could have departed earlier than they did, but chose to remain in the location where they said they were in danger.

H. *No Credible Basis*

[45] The Applicants submit that because the RPD's credibility findings were unreasonable, it follows that the no credible basis finding cannot stand. As I have found the negative credibility findings to be reasonable, it follows that I must reject this argument.

[46] However, the Applicants also say that

31. It is submitted in any event that this was not a case where a finding of no credible basis could validly have been made. In that regard, it is submitted that there was "independent and credible" evidence in the form of the medical and police documentation referred to at paragraphs 11 to 17 above, which went unmentioned by the RPD but was capable of supporting a positive determination of the claims. That being so, it was not reasonably open to the Member to make finding that the applicant's claims had no credible basis.

[47] Although I accept that the Decision is reasonable in that it falls within the *Dunsmuir* range, I don't think it is reasonable or possible, given the evidence as a whole, to say that there was no credible basis at all for this claim. This is a case about insufficient evidence; but there was some evidence – Marta's experience, for example – that could have supported a positive determination.

I. *Conclusions*

[48] This is a difficult case that, in the end, rests upon the Applicants' failure to present sufficient evidence to establish that the Principal Applicant would be perceived to be Roma in the Ukraine, and so will suffer s 96 persecution and/or s 97 risk if he is returned there. The RPD gives clear reasons as to why the evidence is not sufficient. It is possible to disagree with the RPD's conclusions, but I don't think it can be said that they fall outside of a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. This means that the Court cannot interfere.

J. *Certification*

[49] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed, except for the no credible basis finding.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: RUSLAN IHOROVYC SOMYK ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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