

Federal Court



Cour fédérale

Date: 20180409

Docket: IMM-4195-17

Citation: 2018 FC 382

Ottawa, Ontario, April 9, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MARIA NIKOLOVA

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated September 13, 2017 [RAD Decision], wherein the RAD confirmed the decision of the Refugee Protection Division [RPD] dated January 22,

2016 [RPD Decision], that the Applicant is not a Convention refugee or a person in need of protection.

[2] As explained in greater detail below, this application is dismissed because the Applicant's arguments do not demonstrate any errors on the part of the RAD that render the RAD Decision unreasonable.

II. Background

[3] The Applicant, Maria Nikolova, is a citizen of Bulgaria. She alleges that she is Roma, on her father's side. Ms. Nikolava says that, because of her ethnicity, she had problems growing up and could not find work that corresponded to her level of education. She alleges that she has been harassed and assaulted by skinheads in Bulgaria and that the police failed to provide her with assistance, even threatening her themselves. Ms. Nikolava left Bulgaria and entered Canada on a visitor visa on June 12, 2015. She claimed refugee status on July 16, 2015.

[4] A hearing was held before the RPD on September 11 and December 3, 2015. In the RPD Decision, the RPD held that Ms. Nikolova had not established that she was Roma and also concluded that she had a viable internal flight alternative [IFA] to the city of Varna. She appealed this decision to the RAD, which affirmed the RPD Decision on August 9, 2016. Ms. Nikolova filed an application for judicial review with the Federal Court, but the matter was returned by consent to the RAD, which again affirmed the RPD Decision. It is that RAD Decision which is the subject of the present application for judicial review.

III. The RAD Decision

[5] The RAD agreed with the RPD that Ms. Nikolova had failed to prove her identity as a member of the Roma community. It held that she could not be identified as a member of the Roma community based on her surname and that she had not demonstrated that she was Roma through proficiency in the language. She introduced a supporting letter purportedly from a member of the Council of Roma Elders, but the RAD gave this letter no evidentiary weight, because it was hand written and did not contain any information, such as a letterhead, indicating that it was written by a member of the Council. The RAD considered supporting letters from a Roma community group in Canada but gave them no evidentiary weight in establishing Ms. Nikolova's identity as Roma. The RAD also gave little evidentiary weight to Ms. Nikolova's testimony as to her interest in and knowledge of Romani culture and held that the RPD had not erred in finding that she would not be identified as a member of the Roma community based on the clothing that she wore.

[6] Because it considered Ms. Nikolova to have failed to establish her identity as a member of the Roma community, the RAD affirmed the determination of the RPD that she is not a Convention refugee or a person in need of protection. Having reached this conclusion, the RAD did not address the RPD's alternative finding of the availability of an IFA.

IV. Issues and Standard of Review

[7] The Applicant submits that the issues for the Court's consideration are:

A. Did the RAD err by engaging in ethnic or racial stereotyping?

B. Did the RAD err by ignoring and misconstruing relevant evidence or by reaching conclusions without evidence?

[8] Neither party expressly addressed the standard of review, which I find to be reasonableness (see *Poudel v Canada (Citizenship and Immigration)*, 2016 FC 978 at para 5; *Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 at para 16).

V. Analysis

A. *Did the RAD err by engaging in ethnic or racial stereotyping?*

[9] Ms. Nikolova argues that the RAD erred, by engaging in ethnic or racial stereotyping, when it deferred to the RPD's assessment as to whether she would be identified as a member of the Roma community based on her physical appearance. She refers to this Court's decision in *Pluhar v Canada (Minister of Citizenship and Immigration)* (1999), 174 FTR 153 (FCTD), in which Justice Evans stated as follows at paragraph 10:

[10] In my opinion the Refugee Division erred in law by effectively basing the decision on its assessment that Ms. Pluharova was not dark skinned, especially since it claimed no relevant "expertise". It is inherently dangerous for Board members to base a finding on whether people in another country would regard a claimant is of particular ethnicity solely on the basis of the members' observation of the person concerned.

[10] The difficulty with this argument is the fact that, as she emphasized in her submissions before the Court, Ms. Nikolova referred to her physical appearance, including her manner of

dress, as a means by which she can be identified as Roma. The RAD therefor cannot be faulted for considering her assertion to this effect.

[11] Ms. Nikolova also challenges the RAD's deference to the RPD's conclusions, based on how she was dressed at the hearing and in the one vacation photograph she submitted. She argues that it is how she dresses in Bulgaria, not in Canada or on vacation, that would identify her as Roma. However, Ms. Nikolova did not refer the Court to any evidence before the RPD or RAD of how she dresses when in Bulgaria, or how this would identify her as Roma. As argued by the Respondent, Ms. Nikolova bears the onus of establishing her identity as a member of the Roma community. The RPD and the RAD can reach conclusions only based on the evidence before it.

[12] I find no error by the RAD in its consideration of Ms. Nikolova's arguments surrounding her physical appearance.

B. Did the RAD err by ignoring and misconstruing relevant evidence or by reaching conclusions without evidence?

(1) Surname

[13] Ms. Nikolova argues that it was unreasonable for the RAD to conclude that she is not Roma, in reliance on the fact that her surname is not Roma, given that she testified that all Roma were required to take Bulgarian surnames during the communist era.

[14] I find nothing unreasonable in this aspect of the RAD's analysis. The RAD Decision demonstrates that it considered a number of factors to determine whether the evidence established that Ms. Nikolova was a member of the Roma community. It considered her surname and concluded, based on her evidence, that she could not be identified as Roma based on this factor. While I appreciate that Ms. Nikolova was not arguing that her surname was indicative of her identity, I find no error in the RAD's consideration of, and conclusion based on, this factor.

(2) Language

[15] The RAD also concluded that Ms. Nikolova's limited knowledge of the Romani language did not assist her in establishing her identity as Roma. She takes issue with a number of aspects of this conclusion.

[16] Ms. Nikolova submits that she is not alone among Roma in not speaking Romani, referring to her evidence that young people do not speak the language. However, this does not assist her in establishing an error on the part of the RAD in concluding that she cannot rely on her knowledge of the language to demonstrate her identity.

[17] Ms. Nikolova also takes issue with the RAD's conclusion as to her limited facility with the Romani language. While the RAD referred to the fact that, when asked if she knew any Romani words, Ms. Nikolova responded only with the words for "goose" and "lamb", she submits that the RAD overlooked three other Romani words used in the course of her testimony. I find little merit to this submission, as the RAD's conclusion is not undermined by evidence that Ms. Nikolova knew five Romani words, rather than three.

[18] She also challenges the RAD's statement that she testified before the RPD that she did not know conversational terms such as "hello" or "how are you doing". Ms. Nikolova submits that the testimony to which the RAD refers involved her answering a convoluted question about her grandparents and she refers the Court to a portion of the audio recording of her RPD hearing in which she states that she understands the Romani language. I have listened to this portion of the audio recording, and the portion in which the RPD posed the question about Ms. Nikolova's grandparents. While her statement about understanding the Romani language is not particularly clear in the recording, I accept for purposes of this analysis that she did testify that she understands the language. However, that statement was made shortly after Ms. Nikolova testified that, while she cannot speak the language, she would recognize some words. After both these pieces of testimony, the RPD questioned Ms. Nikolova on what words she would recognize. It was then that she identified the words for "goose" and "lamb". As such, the record does not support her argument that the statement that she understands the Romani language was overlooked. Rather, the evidence demonstrated comprehension of a very limited number of words.

[19] I also disagree with her characterization of the question put to her, which referred to grandparents, as convoluted. The RPD asked whether Ms. Nikolova was capable of using conversational terms of greeting in the Romani language, such as a Canadian who is not fluent in French might employ with a francophone grandparent. She replied that her grandparents were deceased and that her mother insisted on speaking Bulgarian as she did not speak Romani. Again, I can find no error in the RAD concluding from this that Ms. Nikolova has limited knowledge of the Romani language.

[20] Ms. Nikolova also takes issue with the RAD's statement that she was employed in a Roma neighbourhood where the majority of the clients spoke Romani, from which the RAD concluded that it was reasonable to expect that she would have known simple salutations in that language. She states that she was employed near the Roma neighbourhood where she had grown up, not in a Roma neighbourhood, and that she did not testify as to the language spoken by persons in the neighbourhood but rather that most young Roma do not speak Romani.

[21] I accept that Ms. Nikolova's assertion, as expressed in her Basis of Claim form, is that she worked as a waitress in a restaurant near —not in— a Roma neighbourhood and that she did not give evidence as to the language spoken by the restaurant's clientele. However, she did state that the owner of the restaurant and most of the clients were Roma. As noted by the Respondent, the RPD found from the documentary evidence that 85% of the Romani population in Bulgaria speak Romani and therefore did not find it credible that, if Ms. Nikolova was as involved in the Roma community as she alleged, she could have worked in a Roma café without learning any generic social greetings. The RAD considered Ms. Nikolova's responses to the RPD's questions about her capability with conversational terms and found it reasonable to expect, given the particular location of her employment, that she would have had such capability. This analysis is based on the fact that the restaurant's clientele was Roma. The fact that the restaurant was near a Roma neighbourhood, rather than in that neighbourhood, does not undermine the reasonableness of this analysis.

(3) Letters from Roma Settlement Worker

[22] The documentary evidence submitted by Ms. Nikolova to the RPD included a letter from a Roma settlement worker with a Canadian organization called CultureLink. That letter stated the author's confirmation that Ms. Nikolova "is identified as Roma based on her cultural background and Romani language". Ms. Nikolova identified at the RPD hearing the error in this letter's reference to her knowledge of the Romani language, as a result of which the RPD sought clarification from the author of the letter.

[23] The Roma settlement worker responded in a second letter, confirming that the first letter should not have stated that Ms. Nikolova was identified as Roma based on her language, but rather should have referred to the language of her ancestors. This letter also provided other bases for the author's conclusion that Ms. Nikolova is of Roma origin. However, while the RAD noted the author's statement that she had made a mistake, it was concerned about the contradiction between the two letters in the absence of any explanation for the mistake. The RAD therefore gave the evidence from the Roma settlement worker no evidentiary weight.

[24] Ms. Nikolova takes issue with this analysis, arguing that the inquiry the RPD made of the Roma settlement worker did not request an explanation for the mistake. The RPD noted that the Roma settlement worker's finding was stated to be based on Ms. Nikolova's "cultural background and Romani language" and asked for a written explanation as to how the settlement worker was able to determine her background and Romani language, including questions asked, research conducted, and assessments made.

[25] After receiving the response described above, the RAD noted that there was no explanation in the second letter as to how the mistake was made in the first letter. Its analysis was that it was reasonable to expect that some form of explanation would have been provided, and it therefore gave the letter no evidentiary weight. I do not find the manner in which the RPD's request for an explanation was framed to undermine the reasonableness of the RAD's analysis. The second letter from the Roma settlement worker provided a different explanation for the conclusion as to Ms. Nikolova's identity, without any explanation for this change except that she had made a mistake, and it was not unreasonable for the RAD to take this into account in its analysis.

[26] Ms. Nikolova also notes that, in the first decision by the RAD (the one which was returned to the RAD for redetermination on consent), it accepted the explanation by the Roma settlement worker and found that the letter gave support to Ms. Nikolova's claim of Roma ethnicity. She does not explain how this affects the reasonableness of the current RAD Decision, and I find that it does not. When the matter was remitted to the RAD for redetermination on consent, the new RAD panel was obliged to reach its own conclusions on the evidence. It was not bound by any conclusions of the previous RAD panel.

(4) Letter by Ivaylo Vasilev

[27] At the suggestion of the RPD, Ms. Nikolova obtained and submitted a letter by Ivaylo Vasilev, whom she identified as a friend of her father's and a member of the Council of Roma Elders. She challenges the RAD's conclusion that this letter should be given no evidentiary weight because the RAD expected that a letter written by a member of the Council of Roma

Elders would include pertinent information indicating that the author did belong to that organization. She notes that the author does state in the letter that he is a member of the Meshere for the Filipovtsi Neighbourhood.

[28] As I read the RAD Decision, it adopted the same analysis as the RPD, noting that the letter was handwritten and, more importantly, that did not contain vital information such as a letterhead which would indicate that it was written by a member of the Council. It was the absence of this sort of objective indicia of the author's position which resulted in the RAD decision to give the document no weight. I find no reviewable error in the RAD's treatment of this document.

(5) Cultural Knowledge

[29] The RAD gave little evidentiary weight to Ms. Nikolova's response to the RPD's question about what Roma musicians and music she listened to, because she identified a Roma singer who performs with a Bulgarian band that does not play Roma music. It also gave little weight to her identification of Roma celebrations, on the basis that this information could easily be obtained through the public media.

[30] Ms. Nikolova argues that the RPD interrupted her testimony about Roma musicians and celebrations, and that it was as a result of that interruption that she identified only one musician and gave details of only two of the three celebrations she had identified. I find no merit to this submission. As previously noted, Ms. Nikolova bore the onus of establishing her Roma identity. As the Respondent submits, she was represented by counsel at the RPD hearing and could have

added to her testimony surrounding her cultural knowledge before the conclusion of her evidence.

(6) Presumption of Truthfulness

[31] Finally, Ms. Nikolova relies on *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCTD) [*Maldonado*], for the principle that a refugee claimant is presumed to be truthful. She submits that the RPD and RAD should therefore have accepted her testimony as to her Roma identity.

[32] However, as submitted by the Respondent, the presumption of truthfulness applies in the absence of a reason to doubt the claimant's credibility. The various factors canvassed by the RAD, leading to its conclusion that Ms. Nikolova had not established her identity as Roma, represent concerns which rebut this presumption. I have found the RAD's analysis of these factors to be reasonable. The reasonableness of the RAD Decision is therefore not affected by the *Maldonado* presumption.

VI. Conclusion

[33] Having found that the Applicant's arguments do not demonstrate any error by the RAD which would render the RAD Decision unreasonable, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal and none is stated.

JUDGMENT IN IMM-4195-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4195-17

STYLE OF CAUSE: MARIA NIKOLOVA V THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 28, 2018

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: APRIL 9, 2018

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