

Federal Court



Cour fédérale

**Date: 20181101**

**Docket: IMM-82-18**

**Citation: 2018 FC 1099**

**Ottawa, Ontario, November 1, 2018**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**MYKOLA DANCHENKO, TETIANA  
DANCHENKO AND MARKO DANCHENKO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Tetiana Danchenko (the “Applicant”) is a Ukrainian citizen of the Roma ethnic group. She states that she and her family (collectively, the “Applicants”) face persecution at the hands of Ukrainian nationalists and made a refugee claim under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “IRPA”).

[2] The Refugee Protection Division of the Immigration and Refugee Board of Canada (the “RPD”) determined that the Applicants had a viable Internal Flight Alternative (“IFA”) in Odessa and rejected the refugee claim. The Applicants appealed that decision to the Refugee Appeal Division (“RAD”). The RAD dismissed the appeal.

[3] On January 9, 2018 the Applicants applied for judicial review of the RAD decision arguing that its IFA finding is unreasonable. I agree and will set aside the decision for the reasons below.

## II. **Facts**

### A. *The Applicants*

[4] The Applicant is a 31 year old citizen of the Ukraine and a member of the Roma ethnic group. She is married to Mykola Danchenko, and together they have a 4 year old son, Marko Danchenko.

[5] The Applicant was born into a Roma family of Polish origins. As Roma persons, her parents were separated from their families and sent to vocational schools. They met in Kyiv and eloped to Ivano-Frankivsk. The Applicant claims to have experienced profiling and mistreatment as a Roma person at an early age, and she experienced a hard time fitting in at school. Nevertheless, her father was a skilled craftsman and was able to run a business to finance her post-secondary education.

[6] The Applicant worked in her father’s business, where she met her Ukrainian husband. With help from Mykola’s father, the couple built a successful concert hall. They visited Canada

in 2015, but did not make a claim for refugee protection as they had no fear for their lives at that time.

[7] On November 26, 2015, the Applicants rented the concert hall to a group of rappers from Azerbaijan. The concert was a success, but a local journalist reviewed the event and took issue with the Applicants hosting Russian-language performers (and thus characterizing them as anti-Ukrainian). The couple subsequently cancelled a Russian rap performer's show, fearing repercussions by Ukrainian nationalists. The Applicant says that, by that time, it was already too late; her ethnicity was then used as a tool to discredit her as an intruder who was indifferent to the place that she was doing business, its culture, and the political sensitivities between Russia and the Ukraine.

[8] In January 2016, the couple was approached by Ukrainian nationalists, threatening physical violence and demanding payment to support their armed forces. The Applicants applied for Polish visas as a safety measure, sensing that they might be at risk.

[9] In May 2016, the nationalists blocked a concert that the Applicants were hosting featuring a Ukrainian pop star, Svitlana Loboda. Some attendees were injured, and the police were called but did not intervene. Later that evening during the post-event cleanup, the Applicant went to buy a pack of cigarettes and was intercepted by some nationalists, who beat her and called her a "stinky Gypsy bitch." After this, the Applicants tried to flee for Poland, but their visas were cancelled at the border when Polish officials could not reach their intended hosts.

[10] The Applicant and her husband thus returned to Ivano-Frankivsk. They complained to the police again, but no action was taken. Instead, the Applicant asserts that the police tipped off the

nationalists and, on July 29, 2016, she was attacked again. This time, she was severely injured and required prolonged medical attention. On that same night, their car was vandalized.

[11] On August 8, 2016, after boarding a bus, the Applicant was told by the driver that “today, Gypsies are getting a free ride.” He refused to stop the bus at her stop, and instead drove it to a remote location. During the ride, people laughed and some women spit on her.

[12] Due to fear for their lives, the Applicants decided to leave Ukraine. They arrived in Canada on August 13, 2016 and made a claim for refugee protection.

B. *Refugee Protection Division*

[13] The RPD held a hearing on February 15, 2017, and rendered a decision to reject the claim on March 31, 2017. The RPD was satisfied with respect to the Applicants’ identities, and found the Applicant to be credible with respect to the discrimination and physical violence that she suffered in the Ukraine. However, the RPD also stipulated that harassment and discrimination do not necessarily amount to persecution, and concluded that the mistreatment that the Applicant suffered did not amount to persecution.

[14] The RPD went on to decide whether the Applicant had a viable IFA, having identified Odessa as an option at the outset of the hearing. The RPD found that the first prong of the IFA test was met; namely, there was no serious possibility that the Applicants would be persecuted in Odessa on account of the Applicant’s Roma ethnicity. The RPD noted that Odessa is a city where Roma communities exist (albeit with some exposure to harassment and discrimination), and reasoned that the Applicant’s “broader and more integrated Ukrainian life affords her

opportunity to live elsewhere in Ukrainian society in a way that may not be as available to other Roma” (RPD Decision, para 24).

[15] The RPD further found that the second prong of the IFA test is also met in the Applicant’s case. The RPD cites *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FC 589 (CA) for the notion that “conditions that fall short of endangering the lives and safety of the claimants are insufficient to constitute undue hardship” (RPD Decision, para 29). Reasserting that the Applicant is more protected as compared to other Roma, and underlining her experience of living well within Ukrainian society for most of her life, the RPD reasons that the family would not face undue hardship in Odessa. The RPD also concludes that there are insufficient grounds to support the notion that the nationalists will continue to pursue the Applicant there, or that they (the nationalists) would be able to convince the Ukrainian police to assist them in tracking the family down. Accordingly, the RPD dismissed the Applicants’ claim.

C. *Refugee Appeal Division*

[16] The Applicants appealed the decision to the RAD. The RAD dismissed the appeal by way of a 19-paragraph decision dated December 14, 2017. The RAD briefly reviews the facts of the Applicants’ appeal, noting the initial incident of November 2015, extortion by the Ukrainian nationalists in January 2016, and the two physical attacks that the Applicant suffered in May and July 2016. The RAD then states that the determinative issue in this appeal is the IFA, and that it will not review the RPD finding about whether the level of discrimination faced by the Applicant amounts to persecution.

[17] As a preliminary matter, the RAD first considers the admissibility of two new pieces of evidence presented by the Applicant: an affidavit from the Applicant describing a recent incident involving her father, and a police report about the same incident. The affidavit says that the Applicant's father called her on May 8, 2017 to inform her that, on the previous day, he had been assaulted by four individuals wearing army fatigues with the "Right Sector" insignia on their sleeves. They called him a "Gypsy bastard who ripped off Ukrainians" and asked for the Applicant's whereabouts. They also said they would "punish his Gypsy bitch daughter who owes them money," and threatened to kill her if she returned. The police report confirms that the altercation was officially documented, but that it was impossible to identify those who approached the Applicant's father. The RAD accepts this evidence because it was not available prior to the hearing, appears genuine, and relates to a material aspect of the appeal.

[18] Having reviewed the evidence, the RAD finds that the Applicants had difficulties with Ukrainian nationalists and accepts that these problems were aggravated by the Applicant's Roma ethnicity. However, the RAD also agrees with the RPD's determination that the Applicant's profile was substantially different to that of the average Ukrainian Roma person described in the documentary evidence: her husband is Ukrainian and from a prominent family, they own property together, and she had not previously faced physical violence due to her ethnicity. Moreover, the RAD found that the situation at the concert hall was an "unfortunate random or one-off occurrence" and that, while it is plausible that the nationalists may still be interested in extorting the Applicant, it is unlikely that they would search for her in a different city. The RAD considered the incident involving her father in May 2017, but found it is unlikely that the nationalists would search for her elsewhere in the Ukraine because her father told them during the altercation that she had left the country. The RAD also finds it unlikely that the nationalists

could bribe the police into helping them find her, due to the passage of time (two years) and the fact that the concert venue is already up for sale. Finally, the RAD does not consider that it would be unduly harsh for the family to relocate to Odessa, given the couple's relative youth, level of education and entrepreneurial experience.

### III. Issues

[19] In my view, there are two issues that arise on this application for judicial review:

- Was the IFA finding unreasonable?
- Did the RAD apply the correct test when determining the Applicants' IFA?

### IV. Standard of Review

[20] The first issue is a question of mixed fact and law, as it involves the application of the IFA test, and thus is reviewable on a standard of reasonableness (*Okohue v Canada (Citizenship and Immigration)*, 2016 FC 1305 at paras 8-10). Whether the decision maker applied the correct legal test attracts the correctness standard (*Reci v Canada (Citizenship and Immigration)*, 2016 FC 833 at para 16).

### V. Analysis

#### A. *Was the IFA finding unreasonable?*

[21] The Applicants argue that the RAD's finding that it was unlikely that the nationalists would pursue them in Odessa was neither transparent nor justified, thereby rendering the IFA determination unreasonable. They submit that this finding is not grounded in the evidence, and has been made in the face of evidence to the contrary. For example, the Applicants note that the nationalists waited more than 9 months (after they left the Ukraine) to accost the Applicant's

father, demanding to know her whereabouts and thereby demonstrating their continued interest in the family. The Applicants further argue that the RAD ignored uncontradicted evidence that nationalists continue to patrol the south of Ukraine, not far from Odessa, as presented in the documentary evidence. Finally, it is submitted that the RAD erred in finding that the Applicant is at far less risk as compared to other Roma in Odessa, because this conclusion was not only unsupported, but also contradicted by credible evidence before it.

[22] The Respondent contends that it was reasonable for the RAD to infer that the nationalists would not look for the Applicants outside of Ivano-Frankivsk, because their concert hall was listed for sale and the Applicant's father told them (the nationalists) that the family had left the Ukraine. The Respondent argues that the RAD reasonably distinguished the Applicant's situation from that of other Roma living in the Ukraine, based on the documentary evidence and in light of the Applicant's personal circumstances. The Respondent adds that it was reasonable for the RAD to find that the IFA was not unduly harsh, given the Applicants' youth, level of education and entrepreneurial experience and success.

[23] I agree with the Applicants. There is no line of analysis to support the RAD's explanation that the "passage of time" makes it unlikely that the nationalists will pursue the Applicants in Odessa. Nor is there any evidence on the record that the nationalists are disinterested in pursuing the Applicants to date. In fact, the evidence shows the opposite. For example, the nationalists pursued the Applicant's father 18 months after the initial incident and 9 months after the family left for Canada.



[24] As such, the RAD's reasoning about the passage of time is not a reasoned inference, but rather bald speculation in complete disregard of the pattern of escalating violence presented in the evidence.

[25] Moreover, the RAD's finding that the incident was "random" or a "one off" is made without regards to the evidence that multiple incidents took place such as: the initial backlash after the concert in November 2015, threats/extortion in January 2016, blocking of the concert hall and physical attack in May 2016, and the serious beating that the Applicant suffered in July 2016. This is to say nothing of the incident involving her father in May 2017, which appears to be directly linked to the Applicants' situation. No reading of the evidence can logically be characterized as "random" or a "one off" event.

[26] Similarly, the fact that their concert hall is for sale says nothing about the nationalists' continued interest in extorting the Applicants. The inferences in the reasons are nothing more than pure speculation and render the decision unintelligible.

[27] Having decided that the RAD's IFA finding was unreasonable, I need not consider the second issue.

## VI. **Certification**

[28] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

## VII. **Conclusion**

[29] This application for judicial review is allowed.

**JUDGMENT in IMM-82-18**

**THIS COURT'S JUDGMENT is that:**

1. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-82-18

**STYLE OF CAUSE:** MYKOLA DANCHENKO, TETIANA DANCHENKO  
AND MARKO DANCHENKO v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 12, 2018

**JUDGMENT AND REASONS:** AHMED J.

**DATED:** NOVEMBER 1, 2018

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