Federal Court  Cour fédérale

Date: 20110531

Docket: IMM-1773-10

Citation: 2011 FC 635

Ottawa, Ontario, May 31, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

MILAN CINA, HELENA CINOVA,
ANDREA CINOVA, TOMAS CINA

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 4, 2010, concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the applicants do not have a well-founded fear of persecution in the Czech Republic on a Convention ground, nor

would their return to the Czech Republic subject them personally to a risk to their lives, or to a risk of cruel and unusual treatment or punishment, or of torture.

FACTS

Background

[2] The applicants are a family of four citizens of the Czech Republic: Milan Cina, the principal applicant, Helena Cinova, his wife, and their two children, Andrea Cinova (age 21) and Tomas Cina (age 19). They arrived in Canada on November 11, 2007, and claimed refugee status.

[3] The applicants claim that they have been persecuted in the Czech Republic because of their Roma ethnicity. In the narrative accompanying his Personal Information Form (PIF), the principal applicant described the bases for his claim.

[4] The principal applicant described ongoing employment discrimination. He stated that he began working for a painting company in 1984. After the fall of Communism, he was first paid a lower wage and ostracized by his coworkers, who would insult him by calling him “black gypsy swine” and say that it is “too bad that Hitler forgot about you,” and ultimately fired from his employment in 1993. When asked why he had been fired, the applicant was told that no one wanted to work with him because he was gypsy.

[5] Between 1993 and 1999 the applicant sought work but was only able to find temporary positions. He stated that he would receive positive indications in telephone applications, but once people saw him at job interviews he would be denied the positions. In 1999, the applicant found a job as a security guard with a guard company. After three days, however, the owner of the factory to

which he had been assigned saw him at work. The next day, he was fired from his company. When he asked why, he was again told that it was because he was a dark-skinned gypsy.

[6] The principal applicant also detailed a specific incident where his life was threatened. He had gone out with his younger sister to purchase medication for his grandfather when a car drove by and began to shoot at them. He stated that he was only saved because his sister pushed him aside. The principal applicant and his sister reported the shooting to the police, who told them that they should "be happy that you have survived and don't complain about it."

[7] The applicants were forced out of their apartment in Prague, in which they were the only gypsy family, by the other tenants in the building. In 2002, the other tenants all signed a petition forcing the applicants out. This followed a period of intense harassment, including breaking of the applicants' apartment windows, which culminated when the applicants found their dog poisoned in the building's yard. The applicants moved to Teplice.

[8] In Teplice, the principal applicant was attacked by a gang of five men and beaten so badly that he required surgery and has been permanently made deaf in one ear, and dependant on a hearing aid to hear from the other ear.

[9] Helena Cinova, the principal applicant's wife, stated that she, too, has faced employment discrimination and physical attacks. From 1997 to 2002 she worked as a maintenance worker at a hospital. After having worked there for six months, Helena was told that if she wanted to continue her employment she would have to work the night shifts and do only the most unwanted tasks – like

cleaning the toilets and hallways – because she was gypsy. In 2001, Helena was attacked by three men who physically and verbally assaulted her.

[10] Helena stated that when the applicants moved to Teplice they could not find accommodation in the city. Instead, the only area in which they were accepted as tenants was a gypsy-dominated suburb of the city.

[11] Helena was unable to find work for the first two years that the family lived in Teplice. In September 2004 she was able to find the same hospital nightshift work that she had in Prague. She was fired in December 2006 and found work in a bathhouse in 2007.

[12] The applicants also stated that the children were unable to attend school because they were repeatedly physically and verbally abused by their classmates and unable to get protection from the school authorities. Both children tried to attend trade schools but both ultimately dropped out as a result of the unending abuse.

[13] The principal applicant's parents and two siblings reside in Canada. The applicants were not represented by counsel at the hearing.

Decision under review

[14] In a decision dated March 4, 2010, the Board found that the applicants are neither Convention refugees nor persons in need of protection.

[15] At paragraph 15 of its decision, the Board stated the determinative issue before it:

> ¶15. The determinative issue is whether there is a serious possibility that the claimants will be persecuted if they return to the Czech Republic by reason of their Roma ethnicity.

[16] The Board found that the discrimination suffered by the applicants did not amount to persecution. At paragraph 17, the Board stated the law regarding when incidents of discrimination may singularly or cumulatively amount to persecution. The Court notes that this is obviously a form paragraph since the exact same paragraph was used in the *Dunkova* case which I heard in December 2010:

> ¶17. . . . 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 demonstrative of a failure of state protection.[1] In the case of *Chan*,[2] La Forest J. (in dissent) reiterated that the essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way.

[17] The Board considered the following evidence regarding the persecution feared by the applicants:

- Whether the applicants had been refused medical treatment in the Czech Republic as a result of the failure to diagnose his cancer. Although the applicants testified that their Canadian doctors said that the cancer must have occurred while the principal applicant was in the Czech Republic, the Board concluded that this was not persuasive:

  > ¶19. There was no persuasive evidence presented by the claimants that the FC had been refused medical treatment in the Czech Republic because of his ethnicity. He had been

[1] James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 104-105, cited with approval in *Canada (Attorney General) v Ward*, [1993] 3 F.C. 675 (C.A.).
[2] *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593; affirming *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675 (C.A.).

> able to go to doctors and he received medication. There is no persuasive evidence that he suffered from undiagnosed cancer in the Czech Republic.

- The applicants' evidence regarding the mistreatment of the children at school. The Board concluded that this was not serious enough to rise to the level persecution:

  > ¶20. The claimants stated that the children had difficulties when they went to school. There appears to have been discrimination against them but there is no persuasive evidence that they were prevented from obtaining the education that they wished.

- The applicants' evidence regarding their difficulties in finding housing:

  > ¶21. The claimants said they had difficulty in the places where they lived but there was no persuasive evidence that they were unable to obtain adequate housing for their needs.

- Evidence of employment discrimination:

  > ¶22. The FC and the SC stated they were discriminated against in the jobs they held in the Czech Republic but they were able to find employment for a great deal of the time they lived there.

- Evidence of physical and verbal attacks:

  > ¶23. There were statements that they had been physically and verbally attacked because of their ethnicity but they only went to the police on one occasion. This occurred after the alleged drive-by shooting against the FC. They went to the police and described the vehicle but it appears that the police were unable to find the perpetrators. The FC acknowledged that the police had told him that it would be difficult to find them without a personal description. There is no persuasive evidence that the police failed to carry out an investigation in regard to this matter. There is no persuasive evidence presented that the claimants reported the other two attacks to the police.

[18] The Board concluded at paragraph 24 that the applicants had been "able to find employment, they were not denied an education, they obtained adequate housing and they were provided with health care." The Board therefore found that the applicants did not suffer persecution, and so were neither Convention refugees nor persons at risk:

> ¶24. … Therefore, I conclude that the claimants do not have a well-founded fear of persecution and there is no serious possibility that they will be persecuted if they return to the Czech Republic. There is also no persuasive evidence that, on a balance of probabilities, they are personally at risk to their lives or at risk of cruel and unusual treatment or punishment or torture if they return to the Czech Republic.

[19] The Board then considered the availability of state protection to the applicants. The Board stated the law relating to state protection, including that a state that is not in complete breakdown is presumed to be capable of protecting its citizens, and that the applicants had the burden of persuading the Board on a balance of probabilities that state protection was not "adequate." The Board recognized that adequacy does not require a standard of perfection. The Board further stated that the burden on the applicants to prove an absence of state protection increases with the level of democracy that exists in the state in question. In this case, the Board found at paragraph 26 that since the Czech Republic is a democracy with free and fair elections, "the presumption of state protection is a strong one." The Board found that this required the applicants to demonstrate that they had sought additional courses of action for redress were they unhappy with their treatment at the hands of some police officers.

[20] The Board concluded at paragraph 31 that the applicants had failed to rebut the presumption of state protection. The Board highlighted the following elements of the Czech Republic's anti-discrimination efforts:

- Legislative prohibitions against discrimination and hate crimes in the Czech Constitution, legislation governing employment and education, and the *Charter of Rights and Freedoms*.
- Membership in the European Union, which gives its citizens recourse to the European Court of Human Rights, and "multilateral programs such as The Decade of Roma Inclusion."

- The hiring of "Roma Police Assistants" – individuals hired to assist police in investigating, and Romani victims in reporting, crime.

- Close monitoring by the police of extremist movements.

- Efforts to increase recruitment of Roma poice officers, including by providing financial assistance to complete formal education requirements.

- Police training on how to deal with minorities, and efforts to engage with Roma communities.

- Prosecutions of hate crimes committed against Roma by the judiciary.

- Investigations by the Czech Ombudsman into allegations of public-sector mistreatment of Roma.

- Non-governmental organizations, including 400 that the Board identifies as Romani, dedicated to investigating police misconduct involving Roma and the "social integration of Roma into Czech society, including housing, healthcare, employment, social services and cohesion."

[21] The Board concluded as follows:

> ¶29. … 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.

[22] The Board found that the applicant's interactions with the police did not demonstrate an absence of adequate of state protection:

> ¶30. The claimants state that they went to the police on one occasion when they were attacked. The police appeared to have taken a report. There may have been an inappropriate comment that the FC should not complain and he was lucky to survive but I do not know the context of that remark. The police appear to have taken some action in this matter. As noted above, the documentary evidence shows that serious efforts are being made to provide protection to the Roma.

LEGISLATION

[23] Section 96 of the Act grants protection to Convention refugees:

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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) 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	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.

[24] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	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.

[25] Rule 80(2.1) of the *Federal Courts Rules*, SOR/98-106, requires that where an affidavit is provided from a person who speaks neither official language, the affidavit must be translated and accompanied by a translator's oath and *jurat*:

80. (1) Affidavits shall be drawn in the first person, in Form 80A. … (2.1) Where an affidavit is written in an official language	80. (1) Les affidavits sont rédigés à la première personne et sont établis selon la formule 80A. … (2.1) Lorsqu'un affidavit est

for a deponent who does not understand that official language, the affidavit shall	rédigé dans une des langues officielles pour un déclarant qui ne comprend pas cette langue, l'affidavit doit :
(*a*) be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath, in Form 80B, as to the performance of his or her duties; and	*a*) être traduit oralement pour le déclarant dans sa langue par un interprète indépendant et compétent qui a prêté le serment, selon la formule 80B, de bien exercer ses fonctions;
(*b*) contain a jurat in Form 80C.	*b*) comporter la formule d'assermentation prévue à la formule 80C.
...	

ISSUES

[26] The applicants raise four issues:

1. Does the dramatic difference in the Board's acceptance rate for Czech refugees before and after comments from the Minister and Citizenship of Immigration in April 2009 raise a reasonable apprehension of bias on the part of members of the Board with regard to their determinations of refugee claims from the Czech Republic?

2. Did the Board make capricious findings of fact in holding that the applicant's problems in the Czech Republic did not rise to the level of persecution?

3. Did the Board err in law in relying upon the wrong test for state protection?

4. Did the Board err in law in concluding that violence against Roma had declined by failing to refer to, or consider, the most recent evidence suggesting the opposite conclusion?

STANDARD OF REVIEW

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to

"ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[28] It is clear as a result of *Dunsmuir* and *Khosa* that questions of fact or mixed fact and law are to be reviewed on a standard of reasonableness: see, for example, *Liang* at paragraph 15; and my decisions in *Corzas Monjaras v. Canada (Citizenship and Immigration)*, 2010 FC 771 at paragraph 15; and *Rodriguez Perez v. Canada (Citizenship and Immigration)* 2009 FC 1029 at paragraph 25.

[29] The determination of whether incidents of discrimination or harassment amount to persecution is a question of mixed fact and law to be determined on a standard of reasonableness: *Liang v. Canada (Citizenship and Immigration)*, 2008 FC 450 at paragraph 12.

[30] The Board's consideration of the evidence regarding the status of violence against Roma is also a determination of fact to be reviewed on a standard of reasonableness.

[31] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at paragraph 47; *Khosa* at paragraph 59.

[32] The issue of whether the facts of the case give rise to a reasonable apprehension of bias is an element of the duty of fairness to be determined on a standard of correctness: *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at paragraph 44; *Dunsmuir*, above at paras. 55 and 90; and *Khosa*, above at paragraph 43.

ANALYSIS

Issue No. 1: Does the dramatic difference in the Board's acceptance rate for Czech refugees before and after comments from the Minister and Citizenship of Immigration in April 2009 raise a reasonable apprehension of bias on the part of members of the Board with regard to their determinations of refugee claims from the Czech Republic?

[33] The applicants submit that, as a result of comments made by the Canadian Minister of Citizenship and Immigration in April 2009, there is a reasonable apprehension of bias on the part of members of the Board with regard to their determinations of refugee claims from the Czech Republic. This issue was not raised before the Board since the applicants were self-represented. The Minister's comments are in paragraphs 44, 45 and 53 herein.

Judicial comity applies

[34] This allegation has been raised in numerous recent cases before this Court. In *Zupko v. Canada (Citizenship and Immigration)*, 2010 FC 1319, Justice Snider was faced with precisely this issue, argued by the same counsel, Mr. Max Berger, who argued this case before me. Justice Snider summarized the results of the other decided cases:

> ¶11. As the parties before me were aware, this very issue of reasonable apprehension of bias has been considered and dealt with in three separate decisions:
> - *Dunova v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 438, 367 F.T.R. 89 (Eng.) (F.C.) (*Dunova*) (Justice Crampton);

- *Gabor v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1162 (F.C.) (*Gabor*) (Justice Zinn); and
- *Cervenakova v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1281 (F.C.) (*Cervenakova*) (Justice Crampton).

> ¶12. In each of these cases, the Court rejected the arguments of the applicants. In the words of Justice Zinn, in *Gabor*, above, at paragraph 35:
>
> > An informed person, viewing the matter realistically and practically and having thought the matter through, would not think it more likely than not that the Board would consciously or unconsciously decide a refugee claim of a Czech Roma unfairly.

Since *Zupko*, Justice Mosley has decided and rejected this allegation of bias. See *Ferencova v. Canada (Minister of Citizenship and Immigration)* 2011 FC 443 per Mosley J.

[35] As Justice Snider recognized in *Zupko*, the case therefore raises the principle of judicial comity:

> ¶14. In light of the existing jurisprudence on this very issue, I am of the view that this case is one where the principle of judicial comity is directly applicable. As stated by Justice Lemieux in *Almrei v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1025, 316 F.T.R. 49 (Eng.) (F.C.) at paragraphs 61-62:
>
> > The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law.... [citations omitted.]
> >
> > There are a number of exceptions to the principle of judicial comity as expressed above they are:
> >
> > 1. The existence of a different factual matrix or evidentiary basis between the two cases;
> >
> > 2. Where the issue to be decided is different;
> >
> > 3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and

4. The decision it followed would create an injustice.

[36] In *Zupko*, Justice Snider concluded that none of the exceptions to the principle of judicial comity applied. Justice Snider nevertheless proceeded to consider the issue of bias, and concluded that aside from the earlier decisions of this Court, the evidence in her opinion does not raise a reasonable apprehension of bias.

[37] I am also of the view that the principle of judicial comity applies in this case. Accordingly, the Minister's comments do not raise a reasonable apprehension of bias. However, I will consider the issue in any event.

Law of bias

[38] In this case, the Court has additional evidence not previously available: the statistics regarding the Board's treatment of claims from the Czech Republic between January and September of 2010.

[39] Procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 45. Allegations of bias are therefore serious and impugn the decision-making process and the decision-maker. Such allegations must be proven to be probably true. This is a high threshold.

[40] The cases outlined above, as well as my decision in *Dunkova v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1322, which mentioned but did not decide the same issue,

have repeated the test for determining whether a decision gives rise to a reasonable apprehension of bias—a test which has been repeatedly affirmed by the Supreme Court of Canada. The classic articulation of the test is that provided by Justice de Grandpré at page 394 of *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 [emphasis added]:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly." [Emphasis added]

[41] Where the bias is alleged to be not of an individual decision-maker but at an institutional level, the test is similar. In considering the question of institutional bias and independence of tribunals in the context of section 11(d) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673, stated that the objective independence of the Tribunal must also be assessed:

> It is therefore important that a tribunal should be perceived as independent as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

[42] Apprehension of bias must be established on the balance of probabilities. The applicant alleging apprehension of bias must demonstrate that an informed person, viewing the matter

realistically and practically, and having thought the matter through, would probably conclude that the Board was biased.

The Minister's comments

[43] The applicants submit that the following comments reported in two media articles biased the Board:

- A National Post news article, dated April 15, 2009, "Canada Flooded with Czech Refugee Claims", by Peter O'Neil, in which the Minister is reported to have made the negative comments about Czech Roma refugee claimants during an interview with Canwest News Service. The applicants state the following statements biased the Board:

    i. Although, like every other democracy, it has its challenges and shortcomings, it's hard to believe that the Czech Republic is an island of persecution in Europe

    ii. We would like to maintain our visa exemption with the Czech Republic. At the same time, we are obviously concerned about the numbers of false refugee claimants.

- An Embassy Magazine article, dated July 22, 2009, "Political Interference Crippling Refugee Board: Former Chair", by Michelle Collins, in which the Minister is quoted as making the following comments regarding a report produced by researchers from the Board in an interview with the *Toronto Star* on June 24, 2009:

    i. If someone comes in and says the police have been beating the crap out of them, the IRB panellists can then go to their report and say, 'Well, actually, there's been no evidence of police brutality".

[44] The *National Post* article has the headline: **Canada flooded with Czech refugee claims** (bold in the original headline). This article reports that Immigration Minister Jason Kenney called on the Czech Government "to crack down on unscrupulous operators behind the massive surge in the number of refugee claimants arriving at Canadian airports". The Minister was quoted as saying:

> If indeed there are commercial operations (arranging for the refugee claimants from the Czech Republic), I would hope the Czech authorities are able to identify those and crack down on them.

The article refers to the mid-1990s when Canada re-imposed a visa requirement on the Czech Republic after a "flood of more than 4000 Czechs, again mostly Roma, showed up during the visa-free period. At the time, a documentary appeared on Czech television, touting Canada as a promised land for Roma because of the alleged easy access into the country and generous social programs after arrival".

The allegation of bias or reasonable apprehension thereof

[45] The applicants submit that:

1. the comments create a reasonable apprehension of bias that the Board will be biased against Czech refugee claimants; and
2. the acceptance rates for Czech refugee claimants before and after those comments proves there was actual bias.

[46] Attached as Appendix 1 is a table prepared by the Board showing acceptance rates for Czech refugee claimants which include cases abandoned or withdrawn before proceeding to a full hearing. The respondent submits that the Court must take into account the number of refugee claims from the Czech Republic which are abandoned or withdrawn each year because these claims would presumably not have succeeded at a hearing or else they would not have been abandoned or withdrawn. Now that the Court understands these statistics, the Court agrees with this analysis. Using these rates of acceptance, the acceptance rates are as follows:

Percentage of refugee claims from the Czech Republic accepted by the Board

1.	2008	43% of the claims from the Czech Republic were accepted
2.	2009	10% of the claims from the Czech Republic were accepted
3.	2010	(January – September) 2% of the claims from the Czech Republic were accepted

[47] However, the same table has another important statistic. In 2008, 107 claims from the Czech Republic were withdrawn or abandoned. In 2009, 760 claims from the Czech Republic were withdrawn or abandoned. In 2010, 624 claims from the Czech Republic were withdrawn or abandoned. The respondent submits that when the Minister of Citizenship and Immigration stated that his department was concerned "about the number of false refugee claimants", he could reasonably have been referring to the large number of refugee claimants who voluntarily withdrew or abandoned their claims presumably because they were false and could not succeed.

[48] The applicants submit that the dramatic decline in acceptance rates demonstrates an actual bias by the Board against Czech refugee claimants. The applicants point to comments made by members of the Canadian legal community in the *Embassy Magazine* article referred to above. These quotations are contained in a magazine article. While the Court has great respect for the persons quoted in the *Embassy Magazine* article, the Court cannot give weight to these opinions. First, the Court does not accept opinion evidence on conclusions of law. The Court will decide whether the statements made by the Minister of Citizenship and Immigration raise a reasonable apprehension of bias. Second, the expert opinion evidence on such key issues, even if it were admissible, cannot be admitted without providing the witness for cross-examination.

Context of the Minister's comments

[49] The Minister's comments about the surge in refugee claims from the Czech Republic must be taken in context. First, he was in Europe attending EU meetings which included the Czech Republic. Second, Canada had suddenly seen a surge in refugee claims from the Czech Republic

after the visa requirement was lifted in late 2007. (The Board Table at Appendix 1 shows the surge in Czech refugee claims referred to the Board.) Third, the Minister obviously had heard reports of “unscrupulous operators” who promote and assist Czech refugee claimants to Canada in return for money. Fourth, Canada has a history of Czech Roma refugee claimants streaming into Canada in the mid-1990s after a Czech television program touted Canada as a “promised land for Roma” because of alleged easy access and generous social programs. After that, Canada had to impose a visa requirement on visitors from the Czech Republic. All of these factors constitute the context for the Minister to make the comments.

[50] The Court finds that the newspaper report demonstrates that the Minister was expressing a concern that there are alleged commercial operations in the Czech Republic bringing large numbers of Czech citizens to Canada via the refugee system. As a result, many of these claimants were not genuinely refugee claimants in need of protection. In particular, the Court finds the following section of the article helpful to establishing its context:

> Kenney said the Canadian government has no immediate plans to re-impose the visa requirement — a move almost certain to infuriate Czech authorities and citizens.
>
> "We would like to maintain our visa exemption with the Czech Republic. At the same time, we are obviously concerned about the numbers of false refugee claimants."
>
> He said he hopes Czech authorities, who are also anxious to retain visa-free status, do their part.
>
> "If indeed there are commercial operations, I would hope the Czech authorities are able to identify those and crack down on them."
>
> He also said Canada and the Czech Republic are looking at ways "to prevent people from abusing our very generous refugee determination system."

> He noted that seven other eastern European and Baltic countries had their visa requirements waived in the 2007-08 period, and in no other case was there a refugee spike.
>
> Several of those countries, including Slovakia and Hungary, have large Roma minorities.

[51] The Court also notes that the evidence demonstrates that the 2007/2008 surge of Czech claimants following the lifting of visa requirements echoes Canada's previous experience. In 1997, Canada re-imposed visa requirements for Czech visitors to Canada after having lifted them for one year. The following uncontested evidence is provided by the National Post article:

> Canada has shown in the past it's prepared to take firm action, lifting in the mid-1990s and then re-imposing the visa requirement a year later, after a flood of more than 4,000 Czechs, again mostly Roma, showed up during the visa-free period. At the time, a documentary appeared on Czech television, touting Canada as a promised land for Roma because of alleged easy access into the country and generous social programs after arrival.

[52] Within the above described context, the Court understands why the Minister made his alleged comments expressing a concern "about the numbers of false refugee claimants" from the Czech Republic. Within this context, the Court finds reasonable these comments made in Paris by the Minister in the presence of senior political and bureaucratic officials from the Czech Republic.

[53] The other cases that have considered this bias question have all concluded that the statistical evidence is not sufficient to demonstrate bias on the part of the Board, and that no other evidence of bias exists to support the bias claim.

[54] In *Gabor*, Justice Zinn found that the statistics simply did not give rise to a reasonable apprehension of bias:

> ¶34. Allegations of the possibility or apprehension of bias by an independent decision-maker are serious allegations. I agree with the respondent that the allegations in this case "call into question the professionalism of the panel member, the functioning of the administrative tribunal and the impartiality of decision-making. They should be made in only the clearest of cases where the grounds for the apprehension are substantial." I find no substantial grounds here for the allegations raised by the applicant. His allegations are speculative and there is no evidence before the Court that the Board was or could be influenced by the Minister's statements.

[55] In *Cervenakova*, Justice Crampton had the opportunity to review the fact-finding reports to which he had merely referred in *Dunova*. He concluded that the reports could potentially have supported such a decline:

> ¶68. Now that I have had an opportunity to review the Board's two issue papers, I am satisfied that content of those papers provides an entirely plausible explanation for the decline in the level of acceptance of refugee claimants from the Czech Republic, from the last quarter of 2008 to the second quarter of 2010.

[56] Furthermore, Justice Crampton agreed with Justice Zinn that the statistics were simply insufficient to provide the necessary grounds for a reasonable apprehension of bias.

[57] Finally, in *Zupko*, Justice Snider explained why she did not find the statistics convincing:

> ¶22. The problem with this argument is that there are other factors that could have affected the decline in acceptance rates. I do not intend to embark on an extensive statistical analysis (in part, because no such analysis was presented by an expert in such analyses). However, I observe that the acceptance rate could well have been a result of updated documentary evidence or by a number of abandoned claims. Indeed, the rate of acceptance had begun (albeit not markedly so) to decline even before the Minister's comments.

> Without expert guidance, it would be difficult to draw conclusions from such evidence unless the statistics were overwhelming conclusive on their face or unless the statistics were clearly supported by other reliable evidence. Statistics alone cannot establish a reasonable apprehension of bias (see, *Geza v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 124, 52 Imm. L.R. (3d) 163 (F.C.A.) at para. 72; *Zrig c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2001 FCT 1043, [2002] 1 F.C. 559 (Fed. T.D.) at para. 130).

[58] Many factors can explain why the Board stopped accepting as many refugee claims from the Czech Republic in the latter part of 2009 and 2010. There was the fact finding mission from the Board which issued its papers in the summer of 2009. There was the fact that the Board had much more experience in dealing with Czech claims after the surge in 2007 and 2008.

The Board's actual analysis in the case at bar

[59] In the case at bar, for example, the Board member did a very thorough analysis of all aspects of the refugee claim and disposed of it in a fair and reasonable manner. For the reasons which follow, the Court cannot fault the Board member's analysis in this case.

The Board is independent of Minister

[60] Moreover, the Court affirms earlier jurisprudence holding that the Board is independent: see *Bader v. Canada (Citizenship and Immigration)*, 2004 FC 214, at paragraph 16. An informed person, reviewing the Board decision in the application at bar, would not apprehend that the Board was influenced by the Minister's statements in April 2009. Rather, an informed person would conclude that the Board carefully and independently assessed the merits of the applicants' claim on a reasonable basis: i.e. (1) the applicants experienced discrimination, but not persecution; (2) the Czech Republic provides adequate state protection; and (3) the two assaults on the applicants were

isolated incidents which, when reported to the police, were investigated. The state is taking action against attacks by skinheads and by other extremist groups.

[61] In *Zupko* Justice Snider ably considered this issue at paragraph 20. She found that under IRPA the Board is independent from Citizenship and Immigration Canada and from the Minister of that department. Every member of the Board is statutorily required to swear an oath of office requiring the Board member to impartially carry out the duties of a Board member. Board members cannot be removed from office on the basis of how they decide cases. Then Justice Snider held that it is sheer speculation, without any evidence, to think that Board members are reappointed on the basis of their particular refugee claim acceptance rates with respect to Czech Roma.

[62] I agree with Justice Snider. An informed person, viewing the matter realistically and practically, and having thought the matter through, would not apprehend that the Board member was biased in this case because of the public remarks made by the Minister of Citizenship and Immigration on April 15, 2009. This submission is premised on unrealistic speculation. It speculates that the current Minister is re-elected and reappointed as Minister of Citizenship and Immigration, it speculates that the Minister renews appointments on the basis of the Board member's rejection of Czech refugee claims it speculates that the Board member will seek reappointment, and it speculates that such a Board position even exists under Bill C-11. Accordingly, the Court is not satisfied on the balance of probabilities that an informed person, viewing the matter realistically and practically, would have a reasonable apprehension of bias on this basis.

<u>Issue No. 2</u>: Did the Board make capricious findings of fact in holding that the applicant's problems in the Czech Republic did not rise to the level of persecution?

[63] The applicant submits that the Board ignored the applicants' evidence regarding their mistreatment in the Czech Republic. In particular, the applicant submits that the following conclusions were unreasonable based on the evidence before the Board:

- The Board concluded that the applicants were not persecuted, but neglected to address the litany of physical attacks and verbal assaults that the applicants stated drove them from their homes and away from their employment. The Board found that the applicants were able to find employment and adequate housing, but did not address the evidence that they were driven from job to job and from apartment to apartment.

- The Board entirely ignored the principal applicant's description of the most serious attack that he suffered, which left him completely deaf in one ear.

- The Board stated that "the police appeared to have taken some action" with regard to the principal applicant's report to them of the drive-by shooting that he suffered. The Board held that the police could not have done more without a description of the perpetrators. The applicants submit that, in fact, the only evidence before the Board was that the police had refused to take action at all, even though the applicant, contrary to the Board's finding, stated that he had provided the police with a description of the shooters' vehicle. The only response that the police gave was the "inappropriate comment" cited by the Board.

[64] The respondent submits that the Board accepted the applicants' account of events, but found that it did not rise to the level of persecution. The respondent submits that the Board reasonably found that the applicants had only once approached the police and had received a positive response in that case.

[65] The Court agrees with the respondent regarding the Board's evaluation of the evidence regarding persecution in employment, education, housing and healthcare. The question of the adequacy of the police response is discussed below, in issue three.

[66] The Board is entitled to significant deference regarding its factual findings, including whether the treatment to which the applicants were subjected amounted to persecution. In this case the Board considered each of the applicants' examples of mistreatment. The Board stated that it accepts the applicants' evidence, but found that it did not amount to persecution. At paragraph 24, the Board states the following:

> ¶24. I accept the truthfulness of the claimant's statements but they were able to find employment, they were not denied an education, they obtained adequate housing and they were provided with healthcare. I find that the discrimination claimed in this matter does not rise to the level of persecution. …

[67] In fact, the applicants' evidence was that they were only able to find temporary employment, were constantly fired because of their ethnicity, and had difficulty accessing services on par with other members of Czech society. Nevertheless, the Board's conclusion that these impediments do not rise beyond discrimination is within the Board's specialized expertise and entitled to deference from this Court. This Court is not to substitute its own evaluation of the evidence for that of the Board. In this case, the Board's reasons demonstrate that the Board was aware of and considered the applicants' evidence, and came to its own conclusion. Its conclusion was within the range of reasonable conclusions.

Issue No. 3: Did the Board rely upon the wrong test for state protection?

[68] The applicants submit that although the Board correctly stated the law with respect to state protection, the Board proceeded to confuse the test of "adequate" state protection with "serious efforts" to protect citizens. The applicants submit that "serious efforts" does not constitute "adequate protection." The applicants submit that the Board therefore committed an error of law by misconstruing the legal test for state protection.

[69] The respondent submits that the Board correctly understood and applied the test regarding the availability of state protection. The respondent submits that "effective" protection is not the standard, insofar as "effectiveness" suggests "perfection", which can never be attained. The test for state protection is "adequacy". The Federal Court of Appeal in *Flores Carillo v. Canada*, 2008 FCA 94 per Létourneau J.A. at paragraph 38 clearly settled the test for state protection and I paraphrase:

> A refugee claimant who claims that the state protection is inadequate or non-existent must rebut the presumption of state protection with clear and convincing evidence that the state protection is inadequate or non-existent.

Insofar as the Board makes reference to "serious efforts," the respondent submits that it refers to "serious efforts" as a measure of assessment of the adequacy of state protection.

[70] The respondent submits that the applicants in this case failed to provide persuasive evidence that state protection was not available to them in the Czech Republic. The applicants had approached the police on one occasion, and the police tried to take action but could not identify the perpetrators. The applicants had the burden of providing "clear and convincing" evidence of the state's inability to protect them, and the Board was reasonable in finding that such evidence had not been provided.

[71] The Court agrees with the respondent that the Board correctly understood the test for state protection. Although the Board did refer to the "serious efforts" of the Czech government to combat discrimination against Roma, the Board's reasons demonstrate that the Board was providing details of those efforts as part of a broader description of the adequacy of state protection. The Board was also supporting its finding that the burden on the applicants to displace the presumption of state

protection was relatively high in the case of the Czech Republic, because the Czech Republic is a functioning democracy with relatively robust protection of human rights.

[72] The same applies to the Board's consideration of the single instance during which the applicants sought state protection. The Board provided a description of the event that differs only in its tone from that suggested by the applicants. The applicants had the burden of demonstrating to the Board that the police failed to adequately respond. The Board considered the applicants' evidence and found that the police response was adequate in the circumstances described by the applicants. The Court finds that this conclusion was reasonably open to the Board so that the Court cannot interfere with the Board's conclusion.

Issue No. 4: Did the Board err in law in concluding that violence against Roma had declined by failing to refer to, or consider, the most recent evidence suggesting the opposite conclusion?

[73] The applicants submit that the most current evidence regarding discrimination against Roma in the Czech Republic is contained in the report from the Board's fact-finding mission referred to by the Minister. That report, *Czech Republic: Fact-Finding Mission Report on State Protection*, June 2009, and a second one dated July 2009, provided many pages of describing violent attacks against Roma, including arson and fire-bombing attacks against Roma dwellings inhabited. The report recognized that "Some interlocutors argued that government statistics on racially motivated crimes are of limited use because of the extent to which these crimes are unreported" (references omitted). The report also stated that Roma continue to be the frequent victims of "hardcore" right-wing extremists. As a result, Roma are said to rarely travel by train, "for fear of being intimidated or attacked". Roma are also refused seating in restaurants because of their ethnicity. The report stated

that there is, in fact, a reported increase in public attitudes of extremism toward Roma [references omitted]:

> … Interlocutors reported an increase in the mobilization of anti-Roma extremist groups in recent years, as exemplified most notably by the recent rise of the Workers' Party in Northern Bohemia. NGO and government interlocutors explained the increase in anti-Roma activism as attempts by various extremist groups to attract public support in an effort to re-enter the political arena.

[74] The respondent submits that the Board did consider the report quoted by the applicants. The fact that the Board did not refer to the specific sections of the report quoted by the applicants does not indicate that the Board failed to consider relevant information. To the contrary, the Board is presumed to have considered all of the evidence, and need not refer to portions of documents that assist the applicants, where such portions are not especially compelling or relevant: *Sashitharan v. Canada (Citizenship and Immigration)*, 2004 FC 1021, at paragraphs 10-11. In this case, the respondent submits that the excerpts quoted by the applicants are not so compelling as to require specific mention.

[75] The Court agrees with the respondent. The Board relied upon the report quoted by the applicants. Although a court may infer from a tribunal's silence regarding a particularly important piece of evidence that the tribunal reached its decision without proper regard to that evidence (see, for example, *Gonzalez Cervantes v. Canada (Citizenship and Immigration)*, 2008 FC 680, at paragraphs 9 and 11), in this case the Board did have regard to the gist of the evidence cited by the applicants. The sections of the report quoted by the applicants demonstrate the mistreatment of Roma in the Czech Republic that the Board itself acknowledged. The Board recognized that there is rampant discrimination against Roma in the Czech Republic. The Board concluded, however, that

such discrimination does not rise to the level of persecution, which would entitle the applicants to refugee protection. The Board also found that the Czech government is willing and able to protect the applicants with “adequate state protection”.

[76] The Board’s conclusions in this regard are supported by the evidence and within the range of reasonable outcomes. The Court has no basis to interfere with the Board’s decision in this regard.

CONCLUSION

[77] The Court finds that the Board reasonably concluded that the applicants were not Convention refugees or persons in need of protection. As a result, this application is dismissed.

CERTIFIED QUESTION

[78] The applicants propose three questions for certification. These questions are similar to proposed questions for certification raised in the following recent cases involving exactly the same issue: *Ferencova v. Canada (Minister of Citizenship and Immigration)* 2011 FC 443 per Mosley J. at paragraphs 27 to 31; *Cervenakova v. Canada (Minister of Citizenship and Immigration)* 2010 FC 1281 per Crampton J. at paragraphs 97 to 102; *Dunova v. Canada (Minister of Citizenship and Immigration)* 2010 FC 438 per Crampton J. at paragraphs 75 to 77; *Zupko v. Canada (Minister of Citizenship and Immigration)* 2010 FC 1319 per Snider J. at paragraphs 44 to 48. In all of these cases, the Court declined to certify similar questions. I am of the view that this issue is one where the principle of judicial comity is directly applicable and that none of the exceptions to the principle of judicial comity applies. Accordingly, there is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

APPENDIX 1

Immigration and Refugee Board of Canada
Refugee Protection Division

Commission de l'immigration et du statut de réfugié du Canada
Section de la protection des réfugiés

Claims Referred and Finalized: Czech Republic
Demandes d'asile déférées et réglées : Rép. Tchèque

	Referred/ Déférées	Finalized / Réglées[1]	Accepted/ Acceptées	Rejected/ Rejetées	Abandoned/ Désistements	Withdrawn/ Retraits	%Accepted[2] %Acceptées[2]
2005	11	19	2	7	6	4	11%
2006		10	2	6	2	-	20%
2007	86	1	-	-	-	1	0%
2008	860	196	84	5	11	96	43%
2009	2,206	929	93	76	32	728	10%
2010 (Jan-Sept)	49	864	16	224	8	616	2%

(1): Claims finalized in a given year may have been referred in a previous year.
(1): Les demandes finalisées durant une année peuvent avoir été déférées lors d'une année précédente.

(2): The acceptance rate is calculated by dividing the number of accepted claims by the number of all claims finalized (accepted, rejected, abandoned, withdrawn).
(2): Le taux d'acceptation représente la somme des demandes d'asile qui sont acceptées, divisée par le nombre total de demandes d'asile réglées (acceptées, rejetées, désistements, retraits).

FEDERAL COURT

SOLICITORS OF RECORD

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