Federal Court  Cour fédérale

Date: 20121207

Docket: IMM-1282-12

Citation: 2012 FC 1458

Ottawa, Ontario, December 7, 2012

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**MIROSLAV HARVAN, EVA HARVANOVA,
MIROSLAV HARVAN (JR.) and
EVA HARVANOVA (JR.)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the negative decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] made on January 6, 2012 wherein the Board determined that the applicants were not Convention Refugees pursuant to s.96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*, the Act] nor persons in need of protection pursuant to s.97 of the Act.

[2] The applicants are a family of four Roma citizens of Slovakia: the principal applicant, Miroslav Harvan, his wife, Eva Harvanova, and two children, aged four and seven.

[3] The Board's decision focussed on the availability of state protection and the applicants' failure to rebut the presumption of state protection with clear and convincing evidence due to adverse credibility findings.

[4] As a preliminary issue, the respondent submits that this Court should dismiss the judicial review without considering its merits due to a misleading affidavit filed by the applicant's spouse, Mrs. Harvanova.

The Misleading Affidavit

[5] In the application for leave, the applicant's spouse, Mrs. Harvanova filed an affidavit which included the following statement:

> The panel did not question me on the evidence I provided in my PIF. I was not given an opportunity to present my case… I was shocked to find that the Panel concluded that I was not credible in its reasons… I was not given an opportunity to address the Board concerning the persecution I have experienced in the Slovak Republic and or to address any credibility issues.

[6] The tribunal record supports the respondent's submission that it is untrue and misleading to suggest that Mrs. Harvanova was not given an opportunity to be heard.

[7] The hearing transcript indicates that the Board endeavoured to ensure that Mrs. Harvanova understood the proceedings and the contents of her PIF. For example, the Board allowed her to take

breaks to care for the children and suspended the proceedings in her absence. Both she and the applicant were sworn as witnesses. The Board confirmed that the applicant, Mr. Harvan, was the designated representative for the children. Mrs. Harvanova consented to her husband acting in this role. The Board also specifically asked counsel for the applicants whether counsel had "any other evidence" to present before making final submissions and none was presented.

[8] The transcript confirms that Mrs. Harvanova was provided with an opportunity to testify and she did not do so. The applicants were represented by counsel at the hearing who could have indicated that Ms. Harvanova wished to give evidence, if that were the case.

[9] The respondent submits that it is inappropriate and offensive to the administration of justice to create an issue of procedural fairness where none exists. Such conduct has been characterised as an abuse of process: *Mutabunga v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1052, [2012] FCJ No 1167 at para 18 [*Mutabunga*].

[10] The respondent submits that the Court should not condone the use of misleading affidavits. In similar situations in the past, the Court has dismissed the application without considering the merits and has sometimes ordered costs: *Mayorga v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1180, [2010] FCJ No 1480 at paras 19-22; *Thanabalasingham v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14, [2006] FCJ No 20 at paras 9-10 [*Thanabalasingham*]; *Mutabunga*, above, at para 18.

[11] The respondent also submits that the applicants were assisted by counsel in preparing their affidavits and counsel had a responsibility to ensure the accuracy of the affidavits since they form the evidentiary basis of the leave and judicial review proceedings: *Mutabunga*, above, at paras 17-18; *Murugamoorthy v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 121, 77 ACWS (3d) 838; *Balouch v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1599, [2004] FCJ No 1934 at paras 5-7, 12-16 [*Balouch*]; *Jaouadi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1347, [2003] FCJ No 1714 at paras 17-19.

[12] While the respondent noted that there is no evidence that counsel for the applicants acted improperly, the affidavit is, nonetheless, misleading and its acceptance would bring the administration of justice into disrepute. The respondent notes that whether the misleading statements were intentional or negligent, the judicial review should be dismissed without considering the merits of the application. The respondent is not seeking costs.

[13] Counsel for the applicants submits that Mrs. Harvanova did not intend to mislead the court or misrepresent what had transpired. Her affidavit simply stated her reaction to the Board's decision which relied on adverse credibility findings, which she regarded as not justified. Counsel acknowledged that Mrs. Harvanova had attended the hearing, had heard all the testimony and her counsel had not indicated that she wished to make any statements or answer questions.

[14] Adducing false or misleading affidavits in judicial review applications is very serious because at the leave stage, neither the Court nor the respondent has access to the tribunal record to verify the facts. The integrity of the affidavits is essential: *Balouch*, above, at paras 6-7.

[15] In several cases, the Court has exercised its discretion to dismiss the application without hearing the merits where an applicant filed a false or misleading affidavit.

[16] In *Thanabalasingham*, above, at paras 9-11, the Federal Court of Appeal provided a useful framework on how to approach misrepresentations and misconduct by applicants:

> …the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court *may* [emphasis in original] dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
>
> In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.
>
> These factors are not intended to be exhaustive, nor are all necessarily relevant in every case…

[17] I have considered these factors and applied them in the present case. Although the affidavit includes two statements which do not reflect what occurred at the hearing, I have considered these statements in the context of the affidavit as a whole.

[18] A misleading affidavit, regardless of whether it is intentional or reactive, brings the administration of justice into disrepute. The applicant must understand the potential consequences of making a misleading statement; her conduct could be considered contempt of court and could result in the application for judicial review being dismissed without being heard on its merits.

[19] However, taking the most favourable interpretation of the applicant's intention in making her affidavit, it expresses her strong reaction to the Board's decision, which she understood as making credibility findings against her despite the fact that she had not given oral evidence. Whether she drafted the statement or was assisted in doing so, it was poorly expressed and it was misleading. In this case, the affidavit was not the only affidavit filed in support of the leave application and, importantly, the application for leave did not assert that Mrs. Harvanova had been denied an opportunity to testify, nor did it allege a denial of procedural fairness. The submissions made regarding procedural fairness in the judicial review were not about any denial of the applicant's opportunity to speak. Counsel for the applicants agreed that Mrs. Harvanova could have given evidence but did not seize the opportunity. Judicial review of the negative decision is clearly important to the applicants and will have a significant impact on their rights. The applicant's submissions on the reasonableness of the decision have some merit and should be considered.

[20] Therefore, I am not dismissing the application on the basis of the misleading affidavit, but this conclusion should not be viewed as condoning the conduct of Mrs. Harvanova in making misleading statements under oath. The affidavit should not be used in any other proceedings the applicants may pursue.

Background

[21] The applicant, Mr. Harvan, asserts that he and his family have suffered discrimination because of their Roma ethnicity. He was abused and beaten at school. Racism and intimidation continued while he attended a vocational school from 1998 to 2000. He asserted that he lost his job because the management did not want a "gypsy" as an employee and then lived on social assistance. Ms. Harvanova asserted that she had similar experiences and was forced to quit her job as an assistant teacher in an elementary school on August 30, 2010, because she was attacked by skinheads.

[22] Mr. Harvan also described three specific attacks on his family by skinheads. On New Year's Eve 2010, skinheads painted a swastika on their house, kicked at their door and threatened them. Police were called but did not respond and advised Mr. Harvan the next day that he should not report the incident unless he had witnesses. On May 7, 2010, the applicant, his wife and their daughter were attacked by skinheads on a bus. After receiving treatment at the hospital, the hospital refused to provide a medical report. The police advised that there would be no investigation unless the applicant could provide medical documentation and witnesses. On July 30, 2010 the applicant and his wife were attacked by two skinheads in a park, but the children were not harmed. Again, a medical report was refused and the police refused to investigate without witnesses or medical documentation.

The Decision under Review

[23] As a general comment, the Board's decision is relatively short. It summarised the facts and provided four short paragraphs related to the credibility of the applicant, followed by 22 paragraphs

describing the country conditions and the current efforts of Slovakia to address discrimination faced by Roma. The Board did not make a clear determination of whether the incidents of discrimination and violence cumulatively amounted to persecution. Rather, the Board concluded that the applicant had not rebutted the presumption of state protection because of a credibility finding or findings, which stem from the applicant's description of one incident.

Credibility

[24] With respect to the May 2010 incident, the Board noted that although the applicant testified at the hearing that he went to the police director after being told that the police would not investigate without a medical report or witnesses, his Personal Information Form (PIF) states only that he went to the police. The Board acknowledged the applicant's explanation that he regarded the police to be 'one unit', but concluded that this was an insufficient explanation for the omission in his PIF. The Board found that "[i]f this incident had occurred then the claimants should have been able to obtain a medical report for the matter", suggesting that the Board did not believe the incident occurred.

[25] The Board appeared to draw several inferences from the applicant's failure to mention the police director in his PIF.

State Protection

[26] The Board considered the guiding principles from the leading cases on state protection. The Board noted that the presumption of adequate state protection is strong in Slovakia because it is a multi-party democracy. However, the country conditions reveal many challenges which the Board concluded were outweighed by the efforts being made by the Government. Despite the Board's

acknowledgement of the inefficiency and corruption in the judicial system and police force, and that "there may be problems with the police" and that "the Slovak Republic has had some difficulties in the past with addressing criminality and corruption" the Board expected the applicant to pursue other mechanisms to complain about police actions.

[27] The Board noted, at paragraph 32, that having regard to the "credibility finding" outlined, the applicant had not taken "all reasonable steps to obtain state protection". I interpret this credibility finding to refer to the omission in the PIF about going to the police director.

[28] At paragraph 33 the Board added that in view of the "credibility findings in regard to the alleged incidents" [emphasis added] it could not find the applicants have rebutted the presumption of state protection. The Board did not specify what the other credibility findings were with respect to the other incidents. It appears that only the May 2010 incident was doubted by the Board.

[29] With respect to the other elements of discrimination, the Board found: that on a balance of probabilities, the applicants were not denied health care in Slovakia; that there was no persuasive evidence that the applicants lived in inadequate housing; that the applicants completed 14 and 12 years of education and there was no evidence of discrimination in education (although the applicants had been mistreated at school); and, that the applicants had various jobs and received social assistance and maternity benefits when not employed. The Board noted the frequency of complaints of discrimination against Roma in employment, education, housing and social services and also noted the efforts being made to address such discrimination including investments in housing, education programs and the action plan against xenophobia and intolerance. The Board

concluded that while the documentary evidence showed that there is discrimination, it also showed that efforts are being made by the Government to address these issues.

[30] The Board also took note of the IRB Notice of Decision which granted refugee status to the applicant's brother and his family, but noted that no reasons were provided for the decision and that, in any event, each case must be considered on its own merits.

[31] The Board concluded that it could not "find that, on a general basis, all Roma in [Slovakia] are persecuted" and that the applicants had not rebutted the presumption of state protection with clear and convincing evidence.

Standard of Review

[32] Turning to the merits of the decision, there are two issues: the credibility finding (or findings) and the state protection analysis, including whether the applicants rebutted the presumption of state protection with clear and convincing evidence. These are closely bound together.

[33] The applicable standard of review is reasonableness. The role of the court on judicial review where the standard of reasonableness applies is not to substitute any decision it would have made but, rather, to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 47). There may be more than one reasonable outcome. Still, "as long as the process and the outcome fit comfortably with the principles of

justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

[34] The Board's analysis of credibility and plausibility is central to its role as trier of fact and the Board's findings should be given significant deference: *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052, [2008] FCJ No 1329 at paras 13-14 [*Lin*].

[35] As noted above, the Board referred to its "credibility finding" and its "credibility findings". Only one aspect of the applicant's evidence led to the adverse credibility inference; the May 2010 assault. If there are other credibility findings, they are not clearly stated.

Credibility

[36] The Board focussed on the May 2010 incident due to the applicant's failure to indicate in his PIF that he had reported the incident to the 'police director' and referred only to the 'police'. The Board rejected his explanation that he regarded the police director as part of the police (as one unit). The applicant submits that this is not an omission or an inconsistency; it is simply a different level of detail.

[37] The Board concluded that the applicant did not go to the police director which led to its conclusion that the applicant had not taken all reasonable steps to seek state protection and that he had not rebutted the presumption of state protection.

[38] The Board also suggests that the incident did not happen because the applicant should have been able to obtain a medical report and a police report.

[39] With respect to the applicant's failure to obtain medical reports for the May 2010 assault, despite the fact that his father was later able to obtain a medical report on his behalf for the July 2010 assault, it is not clear that this is a credibility finding. If it is, the applicant submits that the Board ignored his evidence that he attempted to obtain the medical report but was refused. The report on country conditions in Slovakia also confirms that hospitals sometimes deny Roma patients access to their records.

[40] With respect to the lack of a police report, the applicant submits that the Board did not consider his testimony and PIF, which indicated that he requested a police report but was turned away because he could not provide witnesses or medical documentation. The Board also failed to consider parts of the country documentation showing that corruption and racism still prevail in the Slovak police force.

[41] The respondent submits that the credibility finding was reasonable and that, in any event, it was not determinative of the claim. Rather, the claim was rejected because the applicants failed to rebut the presumption of state protection with clear and convincing evidence.

[42] The respondent submits that the Board was entitled to make an adverse credibility finding due to the inconsistency between the applicant's PIF and his testimony at the hearing. The applicant had counsel when completing his PIF and the omission was a key component of the state protection

test, i.e. seeking higher level recourse. The applicant's assertion that he spoke to the police director was regarded as an embellishment of his claim and the Board exercised its discretion in weighing the inconsistency and the fact that supporting documentation (medical and police reports) could reasonably have been obtained.

[43] Credibility determinations are the "heartland" of the Board's expertise (*Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481, 143 NR 238 at para 1 (FCA) and should thus be approached with deference. However, "deference is not a blank cheque. There must be reasoned reasons leading to a justifiable finding": *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291, [2009] FCJ No 350 at para 12.

[44] This Court has held that not all inconsistencies or implausibilities support negative credibility findings, and such findings should not result from a "microscopic examination" of issues that are irrelevant or peripheral to the claim: *Attakora v Canada (MEI)*, [1989] FCJ No 444, 99 NR 168 at para 9 (FCA).

[45] I have considered the guiding principles from the jurisprudence and appreciate that the Board's determinations of credibility are to be approached with significant deference. However, its findings must be clear, justified and communicated in the reasons.

[46] In this case, it is not clear whether there was one credibility finding or more. The Board's conclusions about the May 2010 incident appear to constitute the basis for the whole decision. The Board rejected the applicant's testimony about that incident despite the fact that the country

conditions provided support for the experiences he described with respect to his inability to obtain the police or medical reports and the uncooperative nature of the police. Although the Board was not required to mention every piece of evidence, it should have addressed this evidence which directly contradicted its findings: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at para 17.

[47] In the present case, the discrepancy between reporting to the police and the police director is not a contradiction or a significant omission. The applicant's explanation that he viewed the police as "one unit" is not unreasonable or implausible.

[48] The Board also acknowledged documentary evidence showing that corruption and discrimination against Roma are persistent problems within the Slovak police. The applicant's claim that the police refused to investigate or to provide him with a report is not inconsistent with this evidence. The applicant provided an explanation of the discrepancy. It was not reasonable for the Board to disbelieve him and to conclude that this adverse credibility finding was determinative of all the issues.

[49] The applicant indicated that he was refused medical reports. This is consistent with information in the country conditions reports and is not, therefore, implausible. No reasons are provided for rejecting the applicant's evidence as being untruthful.

State Protection

[50] The applicant submits that the Board ignored evidence, including the applicant's testimony and documentary evidence, concerning the widespread discrimination against the Roma, the inefficiency of the police and the lack of adequate state protection for the applicants in Slovakia. The applicant's evidence was that he contacted police following each incident but the police failed to respond and / or refused to investigate or to provide reports.

[51] The respondent submits that the applicant's evidence on state protection was rejected due to an adverse credibility finding.

[52] I have concluded that the credibility finding or findings made by the Board were not reasonable. Therefore, the Board's determination that the applicant failed to rebut the presumption of state protection is also not reasonable.

[53] I have also considered the jurisprudence governing state protection, including the jurisprudence that the Board cited in its decision. As the Board noted, the starting point is the presumption that a state is capable of protecting its citizens. The presumption is only rebutted by clear and convincing evidence that state protection is inadequate or non existent: *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2009] 4 FCR 636 [*Carrillo*]. The evidence must be reliable and have probative value; claimants "must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate": *Carrillo*, above, at para 30.

[54] It is well established law that while state protection need not be perfect, it must be forthcoming: *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689, 103 DLR (4th) 1 at paras 55-57 [*Ward*]; *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189, 99 DLR (4th) 334 at para 7.

[55] The test is not 'perfect' state protection, but adequate state protection. Still, mere willingness to protect is insufficient; state protection must be effective to a certain degree: *Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210, 97 Imm LR (3d) 243 at para 47:

> 47 However, as this Court has pointed out on a number of occasions, the mere willingness of a state to ensure the protection of its citizens is not sufficient in itself to establish its ability. Protection must have a certain degree of effectiveness: see *Burgos v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537, 160 ACWS (3d) 696; *Soto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1183 at para 32. As such, an applicant can rebut the presumption of state protection by demonstrating either that a state is unwilling, or that a state is unable to provide adequate protection: see *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at para 52.

[56] The incapacity of the state to provide protection is an essential consideration in determining whether the applicant's fear is well-founded – i.e. in determining whether he has objective grounds for being unwilling to seek the protection of the state.

[57] As noted by the Supreme Court of Canada in *Ward*, above, at para 49:

> Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee"

> where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

[58] In the present case, the Board did not specifically address whether the applicant had a well-founded fear of persecution. However, I would interpret *Ward* as providing guidance more generally about the efforts a person must make in seeking state protection.

[59] In my view, the Board's decision was unreasonable in concluding that the applicant had failed to take all reasonable steps to avail himself of state protection and that he had failed to rebut the presumption of state protection. Even if the May 2010 incident is not considered, the applicant sought police assistance for the New Year and July 2010 incidents and the police did not respond.

[60] The Board acknowledged that the current situation in Slovakia was bleak for the Roma in terms of education, employment, health care and other social services and that there was inefficiency and corruption in the judicial system and police force. While the Government's efforts to address these issues may be commendable, and while the applicants had received some medical treatment, housing and education, the Board appears not to have considered whether state protection reached a sufficient level of adequacy for the particular circumstances of the applicant. As such, the conclusion, whether based on a credibility finding or the other evidence, that the applicant had not rebutted the presumption of state protection is not reasonable.

Conclusion

[61] The application for judicial review is allowed. The Board's adverse credibility finding or findings arising from the May 2010 incident are not justified by the reasons and the record. The Board based several conclusions on its disbelief that the applicant had contacted the police director, despite country condition evidence of discrimination and police corruption, attitudes and actions which were consistent with the applicant's explanation. This, in turn, was the basis for the Board's conclusion that the applicant had not rebutted the presumption of state protection. The applicant contacted the police on each occasion and no action was taken. The applicant's burden to rebut the presumption of state protection must be considered in the context of the current level of adequacy of state protection in Slovakia and not only on the efforts being made by the Government.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted panel of the Immigration and Refugee Board.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1282-12
STYLE OF CAUSE:	MIROSLAV HARVAN ET AL v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 11, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	December 7, 2012

APPEARANCES:

Dumoluhle Siziba	FOR THE APPLICANTS
Bradley Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DUMOLUHLE SIZIBA Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENT