

Federal Court



Cour fédérale

**Date: 20150421**

**Docket: IMM-1785-12**

**Citation: 2015 FC 513**

**Toronto, Ontario, April 21, 2015**

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

**BETWEEN:**

**JIRI HORNAK  
DANA ZELENKOVA  
DANIEL ZELENKA  
ANTONIN HORNAK**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**ORDER AND REASONS**

[1] With respect to the present Application, the Applicants are a family composed of a father, (the claimant), mother (the female claimant), and two children, who are Roma citizens of the Czech Republic and who claim protection pursuant to s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, on the basis of their ethnicity, and protection pursuant to s. 97 on

the basis of fear of racist attacks from ethnic Czechs. In a decision dated February 1, 2012, the Refugee Protection Division (RPD) rejected the Applicants' claim.

[2] For the reasons which follow, I find reviewable error in the RPD's evaluation of the Applicants' claim of prospective risk should they be required to return to the Czech Republic.

[3] The decision under review is complex because it addresses a number of legal and factual issues without a defined structure. For clarity, the present reasons are delivered by applying structure.

[4] In order to achieve success on a claim pursuant to ss. 96 or 97 of the *IRPA*, there are two sequential decision-making steps that must be concluded in an applicant's favour on the evidence presented. On each step, the applicant bears the evidentiary burden of proof.

[5] First, on the basis of an applicant's evidence, the RPD must determine whether a prospective risk exists in the country of return of more than a mere possibility of persecution on a Convention ground (*IRPA*, s. 96), or on a balance of probabilities a personalized risk (*IRPA*, s. 97). If either risk is found, its precise characteristics must be clearly identified because the issue then becomes whether adequate state protection at the operational level for that risk will be available to the applicant upon return (*Hanko v Canada (Citizenship and Immigration)*, 2014 FC 474).

[6] For convenience, the phrase “adequate state protection at the operational level” is abbreviated in the present reasons as State Protection.

[7] And second, with respect to the availability of State Protection upon return, an applicant bears the evidentiary onus of rebutting a presumption: absent a situation of complete breakdown of state apparatus, the state is capable of protecting against a prospective risk. Rebutting the presumption requires clear and convincing evidence of the state’s inability to protect (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724-725).

**I. The First Step of the Analysis**

[8] Before the RPD was a volume of evidence of prospective risk to Roma in the Czech Republic. The Applicants’ evidence contained in their amended PIF was accepted as credible:

During school our older son was constantly verbally attacked just because he is gypsy. That was a big issue for him; he couldn't concentrate on school work, most of the time he spent alone during recess and lunch hour. My spouse and I discussed this with school board many times but no changes were made.

In June 2006 my spouse and I went outside for a walk, from nowhere a couple of white Czech people came and physically hit us. They cut my left hand and hurt my fingers on the right side. After that I went to see a doctor care. The doctor looked at my hand and immediately put a cast on.

In July 2007, Poluceli Czech Rep. Together with my spouse, we looked at this car beside us, it was two white males, when they saw us they speed up and went in front of us and made us stop, and the two males came to us and started to hit us, without reason. We were in shock and didn't have any idea with what just happened. My spouse and I just took off. The next day my spouse had visitors at her work place and they told her that “If she is going to mention what happened she will regret for the rest of her life”. We didn't do anything about it because we got scared especially for our children.

One time I went with for a beer to a pub, while I was ordering my beer at the bar a white Czech guy just came and stabbed me in my thigh and told me to get out of the bar because gypsies are not allowed here. I was bleeding a lot, the bar man called the police and the ambulance, I got eight stitches from the cut, it was a crazy experience of getting stab just for going out for a beer.

When I was pregnant with my second son, I was two months at the time this happened. I went to the doctors to check myself because there was something wrong, I felt dizzy, had morning sickness. The only information that he gave me was that I was fine and that it was a flu and gave me pills to take for my sickness, it was only getting worse and I decided to go, to another doctor immediately, after the check up the doctor told me I am pregnant, I was in shock and I told him what had happened with the doctor I had gone to before and the doctor told me that he was racist that's why he told me I wasn't pregnant and gave me the pills to take.

In December 2004 my husband and I were in a restaurant in the Czech republic. We verbally attacked in the sense that gypsies are coming here with a white girl. After a while when I sat at the table, my attacker came to me and started to push my husband and verbally attack him further. When I stood up for my man, our attacker took a beer glass and he hit me in the face. My face was cut up and when he saw a lot of blood he ran from the restaurant. My husband took me to the hospital where they cared for my injuries and we discovered that my eye was cut, and stitches were necessary. I had to stay four days in the hospital. The hospital made a police report and we made a statement for the police record. No further action was taken on the part of the police.

In October 2005 I was attacked on the way home from work by two men. First they pushed me and called me names. After one of them hit me in the face and he gave me a cut lip and the second one stepped on my hand, breaking some bones. I had to go to the hospital and had my hand in a cast for months. I reported the incident to the police, but because I didn't recall how the men looked, the police told me they could not help as the attackers were unknown.

In June 2006 I was out with a friend when we were attacked by men, one of whom pulled a knife and threatened to stab me. But I moved so he just cut me in the forehead. My friend tried to stop him, but he cut her hand and sprained her thumb in the struggle. We sought medical help and her hand was bandaged in a soft cast. We informed the police about the attack. A report was made and

they told us if they find the attackers, they'd let us know. We are still awaiting any help from police.

In July 2007 I went to drive to work with a girlfriend and a car passed us, forcing us to stop. We got out of the car. One of the men pushed me and verbally attacked me about being a gypsy. We got back in the car and we took off. Later, one man sought out my friend at work, and threatened that if we called the police, we'd be sorry about it. We were fearful for our kids, so we didn't report it.

In September 2008 when my son started school, he was bullied by other kids at school regarding his gypsy background. We knew that kids are kids, but we also knew that those attacks really came from their parents, because we are a mixed family.

In December 2008 my husband was attacked in a restaurant He wanted to buy a beer but they told him they're not going to serve a gypsy. After an argument, the attacker took out spray and sprayed in his face. Afterward he pulled a knife and stabbed him in the leg. When he fell on the ground the attacker cut him in the neck. Later, someone from the bar pulled him off my husband. He was taken to the hospital where they cared for him, and he was sent home. The hospital told him they would report the incident to the police and that they'd contact us later.

The police made a report. They expect that the police would make an arrest for attempted murder or at least an attack. Nothing came from these police reports.

(Certified Tribunal Record, pp. 29-30, 42-43)

[9] In addition, the following in-country evidence was introduced into the record by the

RPD:

I would be remiss if I did not acknowledge and consider that there is information in the documentation to indicate that there is widespread reporting of incidents of intolerance, discrimination and persecution of Romani individuals in the Czech Republic. However, weighted against this is persuasive evidence that indicates that the Czech Republic candidly acknowledges its past problems, and is making serious efforts to rectify the treatment of minorities in that country, especially in the case of the Roma. The Board recognizes that there are some inconsistencies among several sources

within the documentary evidence; however, the preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is an adequate state protection in the Czech Republic for Roma who are victims of crime, police abuse, discrimination or persecution, that the Czech Republic is making serious efforts to address these problems, and that the police and government officials are both willing and able to protect victims.

There is documentary evidence that indicates Roma are discriminated against. The documents indicate that although violent attacks on foreigners and the Roma minority had declined since the 1990s, remaining largely out of the headlines, societal prejudice against the country's Romani population occasionally manifested itself in violence.

There are legitimate concerns from some groups that there is impunity for racially motivated attacks and, the police responses are not sufficient; however, the preponderance of evidence indicates that the state is taking action against extremists and does not condone or assent to extremist actions.

(Decision, paras. 25, 26, and 31)

[10] While the RPD was aware of the deplorable in-country conditions for Roma in the Czech Republic, no discrete finding of prospective risk is made in the decision rendered. As mentioned, in particular with respect to s. 96, the RPD was first required to determine whether the evidence adduced by the Applicants supports a finding that they face more than a mere possibility of persecution on a Convention ground upon return to the Czech Republic, and then to determine whether the Applicants have rebutted the presumption that State Protection will be prospectively forthcoming for that identified risk. In my opinion, the Applicants were entitled to an independent determination on their evidence of objective fear, and the RPD's failure to provide the determination constitutes a reviewable error of fact.

[11] It is very important that a s. 96 claim be determined on the basis of a clear articulation and application of the test respecting persecution. Given the following passages from the decision, in my opinion, the RPD failed to meet this requirement:

I find that the claimant has not satisfied the burden of establishing a serious possibility of persecution for a Convention ground, or that he would personally be subjected, on a balance of probabilities, to a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment upon return to his country. Therefore, I find that the claimant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97(1) of the IRPA. As the claim of his wife and his minor children rely entirely on the evidence of the claimant, their claims must also fail.

[...]

There is no persuasive evidence before me that the claimant would face persecution or, on a balance of probabilities, face a risk to his life, or to cruel and unusual treatment or punishment, or a danger of torture, if he returned to the Czech Republic. For all these reasons, I find that that the claimant is not a Convention refugee or a person in need of protection, whether under section 96 or section 97 of the IRPA, as state protection is available to him.

[Emphasis added] (Decision, paras. 13 and 41)

[12] In the first quoted paragraph which appears at the beginning of the decision, the RPD correctly states the test as being a “serious possibility of persecution,” which is simply another way of expressing “more than a mere possibility” (*Adjei v Canada (MEI)*, [1989] 2 FC 680). However, in the second quoted paragraph which appears at the closing of the decision, RPD has applied a higher evidentiary standard. Given the conflict, I find it is uncertain as to which test was actually applied to the evidence. In my opinion the lack of transparency caused by the conflict constitutes a reviewable error of law.

## II. The Second Step of the Analysis

[13] In my opinion, the RPD fails in this step of the analysis for two reasons.

[14] First, on the RPD's own motion, the Czech Republic's efforts to provide protection for Roma were advanced as proof of the existence of State Protection. The efforts evidence reads as follows:

The documentary evidence indicates the police in the Czech Republic respond to incidents where Roma have been attacked. For instance, on December 10, 2010, a regional court sentenced a youth to a three-year suspended sentence for attempted reckless endangerment, and his mother to an 18-month suspended sentence for not stopping her son from throwing a Molotov cocktail into a bedroom of the Romani home where a 14-year-old girl was the target. In another example, on October 20, 2010, a court found four men guilty of attempted murder and property damage after they were convicted of throwing Molotov cocktails into the home of a Romani family. The judge found the crime to involve extraordinary circumstances that allowed for more stringent sentencing, in the range of 20 to 22 years. These are the longest sentences ever handed down for a racially motivated crime. Relating to another incident, the Prime Minister and other government officials released statements condemning a mayor's actions who posted a statement on the city's official website declaring a "war on gypsies." Police arrested a number of right wing extremists during 2009, including 24 individuals, 18 of whom were charged with supporting and promoting movement aimed at suppressing the rights and freedoms of the individual. It was determined that a member of the Czech military was responsible for training these individuals, and he was subsequently discharged from the military without severance pay or pension. In 2008, estimated 1000 police officers used force to prevent an estimated 500 well-earned, right wing rioters from attacking Roma. The only people charged in this incident, were two Roma, who were sentenced to community service for physically and verbally assaulting members of the Workers Party. However, as a direct result of this incident, the government increased police



presence in Romani neighborhoods. There are numerous other examples in the documentary evidence to demonstrate the Czech Republic's willingness and ability to protect its Romani citizens. (Exhibit R/A-1, 2.1, Country Reports on Human Rights Practices for 2010)

(Decision, para. 28)

[15] It is clear that the efforts are being made with respect to current systemic persecution of Roma of an extraordinarily serious nature. However, I find it is not possible to reasonably name the efforts as any form of state protection because the RPD failed to assess whether those efforts have resulted in State Protection for the Applicants in the present case. The fundamental error in the RPD's state protection analysis is that no attempt is made to define the content of State Protection against which the evidence of in-country conditions, including the evidence of the Applicants' experiences, can be applied and compared to conclude whether State Protection, in fact, exists (see: *Varga v Citizenship and Immigration*, 2014 FC 1030 at paragraphs 4 to 6).

[16] And second, in addition to offering the state's efforts at providing protection as evidence of the existence of State Protection, the RPD places emphasis on the fact that the claimants made complaints to the police about the persecutory conduct they suffered, and the police accepted the reports and stated that an investigation would be conducted. Police willingness to receive a complaint, in and of itself, cannot constitute a finding of State Protection; it is merely a preliminary obligation within a policing regime. The concrete action taken by the regime after becoming aware of misconduct is the protection that citizens have a right to expect from the state.

**III. Conclusion**

[17] For the reasons provided, I find that the decision under review is unreasonable.

**ORDER**

**THIS COURT ORDERS** that the decision under review is set aside and the matter is referred back to a differently constituted panel for redetermination.

There is no question to certify.

"Douglas R. Campbell"

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Judge

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

**DOCKET:** IMM-1785-12

**STYLE OF CAUSE:** JIRI HORNAK, DANA ZELENKOVA, DANIEL  
ZELENKA, ANTONIN HORNAK v THE MINISTER OF  
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**APPEARANCES:**

Rocco Galati FOR THE APPLICANT

Gordon Lee FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Rocco Galati Law Firm FOR THE APPLICANT  
Professional Corporation  
Barrister & Solicitor  
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada