

Federal Court



Cour fédérale

Date: 20170223

Docket: IMM-3165-16

Citation: 2017 FC 219

Toronto, Ontario, February 23, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**PETRO TANKO AND
TETYANA TANKO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants have applied for judicial review of a decision of the Refugee Appeal Division [RAD] dated June 28, 2016 [the Decision] upholding the Refugee Protection Division's [RPD] conclusion that they are not *Convention* refugees. This application is brought pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

I. Background

[2] Petro Tanko (the Applicant) is 43 years old and claims that he is ethnically Roma. His wife, Tetyana, is 37 years old and is ethnically Ukrainian. Both Applicants are citizens of the Ukraine. Tetyana's claim is based on her treatment as a spouse of a Roma man. The Applicant claims that he has suffered discrimination – particularly in education and employment.

[3] The Applicant claims that he was attacked near a grocery store in Irshava in the Fall of 2013. He did not seek medical treatment and when he and Tetyana complained, the police were not helpful. One year later, in September 2014, the Applicant says he was beaten by Vasyl, a neighbour's son.

[4] The Applicant also says that he was attacked by his neighbour Stepan (Vasyl's father) on January 18, 2015. He complained to police, but was later told his complaint would not be investigated. Tetyana then complained to the Prosecutor's office, but was told her complaint would not be investigated because she was married to a Roma man.

[5] On January 26, Tetyana was attacked. She received outpatient medical treatment for 10 days in Irshava. Police took her statement but did not investigate.

[6] At the end of January, the Applicant and his wife moved to Uzhgorod, where, in March 2015, the Applicant was confronted and punched by members of the Right Sector. He was searched when he refused to show his identification.

[7] The Applicants used fraudulent documents to obtain Canadian visas and left the Ukraine on April 29, 2015. They arrived in Canada the next day and applied for refugee protection in October 2015.

II. Decisions

RPD Decision

[8] The RPD noted the seven month delay in claiming refugee protection. It made a negative finding because the justification for the delay in the Applicant's Basis of Claim form [BOC] was inconsistent with his testimony. His BOC said that they "spoke to a few consultants" about their status because they couldn't afford a lawyer. However, the Applicant testified that they did not see consultants, but spoke to staff at a construction company where he was working. Tetyana had allegedly studied law – which made their ignorance of the refugee system unlikely. For these reasons, the RPD concluded that the applicants' delay was inconsistent with a subjective fear.

[9] The RPD also concluded that the September 2014 and January 2015 assaults did not occur. The Applicant's BOC and medical reports provided locations for the assaults that significantly differed from those provided in his oral testimony. The RPD found that the Applicant was unable to explain the discrepancies.

[10] The RPD found that Tetyana's testimony evolved regarding when she received medical treatment following her assault. It was not clear how she could receive ongoing treatment in Irshava when she had moved to Uzhgorod. As well, Tetyana became "very hesitant" when asked

the gender of the doctor who treated her. The RPD concluded that Tetyana's assault had not occurred.

[11] The RPD found that the Applicant's testimony about his assault by the Right Sector was "flat", without detail, and "did not have the ring of truth". The RPD concluded that the assault did not occur.

[12] There was only one official document in evidence that spoke of the Applicant's Roma ethnicity. It was dated September 1, 2015 and was issued by the Executive Committee of Il'nytsa Rural Administration [the Document]. It bore a seal that was printed on an inkjet printer rather than stamped. The Applicant said that it had been obtained by his brother-in-law and he could not say when or how that occurred. The RPD expressed concern about the genuineness of the Document on the first of three hearing days. However, no further evidence about the Document's provenance or seal was adduced.

[13] The RPD did not accept the Document and concluded that the Applicant's Roma ethnicity had not been established. The RPD gave Ronald Lee's letter of support little weight because it did not provide details to show why, in his opinion, the Applicant is Roma and it referred to facts which were not relevant to the applicants' situation.

[14] The Applicant also provided letters from his mother and his sister. He testified that, as a student, he had been blamed for the disappearance of a wallet. However, his sister's letter set out

an identical story about a purse, but said that it had happened to her. The RPD therefore gave the letters little weight.

[15] The RPD found that the Applicant provided only vague testimony about the difficulties he experienced in searching for employment.

[16] The RPD concluded that Applicant was not ethnically Roma, and rejected both applicants' claims.

The RAD Decision

[17] The applicants appealed to the RAD solely on the issue of credibility, and made no submissions about the letters from Mr. Lee and the Applicant's mother and sister.

[18] The RAD focussed on the Applicant's Roma ethnicity and on the Document. The RAD concluded that, once the credibility of the Document was put in issue by the RPD, the onus was on the applicants to produce reliable evidence about its authenticity. This had not been done.

[19] The RAD found that the Applicant's claim failed because he is not Roma and Tetyana's claim failed because she is not the spouse of a Roma man.

III. The Issues

[20] The applicants say:

- 1) The RAD did not independently conduct a full fact-based appeal: This is an error in law.

The applicants also say that the Decision is unreasonable because:

- 2) The RAD did not explain its credibility conclusions;
- 3) The RAD made an unsupported conclusion about plausibility;
- 4) The RAD did not identify the documents it says were not provided;
- 5) The RAD did not refer to the Applicant's oral testimony about Roma customs.

IV. Discussion and Conclusions

Issue 1

[21] The Decision is not a model of clarity. However, the only issue on appeal was the Applicant's ethnicity and I am persuaded that the RAD did conduct the appeal on the basis set out in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93. The RAD referred to the RPD's conclusion about the absence of a stamped seal on the Document and later said at para 30:

The Appellants are under obligation to prove their identity. No documentation was submitted subsequent to the RPD hearings, or in the Memorandum of Appeal, to support the Appellants' submissions that the documentation was genuine, or documentation to support counsel for the male Appellant's testimony at the RPD hearing. In that this was an issue raised by the RPD at the initial hearing, one could expect that the Appellants when questioned about such a critical issue would make efforts to establish the male Appellant's Roma ethnicity.

[22] Although the RAD did not expressly agree or disagree with the RPD's rejection of the Document, it did say at para 33:

Given the above, the RAD finds, on a balance of probabilities, that the male Appellant is not Roma. Given that the basis of the claim is the alleged persecution because of his Roma ethnicity, the RAD finds, on a balance of probabilities, that the male Appellant is not Roma, and his claim for refugee status in Canada must fail.

[23] In my view, the phrase "given the above" refers to the situation discussed by the RAD in paragraph 30 and this reference is sufficient to allow me to conclude that the RAD independently considered the issue of the Applicant's ethnicity.

Issues 2 and 3

[24] The RAD noted the RPD's conclusion that the Applicant's testimony was "vague" but then considered the transcript of the RPD hearing and concluded that the Applicant's evidence about the discrimination he experienced in school was not credible. It reached this conclusion because he provided a story about being blamed for a theft that was virtually identical to a story related in his sister's letter of support. The Applicant says that implausibility findings must be based on clear evidence and that it is entirely possible that over an extended period in primary school, both children had similar experiences. However, in my view, it was reasonable to conclude that such parallel incidents did not occur.

[25] The RAD also concluded, following its review of the transcript, that the Applicant's evidence to the effect that he had difficulty finding work because he was Roma, was not credible. In my view, this conclusion was also reasonable. The Applicant clearly testified that he worked for one employer for many years doing construction jobs. Although he said he experienced

difficulties finding employment as a result of being Roma, he was unable to provide any specifics of such difficulties.

Issue 4

[26] The Applicant says that the RAD was obliged to identify documents which could reasonably be said to exist and which were not provided before it concluded that the Applicant did not meet his onus to show his ethnicity.

[27] While it is true that the RPD and the RAD often describe the documents they expect to receive as part of an applicant's case, there is no requirement to do so. If an applicant is aware of the concerns to be addressed (as was the case here), it is up to him or her to produce documents to allay those concerns. The documents may not exist. They may have to be created. In this case, affidavits from the brother-in-law who obtained the Document and from the town official who prepared it and had knowledge of the seal might have been helpful.

Issue 5

[28] The Applicant testified that he told Ronald Lee that his family had a tradition of having horses and making baskets, craft bags, and decorative plates, and that this father taught him those skills. He also spoke of a Roma holiday on April 8 and the fact that Roma wash men's and women's clothes separately.

[29] Neither the RPD nor the RAD referred to this evidence although it is clear that the RPD heard it during the hearing and the RAD saw it when reviewing the transcript.

[30] In my view, it was not unreasonable to omit reference to it in the Decision because it would not have been sufficient to establish the Applicant's identity as a Roma man.

[31] For all these reasons the application will be dismissed.

V. Certification

[32] No questions were posed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is hereby dismissed.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3165-16

STYLE OF CAUSE: PETRO TANKO ET AL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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APPEARANCES:

James Lawson FOR THE APPLICANTS

Negar Hashemi FOR THE RESPONDENT

SOLICITORS OF RECORD:

Yallen Associates FOR THE APPLICANTS
Barristers and Solicitors
Toronto, Ontario

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