Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-5345-11

Citation: 2012 FC 540

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MIROSLAV GABOR
MAGDALENA GABOROVA
MAGDALENA GABOROVA JR
BIANKA GABOROVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 26 July 2011 (Decision), which refused the Applicants' application to be deemed Convention refugees or a persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Male Applicant is 39 years old and a citizen of the Czech Republic. The Female Applicant, his wife, is 36 years old. The Minor Applicants are their two daughters (Minor Applicants). The Female Applicant and Minor Applicants are citizens of the Slovak Republic. The Applicants have been in Canada since April 2008, when they came here to escape persecution based on their Roma ethnicity.

[3] The Applicants say they have faced discrimination in their home countries because they are Roma. While he was in school, the Male Applicant was often insulted and beaten because of his race. Although his mother told school officials about what happened to him, they told her to change schools if she did not like what was happening. When he began working, the Male Applicant says he could not find a permanent job because he is Roma.

[4] In 1991, while he was waiting for a bus, a group of approximately ten youths attacked the Male Applicant. One of them hit him with a chain, but the Male Applicant escaped by getting on a bus. In 2007, a group of Neo-Nazis attacked him in Bratislava, Slovakia, saying, “Now you die you dirty gypsy, we are going to finish Hitler’s job.” A bystander yelled out that the police were coming, so the attackers fled. After he was treated in hospital, a doctor there refused to give him a medical report to support a complaint. The doctor said “gypsies [are] always making up stories.”

[5] The Female Applicant says she was denied medical treatment in the Slovak Republic because she is Roma. She has epilepsy and often experiences seizures which require emergency medical care. Although the Applicants called ambulances when the Female Applicant had seizures, they would not come to their home because it was in a Roma area. In 2007, the Female Applicant

went to hospital to have a cyst removed from one of her ovaries. When she awoke after the surgery, her doctor told her they had sterilized her. When she asked why, the doctor said “What do you want? You already have two kids, you don’t need any more and we have enough gypsies in this country.”

[6] In April 2008, the Applicants left the Slovak Republic where they had been living since 2002. They came to Canada on 4 April 2008 and claimed protection the same day.

[7] The RPD first heard the Applicants’ claims for protection on 8 May 2009 (First Hearing). After the First Hearing, the RPD found the Applicants were not Convention refugees or persons in need of protection. After the RPD’s negative decision, the Applicants applied to this Court for leave and judicial review. On 12 April 2010, I granted their application for judicial review and remitted their case to the RPD for reconsideration. See *Gabor v Canada (Minister of Citizenship and Immigration)* 2010 FC 383.

[8] The RPD joined the Applicants’ claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR/2002-228 (Rules) and appointed the Male Applicant as representative for the Minor Applicants under subsection 167(2) of the Act. The RPD conducted a *de novo* hearing (Second Hearing) into the Applicants claims over two sittings, one on 31 March 2011 (First Sitting) and the second on 19 May 2011 (Second Sitting). At the First Sitting, the RPD marked the record from the Applicants’ previous application for judicial review as an exhibit. Their counsel said he did not need to submit any additional documents because he thought there was enough documentary evidence on the record from their previous application. The RPD noted that, though the hearing was to be *de novo*, the documentary evidence from the previous hearing would be part of the documentary evidence on the Second Hearing.

[9] The RPD also noted at the Second Hearing that I granted the application for judicial review of its first decision because the RPD had overlooked evidence related to the Female Applicant's allegation of forced sterilization. At the First Sitting, the RPD asked Applicants' counsel for documentary evidence of the sterilization. Counsel advised that the RPD the only way to prove the Female Applicant was sterilized was for her to undergo surgery and internal examination. Although the Female Applicant was willing to undergo the surgery to prove her claim, her physician advised against it; the risk to her because of her epilepsy was too great. The RPD then noted that she had originally had surgery to have a cyst removed from her ovary, and the following exchange occurred:

RPD:	Is there any evidence she can give me that particular operation took place?
Counsel:	We also contacted the hospital in Slovakia.
RPD:	Yes.
Counsel:	Okay. And we still have some family back in Slovakia so we approached the doctor but they are scared to go anywhere because we know what they did and we are not going to confirm ---
RPD:	Okay. But if you ask them to provide you just that the operation of the [cyst] took place not that the other aspect took place? Do you see what I mean?
Counsel:	Yes.
RPD:	Because what that would do, sir, it would corroborate the fact that she did go to the hospital on a particular day to have that operation done.
Counsel:	We can try to reach them regarding this one, yeah, but right now, we are concerned because we approached them so many times, so we are like…
RPD:	May I ask when you approached them, was it specifically for a report on what?
Counsel:	Report on the sterilization.

RPD: Okay. Would it be possible to ask for a report on the [cyst] operation?

Counsel: We will certainly try and I could submit to you a proof that we tried and let's see what happens.

It's really hard to ask anything from there because right now they are under so much you (phon.) from the whole European Union regarding the Roma situation that they are not giving out anything, any information. And even, we called like directly to a doctor from Canada, she called.

[10] Later in the hearing, the RPD said:

RPD: [Ma'am], there are some issues I have with your testimony. However, I think that these issues could be put to rest if I were to have any type of documentation to indicate that you were in the hospital in 2007 in Slovakia.

I realize that probably no doctor is going to admit to the fact that you were sterilized. However, just simple proof that you were in the hospital I think, for me, this issue would lay to rest some of the questions that I had with respect to your credibility.

So I'm going to put this matter over for about a month to give you an opportunity to try and obtain this document.

[11] At the Second Sitting, the Applicants provided the RPD with the documents requested, including a report from the hospital (Hospital Report) and the report from a gynaecologist (Physician Report). Both of these reports say the Female Applicant was in hospital in the Slovak Republic between 21 August 2007 and 22 August 2007. Applicants' counsel did not examine any of the Applicants with respect to these documents. The RPD clarified whether the Female Applicant had contacted a lawyer to seek compensation, saying, "After you had your surgery in 2007 and you

found out that you were sterilized, did you seek help?" The Female Applicant confirmed she had consulted a lawyer and that she had complained to the hospital.

[12] At the end of the Second Sitting, the RPD noted that, if it accepted the Female Applicant had been sterilized, this would be an act of past persecution and the claim would have to be based on her future risk. It gave the Applicants approximately three weeks to provide additional submissions.

[13] The Applicants made additional written submissions on 7 June 2011. In these submissions, they drew attention to the discrimination Roma people face in the Slovak Republic, the need for the RPD to consider the cumulative effect of the discrimination they faced, and the ineffectiveness of state protection for Roma people. They also highlighted the discrimination the Female Applicant experienced because of her epilepsy, when she was denied adequate health care because she is Roma.

[14] The RPD made its Decision on 26 July 2011 and notified the Applicants on 3 August 2011.

DECISION UNDER REVIEW

[15] The RPD found none of the Applicants to be Convention refugees or persons in need of protection. It found the Male Applicant was neither of these because he had not rebutted the presumption of state protection in the Czech Republic. In a similar way, the RPD rejected the Female Applicant's claim because she had not rebutted the presumption of state protection in the Slovak Republic. The claim of the Minor Applicants fell with their parents'.

The Male Applicant

[16] The RPD reviewed the Male Applicant's allegations that he was discriminated against in school, attacked in 1991, and attacked again in 2007, all because he is Roma. It noted that he said he went to a police station in Bratislava after the attack in 2007, but the police told him they had more serious matters to deal with. He also said the police would not allow him into the station because he is Roma. The RPD found the Applicant had sought state protection only once in Slovakia. Because the Male Applicant is a citizen of the Czech Republic, he was required to seek protection there before coming to Canada. The RPD found the Male Applicant had not established that state protection was not available to him in the Czech Republic, his country of citizenship.

[17] When it analyzed the state protection aspect of the Male Applicant's claim, the RPD noted that *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 establishes the presumption of state protection. This presumption can only be rebutted on clear and convincing evidence of the state's inability to protect. See *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94. Further, the burden on a claimant to rebut the presumption of state protection increases with the level of democracy in the state; where the state is a functioning democracy, the burden will be heavy. See *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (FCA). The RPD found the Czech Republic to be a functioning democracy with functioning political and judicial systems. As such, the Male Applicant had to demonstrate more than that he approached a single police officer for protection and was rebuffed.

[18] Although the Applicants said state protection was not available to them, the RPD found the Czech Republic was taking steps to address historical discrimination against Roma people. The RPD relied on a June 2009 report from the Immigration and Refugee Board, the *Czech Republic:*

Fact Finding Mission Report on State Protection (Mission Report) to find that police in the Czech Republic employ Roma Police Assistants and "in general, the police response to Roma complaints or calls of distress is equal to that of non-Romani citizens."

[19] The RPD also relied on the Mission Report to show the Czech government is taking steps to include Roma in Society and to address discrimination in children's education. It also examined other country condition documents and found the preponderance of the evidence establishes that the Czech Republic is making serious efforts to combat discrimination. There is discrimination against Roma in the Czech Republic, but it is not systemic.

[20] The RPD concluded that, if the Male Applicant were to return to the Czech Republic, state protection would be available to him and it would not be unreasonable for him to seek it. On that basis, the RPD found the Male Applicant was neither a Convention refugee under section 96 or person in need of protection under subsection 97(1) of the Act.

The Female Applicant

[21] The RPD found the Female Applicant's claim failed because state protection was available to her in the Slovak Republic, her country of nationality. The RPD reviewed the same jurisprudence it relied on with respect to the Male Applicant's claim concerning the presumption of state protection.

[22] The RPD then examined the Female Applicant's allegation that she had been sterilized without her consent in 2007. The RPD found the Hospital Report did not indicate the Female Applicant was sterilized and there was no other documentary evidence that said this occurred. The

RPD noted the Female Applicant sought legal advice about compensation for the sterilization, but did not pursue the matter when her lawyer told her she could get no more than 10,000 Koruna – approximately $400.

[23] The RPD found that the Slovak Republic has sterilized Roma women without their consent. It also found the Slovak government has enacted a law which codifies the requirement for informed consent to sterilization and that forced sterilization is now a criminal offence in the Slovak Republic. The RPD concluded the Slovak Republic acknowledges the past force sterilization of Roma women, but now provides adequate measures to ensure this will not occur in the future. Hence, the Female Applicant would not be at risk of sterilization if she returned to the Slovak Republic.

[24] The RPD also examined whether the Female Applicant would be at risk of discrimination in the Slovak Republic because she is Roma. It found she would not be at risk because there is adequate state protection in place there. Although documentary evidence before the RPD indicated discrimination against Roma people occurs in the Slovak Republic, it found other evidence showed the Slovak Republic is taking steps to address this problem. The RPD noted that the Slovak government, in its *Third Report on the Implementation of the Framework Convention for the Protection of National Minorities in the Slovak Republic* to the United Nations Committee on Human Rights, said that many avenues are available to those who are attacked or harassed because they are Roma.

[25] The RPD found the Female Applicant could go to the Public Defender of Rights if she had trouble accessing police protection. It also found the Slovak authorities are making serious efforts to deal with police misconduct and there are signs of success. Police officers are offered a course in

Roma language and culture. Further, the Slovak government has hired additional police officers to work in the eastern part of the Slovak Republic where the concentration of Roma people is the highest. The RPD found the government had in place an action plan to prevent and suppress racism and xenophobia.

[26] Although Rome people have faced discrimination in employment in the past, the RPD found that statutes are now in place to protect them from unequal treatment in this regard. In education, Roma people are constitutionally guaranteed education in their minority language and in separate educational institutions. The RPD found the Slovak Republic is making serious efforts to combat racial discrimination.

[27] The RPD found the Female Applicant had not shown state protection would not be forthcoming if she returned to the Slovak Republic or that it was unreasonable for her to do so. It concluded that she is neither a Convention refugee or a person in need of protection.

ISSUES

[28] The Applicants raise the following issues in this proceeding:

a. Whether the RPD applied an incorrect definition of “Convention refugee”;

b. Whether the RPD ignored evidence;

c. Whether the Decision is reasonable;

d. Whether the RPD unreasonably found the Applicants did not have a well-founded fear of persecution;

e. Whether the RPD erred by not examining the Male Applicant at the Second Hearing;

f. Whether the RPD denied the Applicants the opportunity to respond to its concerns;

g. Whether the RPD was biased;

h. Whether the RPD failed to consider a ground the Applicants advanced to support their claim.

STANDARD OF REVIEW

[29] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[30] The RPD's application of the definition of Convention refugee in section 96 of the Act is a question in which the legal and factual issues are inextricably intertwined. In *Dunsmuir*, above, at paragraph 53, the Supreme Court of Canada held that the standard of review applicable to this kind of issue is generally reasonableness. The first issue also calls into question the RPD's interpretation of the definition set out in section 96 of the Act. As this calls for the RPD to interpret its enabling statute, the standard of review is also reasonableness (see *Dunsmuir*, above, at paragraph 54, *Smith v Alliance Pipeline Ltd.* 2011 SCC 7 at paragraph 28 and *Celgene Corp. v Canada (Attorney General)* 2011 SCC 1 at paragraph 33). The standard of review on the first issue is reasonableness.

[31] In *Krishnapillai v Canada (Minister of Citizenship and Immigration)* 2005 FC 244, Justice Richard Mosley held at paragraph 5 that the RPD's determination a person is not a Convention

refugee is subject to the reasonableness standard. Justice Leonard Mandamin made a similar finding in *Hussaini v Canada (Minister of Citizenship and Immigration)* 2012 FC 239 at paragraph 14. The standard of review on the second issue is reasonableness.

[32] The RPD based its determination in this case on the availability of state protection to the Applicants. In *Carillo,* above, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. This approach was followed by Justice Mandamin in *Lozado v Canada (Minister of Citizenship and Immigration)* 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)* 2005 FC 193, Justice Danièle Tremblay-Lamer held that the standard of review on a state protection finding is reasonableness. The third issue will be evaluated on the reasonableness standard.

[33] The reasonableness standard of review is also applicable to the RPD's finding that a claimant's fear of persecution is not well-founded – the fourth issue the Applicant's have raised. Justice Sandra Simpson applied the reasonableness standard of review to this issue at paragraph 7 of *Moreno v Canada (Minister of Citizenship and Immigration)* 2011 FC 841. Justice Leonard Mandamin made a similar finding in *Jean v Canada (Minister of Citizenship and Immigration)* 2010 FC 1014 at paragraph 9.

[34] In *Vilmond v Canada (Minister of Citizenship and Immigration)* 2008 FC 926, Justice Michel Beaudry found held at paragraph 13 that the RPD's "failure to consider the claim as it is put forward by the applicant constitutes a misapprehension of the facts and the evidence" which is reviewable on the standard of reasonableness. The standard of review on the eighth issue is reasonableness.

[35] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[36] The RPD's failure to fully examine the Male Applicant touches on the Applicants' right to fully present their case, which is an issues of procedural fairness (see *Baker*, above, at paragraph 22). The opportunity to respond to a decision-maker's concerns is also an issue of procedural fairness (see *Karimzada v Canada (Minister of Citizenship and Immigration)* 2012 FC 152 at paragraph 10 and *Guleed v Canada (Minister of Citizenship and Immigration)* 2012 FC 22 at paragraphs 11 and 12).

[37] In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that it "is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review on the fifth and sixth issues is correctness.

[38] In *Baker*, above, the Supreme Court of Canada approved the following test for bias, first articulated in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at page 394:

> […] 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. . . [The] 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 [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[39] Whether the RPD was biased – the seventh issue the Applicants raise – is a question of fact within the jurisdiction of the reviewing Court.

STATUTORY PROVISIONS

[40] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
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.

Person in Need of Protection

Personne à protéger

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

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and	internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENTS

The Applicants

The RPD was Biased

[41] The Applicants say the RPD did not conduct their hearing *de novo* as it was required to do. Although it is permissible for the RPD to rely on transcripts of their previous hearing, they say the RPD completely adopted the conclusions of the previous panel. It also did not ask the Applicants many questions at the hearing, which shows it relied exclusively on the evidence presented at the First Hearing.

[42] The Applicants point to the IRB Policy 2003 - 05 – *Court Ordered Rehearings*, which they say shows the RPD may rely on past evidence but not in such a way that would lead to a reasonable apprehension of bias. The RPD was clearly biased at the Second Hearing because it relied only on evidence from the First Hearing. The RPD also denied the Male Applicant the opportunity to be examined at the Second Hearing.

The RPD Ignored Evidence

[43] The RPD ignored the Physician Report after it specifically asked for evidence which would confirm the Female Applicant's stay in hospital in order to put to rest its credibility concerns. Having asked for documentary evidence, which the Applicants then provided, the RPD went on to find that the documents submitted did not show the Female Applicant was sterilized. The RPD did not examine any of the Applicants on this documentary evidence, so they were not aware of its concerns. Rather, the RPD reserved its critique of these documents for the Decision. In doing so, the RPD created the impression that all the Applicants needed was the evidence from the hospital and their claim would be decided favourably.

[44] The RPD also ignored their post-hearing submissions. In these submissions, the Applicants provided a report from Dr. Susan Goodwin – a neurologist who treated the Female Applicant in Toronto – which said the Female Applicant's life would be at risk in the Slovak Republic because of inadequate medical treatment (Goodwin Report). The RPD did not mention the Goodwin Report in its reasons.

Failure to Consider a Ground Advanced

[45] The RPD did not consider the risk to the Female Applicant from her epilepsy. In her PIF and oral testimony, she said she has seizures; she said in her PIF that Ambulances would not come to the Applicants' home because they are in a Roma neighbourhood. The Applicants also say that health care provided to Roma people in the Slovak Republic and Czech Republic is inadequate and the documentary evidence before the RPD showed this to be the case. The RPD did not consider

whether the Female Applicant's experience of forced sterilization and inadequate health care amounted to persecution.

[46] The Applicants note that, where the RPD does not find evidence untrustworthy, it may not reject that evidence out of hand. When the RPD failed to give weight to the documentary evidence submitted, it committed a reviewable error. Further, they say the RPD made assertions not supported by the record and based its conclusions on speculation.

The Respondent

The Decision is Reasonable

[47] The Respondent says the RPD based its Decision on the evidence before it and drew reasonable conclusions from that evidence. Neither the Male nor Female Applicants provided clear and convincing evidence of their respective states' inability to protect them, so the RPD's state protection finding was reasonable.

No Breach of Procedural Fairness

[48] The RPD considered all the evidence before it from both the First and Second Hearings and made an independent and reasonable decision. Further, the Applicants were represented by counsel at the Second Hearing, which shows they were not denied the opportunity to be examined. The RPD did not impugn the Female Applicant's credibility with respect to her allegation of forced sterilization. Instead, it found that the Slovak Republic could adequately protect her from any future risk of sterilization.

ANALYSIS

[49] As the Decision makes clear for both the Male Applicant and the Female Applicant, the determinative issue was state protection. No credibility concerns were raised, and the narratives of what the Applicants have suffered in the past were not questioned. The sole question for the RPD was whether the Applicants had rebutted the presumption of state protection for the Czech Republic (Male Applicant) or the Slovak Republic (Female Applicant and Minor Applicants).

[50] The Applicants' submissions do not really acknowledge that the determinative issue was state protection in both cases. In fact, very little is said about the Male Applicant and the situation that he faces in the Czech Republic. Generally speaking, the Applicants simply make a series of allegations that are not borne out by a reading of the Decision and the record.

[51] The first complaint is that the RPD did not really conduct a *de novo* hearing and merely adopted the conclusions of the previous panel.

[52] As regards the determinative issue of state protection, this is clearly not the case. The RPD conducted an up-to-date and forward-looking analysis of state protection in both countries.

[53] The Applicants say that the RPD did not ask the Male Applicant more than a few questions, and so denied him natural justice. No further questions were required regarding the Male Applicant's narrative. What he said was accepted. If he wanted to add more, his counsel was there to ensure that appropriate questions were asked and his counsel said at the hearing that he had no questions. In any event, the Male Applicant has not been in the Czech Republic since the last

hearing, so that nothing more can have happened to him there since that time. The only issue was whether he had rebutted the presumption of state protection in the Czech Republic.

[54] The Male Applicant has not explained to the Court what he wanted to say that had not been said at the first hearing, or what he could not have said through questions from his own counsel at the second hearing. The Male Applicant is attempting to find formal fault with the Decision without explaining how his complaint has any substance or relevance for the RPD's finding that he had not overcome the presumption of state protection in the Czech Republic. I can find no evidence of bias or procedural unfairness. The Male Applicant's narrative of what had happened to him in the past, including his dealings with the police, was accepted and incorporated by the RPD into its state protection analysis.

[55] As regards the Male Applicant and the Czech Republic, the Applicants make no further criticism of the RPD's state protection analysis, so I must assume they accept it as not containing a reviewable error.

[56] Turning to the Female Applicant, the Applicants, first of all, say that the RPD disregarded the documentary evidence she produced at the second hearing. As regards the Hospital Report and the Physician Report, this is clearly not the case. Once again, the RPD does not question the Female Applicant on her past narrative. Even if she has been sterilized in the past, the RPD has to be forward-looking in its risk analysis. Clearly, the Female Applicant cannot be sterilized again, and the RPD has to deal with the forward-looking health risks she faces. Once again, the determinative issue for the Female Applicant was state-protection if she returns to the Slovak Republic. This is what the RPD addresses in its Decision.

[57] The Applicants also say that the RPD "completely disregarded the medical document prepared by Dr. Susan Goodwin, and the two medical documents from Slovakia, attached to the documentary evidence, stating that the Female Applicant's health and life would be at risk, if she was to return to Slovakia."

[58] Dr. Goodwin's letter has no probative value. She tells us that the Female Applicant has epilepsy and then goes on to make completely unsupported statements about the Slovak Republic and what will happen to the Female Applicant if she goes there. Dr. Goodwin provides no explanation about how she knows any of this, or why she feels she is qualified to speak about the availability of health care in the Slovak Republic. The RPD specifically addresses health care issues in its Decision, and there is really nothing in Dr. Goodwin's letter that has any probative value to place against the RPD's conclusions. I do not think that the RPD's failure to mention this evidence specifically renders the Decision unreasonable within the principles established in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 or otherwise.

[59] The Female Applicant also complains that the RPD does not generally address her epilepsy or the evidence which says that health care provided to Roma in the Czech Republic and the Slovak Republic is not adequate.

[60] In relation to the Female Applicant, the RPD did not need to consider health care in the Czech Republic because she is a citizen of the Slovak Republic. As regards the Slovak Republic, the RPD does examine the health-care situation and acknowledges that "many Roma face severe difficulties and discrimination accessing adequate housing and employment and that they experienced segregation in schools and health care facilities." Notwithstanding this acknowledgment, the RPD goes on to find that "the documentary evidence indicates that the Slovak

Republic has taken and is taking steps to combat these deficiencies and there are signs of real progress":

> For example, the right to equality before the law and the right to equal protection under the law are guaranteed in the Constitution. and there are provisions for equality in all pertinent legislation in the areas of education, health care, labour, civil, criminal and administrative law, and there is legislation to effect what are essentially affirmative action programs.

[61] The RPD looked at health care for the Female Applicant if she returns to Slovakia. Other than the comments from Dr. Goodwin mentioned earlier, which have no probative value because we do not know what they are based upon, the Female Applicant has produced nothing to suggest that the RPD's findings in this regard are unreasonable.

[62] The Female Applicant also says that the RPD told her previous counsel that her refugee claim would be accepted provided she could produce written evidence of her hospitalization in the past.

[63] We have no evidence from previous counsel on this point. All that has been placed before me is hearsay evidence from a student-at-law, who says that

> The hearing proceeded as usual, and after having questioned Ms. Gaborova, Member Fiorino decided to adjourn the hearing for a brief period.
>
> At that moment, Member Fiorino went off the record and asked for a mid-hearing conference in private with Mr. Sarkozi at which point everybody else left the hearing room, including myself.
>
> After some time, Mr. Sarkozi met me in the hallway and told me that Member Fiorino had agreed to accept the claimants as Convention Refugees as long as we were to provide him with any documentary proof that Ms. Gaborova had been hospitalized in Slovakia in 2007.

> Happy with this turn of events, Mr. Sarkozi informed the clients that their claim would be successful provided we produce the said documentary proof of hospitalization at a subsequent date.
>
> We all reconvened in the hearing room and Member Fiorino made the following declaration on the record: "mam, [*sic*] there are some issues that I have with your testimony. However, I think that these issues could be put to rest if I were to have any type of documentation… any type of documentation to indicate you were in the hospital in 2007 in Slovakia…" […]
>
> Member Fiorino adjourned the matter for about a month in order to allow us to get the documentary proof requested.
>
> Mr. Sarkozi and I left the Immigration and Refugee Board with great satisfaction that day, convinced that it was only a matter of time before our clients would be accepted as Convention Refugees.

[64] Mr. Sarkozi's reported representation that the claims would be successful makes no sense at all in light of:

a. My reasons when I returned this matter for re-hearing because of an unreasonable credibility finding about her past sterilization;

b. The transcript of the hearing (which occurred in two parts), which shows what was said and that the RPD addressed the credibility issue, but then went on to deal with state protection as a separate determinative ground;

c. The Decision itself which makes it clear that state protection was the determinative issue.

[65] I do not think that, when read in the whole context of the record, I can give much weight to hearsay evidence that the RPD promised that both claims would be successful provided the Applicants could produce documentary proof of hospitalization. The RPD was simply, in accordance with my judgment returning this matter for reconsideration, attempting to settle the

credibility issue before going on to deal with state protection, which is what the record as a whole shows occurred.

[66] The Applicants say that the RPD also did not conduct a compelling reasons analysis. The transcript shows that the RPD raised the topic of compelling reasons with Applicants' counsel at the end of the hearing and asked for his submissions on point. My reading of counsel's submissions suggests to me that he chose not to address compelling reasons. He certainly does not do it implicitly and I cannot say it is raised even indirectly. So I do not think that the Applicants made any real submissions on compelling reasons that would ground such a claim and require the RPD to conduct a compelling reasons analysis.

[67] All in all, I cannot find a reviewable error with this Decision.

[68] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5345-11
STYLE OF CAUSE:	**MIROSLAV GABOR** **MAGDALENA GABOROVA** **MAGDALENA GABOROVA JR** **BIANKA GABOROVA** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 27, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	May 4, 2012

APPEARANCES:

George J. Kubes	**APPLICANTS**
Brad Gotkin	**RESPONDENT**

SOLICITORS OF RECORD:

George J. Kubes Barrister & Solicitor Toronto, Ontario	**APPLICANTS**
Myles J. Kirvan, Q.C. Deputy Attorney General of Canada	**RESPONDENT**