

Federal Court



Cour fédérale

Date: 20130215

Docket: IMM-5531-12

Citation: 2013 FC 166

Ottawa, Ontario, February 15, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

**MARIAN FERENC
MARIA PETOVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are common-law spouses of Roma ethnicity from the Slovak Republic. They suffered four confrontations with skinheads between 1999 and 2008, three of them violent. The 2008 beating suffered by Mr. Ferenc was so severe that he was incapacitated for several weeks following the attack and was left with permanent facial scarring. The applicants reported the three violent attacks to the police but obtained no assistance. In the case of the most serious attack, even though there were witnesses who apparently called the police, the police failed to question the witnesses and instead, at least initially, dismissed the event as a situation of fighting between

Mr. Ferenc and his cousin (who was also severely beaten by the skinheads). Following this occurrence, the applicants gathered funds and came to Canada, where they made refugee claims, alleging fear of persecution in Slovakia by reason of their Roma ethnicity.

[2] In a decision released May 11, 2012, the Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board] found the applicants to be neither Convention refugees nor persons in need of protection. The Board accepted the applicants' evidence as credible, but held that they had failed to rebut the presumption of state protection in Slovakia. In this regard, the Board noted that, despite the "overall situation of the Roma [being] a matter of deep concern" (decision at para 20) and evidence of ongoing violence and discrimination suffered by the Roma in Slovakia, the Slovak Republic is making "serious efforts to address the problem of criminality and [...] the police are both willing and able to protect victims effectively in practice" (decision at para 23). The Board additionally found that "the male [applicant had] furnished no persuasive evidence to show that the police did not take effective steps to investigate his case, or try to look for the perpetrators who were responsible for his attack in 2008" (decision at para 31). Based on this finding and its review of the police treatment of the other complaints that the applicants made, the RPD concluded that the applicants did not make diligent efforts or take reasonable steps in seeking state protection.

[3] In this application for judicial review, the applicants seek to have this Court set aside the Board's decision on the basis of three alleged errors:

- a. The unreasonableness of the RPD's state protection analysis: the applicants argue that the Board erred in relying on the efforts of the Slovakian government as opposed to analysing the effectiveness of its ability to protect Roma citizens and

assert that the RPD's reasons and the documentary evidence both indicate that state protection for the Roma in Slovakia is ineffective;

- b. The unreasonableness of the Board's conclusion that the applicants did not make diligent efforts or take reasonable steps in seeking state protection in that it ignores the applicants' evidence regarding their experiences with the police in Slovakia; and
- c. The failure of the Board to assess whether the discrimination the applicants experienced amounts to persecution.

[4] The respondent, on the other hand, argues that the Board's decision was reasonable because there was evidence to support the conclusions reached. More specifically, with respect to the first alleged error, the respondent argues that the RPD applied the correct test and recognized that what is relevant to the issue of state protection is the efficacy of the protection offered by the Slovakian state as opposed to the mere efforts made by the government to address the situation of the Roma. The respondent further argues that the evidence before the Board regarding the efficacy of efforts made by the Slovakian state to protect Roma is mixed, and, accordingly, that the Board's conclusion regarding the adequacy of state protection is reasonable. In a similar fashion, the respondent argues that evidence of the steps taken by the police in respect of the applicants' specific complaints is also mixed, indicating in some instances that appropriate steps were taken, but indicating otherwise in other situations. And, given this, the respondent asserts that the Board's conclusion regarding the applicants' lack of diligence is reasonable. Finally, with respect to the third alleged error, the respondent submits that because the applicants did not argue that the discrimination they faced (as

opposed to the victimization and beatings they suffered) constituted persecution, there was no need for the RPD to address the issue of whether any discrimination the applicants encountered amounted to persecution.

[5] As is more fully discussed below, I have determined that the RPD's conclusion regarding the failure of the applicants to make diligent efforts to seek state protection is unreasonable as it is unsupported by the evidence before the Board that had been accepted as credible. As the Board's state protection finding rests in large extent on this conclusion, the decision must be set aside. I also find there to have been flaws in the RPD's reasoning underpinning its conclusions drawn from the objective evidence regarding the situation in Slovakia. As a result of this conclusion, I need not address the applicant's third argument.

Was the Board's conclusion regarding the failure of the applicants to make sufficient efforts to seek state protection reasonable?

[6] Turning, then, to the Board's treatment of the applicants' efforts to seek state protection, it is necessary to briefly outline the evidence before the Board regarding these efforts as well as the conclusions reached by the Board.

[7] The applicants claimed to have had four physical encounters with skinheads and to have reported the three most serious of the assaults to the police. The first assault involved Ms. Petrova and happened in 1999, when she was a teenager. She claimed that she and other members of her band were en route to a concert when they were chased by a group of 10-15 skinheads. She stated that a policeman saw them being chased but merely told her and the others to run away. She claimed that although they ran, the skinheads caught them and beat them up. She also alleged that

she and the others made a report to the police, but the officer who took the report blamed the band manager for failing to take adequate steps to protect the children. Ms. Petrova, however, conceded that she was not able to give a description of the attackers to the police and had no idea who they were. She testified that her parents followed up with the police, but nothing was done to apprehend the attackers.

[8] In discussing this incident, the RPD concluded that the applicant did “not furnish any persuasive evidence to show that the police [...] did not effectively respond to the complaint or did not effectively investigate her complaint about the skinhead attack” (decision at para 33). The RPD did not outline the basis for this determination. Rather, it merely appears in the decision after the Board recounted the facts it found, and there is no explanation of how or why the determination was reached.

[9] While the Board’s reasons on this point are not as fulsome as one might wish, given the lack of information provided to the police regarding the identity of the skinheads, the Board’s conclusion with respect to the adequacy of the police investigation is nonetheless reasonable as it finds support in the evidence. In short, the police had very little to investigate, as Ms. Petrova could not provide a description of her attackers and there is no evidence that the officer who ignored the situation was in a position to do so either. Thus, the facts do not support the suggestion that there was an inadequate investigation and the Board’s conclusion that there was no persuasive evidence that the police did not effectively investigate Ms. Petrova’s complaint is reasonable. Similar conclusions on the adequacy of investigations have been upheld by this Court in circumstances like the present, where the police were provided with limited information about attackers (see e.g. *Rodriguez Osornio v*

Canada (Minister of Citizenship and Immigration), 2011 FC 684 at para 19; *Velazquez Hernandez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 5 at para 10). Therefore, the Board's conclusion on this point is reasonable.

[10] The same, however, cannot be said of its conclusion regarding the initial police response to the incident. It must be recalled that the RPD found the applicants' version of events to be credible and, thus, it must be taken as established that a Slovakian policeman saw several Roma teenagers being chased by a group of skinheads. Furthermore, it must also be taken as established that, as opposed to intervening to stop the situation, the police officer told the teenagers to run faster. If this is in fact what happened – and the RPD did not question the veracity of Ms. Petrova's testimony on this point – the police response was far from adequate and, indeed, demonstrates a cavalier attitude and unwillingness to protect the teenagers.

[11] The applicants claimed that the second attack occurred in 2006, on a bus. They were accosted by a group of skinheads, who insulted them, pushed Ms. Petrova and then beat up Mr. Ferenc. Mr. Ferenc testified that he reported the incident to the police, and followed up two or three times, but nothing transpired. He offered his opinion that when a gypsy makes the report, the police throw it in the garbage. In discussing this incident, the RPD merely noted that it found “no persuasive evidence to back up the male claimant's allegation” regarding the police throwing out complaints from those of Roma ethnicity (decision at para 34). This finding is not unreasonable as the applicant's bald statement is a mere expression of opinion and need not have been taken as persuasive by the Board. The Board provided no further analysis of this incident.

[12] The third skinhead attack occurred in 2007, when Ms. Petrova went to a nightclub with some male coworkers, and was grabbed by a skinhead after he insulted her. She did not report this incident to the police. The RPD did not discuss this incident in the decision, other than noting that it occurred. In my view, nothing turns on this incident as it was not reported.

[13] The final attack took place in 2008, and involved a situation where Mr. Ferenc and his cousin were attacked and savagely beaten by a group of skinheads, who hit Mr. Ferenc with a baseball bat. He testified that his injuries were so severe that he was incapacitated for a month, had to use a straw to eat, required several stitches and has permanent scars. He further stated in his testimony that when the attack was occurring, one of the residents close by shouted out that they were calling the police, that the city police arrived at the scene shortly thereafter, and the skinheads then fled. He further testified that as soon as they arrived, the police accused him and his cousin of having had a brawl amongst themselves, despite the fact that the police had been called and Mr. Ferenc and his cousin repeatedly told them that they had been set upon by a group of skinheads. The police then left.

[14] Mr. Ferenc said that he and his cousin made their way to the hospital, for treatment. While at the hospital, the medical staff called the state police. Mr. Frank claims that, once again, they refused to take a report and instead stated that they believed that Mr. Ferenc and his cousin had beaten each other. Despite this, neither of them was charged.

[15] The following day, Mr. Ferenc's parents made a report to the police, and a few days later the police came to Mr. Ferenc's home to take a statement. Mr. Ferenc testified that he overheard one of

the policeman say to the other that they did not believe Mr. Ferenc had been attacked by skinheads, because none were in the area. He further claimed that he went to the police station a month and half later and learned that nothing had been done to advance the investigation. He testified went back to the police station shortly before he left the Slovak Republic in 2009, to attempt to obtain a copy of his police report, but was not able to do so.

[16] Once again, the RPD accepted this testimony as completely credible. In dealing with this incident, the Board member stated only as follows “I find that the male claimant has furnished no persuasive evidence to show that the police did not take effective steps to investigate his case, or try to look for the perpetrators who were responsible for his attack in 2008” (decision at para 31).

[17] This finding, like the earlier one applicable to Ms. Petrova, is unsupported by the evidence before the Board, which it accepted as being credible. The applicant's version of events, and, in particular, his description of what occurred when the city police first arrived, demonstrates a complete failure to take effective steps to investigate. The police did not believe the applicant and did not question potential witnesses, who might have been able to provide a description. It is hard to imagine a less effective response.

[18] After reviewing these events, the Board member concluded as follows:

I find, in the particular circumstances of this case, that the male and female claimant did not make diligent efforts, nor did they take all reasonable steps in seeking the protection of the authorities when they were attacked by skinheads in the Slovak Republic. I find that the claimants have not produced sufficient reliable, relevant and probative evidence to convince me that adequate state protection is not available in practice to ethnic Roma who are targeted by racist and neo-Nazi skinheads in the Slovak Republic. I find, therefore, that

the claimants, in the particular circumstances of this case, have not rebutted the presumption of adequate state protection in the Slovak Republic with clear and convincing evidence. I am not persuaded that the Slovak Republic would not be reasonably forthcoming with adequate state protection, should the claimant seek it.

[19] As is evident from the preceding quotation, Board's assessment of the adequacy of the applicants' efforts to seek state protection was one of the principal bases upon which the RPD dismissed their claims. (The other basis involved consideration of documentary evidence.)

[20] The case law recognizes that paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7 codifies the grounds upon which a decision may be set aside if a tribunal makes an erroneous factual finding (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 46). That provision stipulates that this Court may set aside a tribunal's decision if it is satisfied that the tribunal "based its decision or order on an erroneous finding of fact it made in a perverse or capricious manner or without regard to the material before it". A finding will be made without regard to the material before the tribunal if there is no evidence before the tribunal to support it (see e.g. *Canadian Union of Postal Workers v Healy*, 2003 FCA 380 at para 25, [2003] FCJ No 1517). And, such a finding will warrant intervention by this Court if the tribunal's decision is based on it (see e.g. *Rohm & Haas Canada Limited v Canada (Anti-Dumping Tribunal)* (1978), 22 NR 175, [1978] FCJ No 522 at para 5 [*Rohm & Haas*]; *Buttar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1281 at para 12, [2006] FCJ No 1607).

[21] For the reasons noted, the evidence before the RPD does not support the Board's conclusion that the applicants have not been diligent in their efforts to seek state protection. And, this finding

was central to the Board's determination. Accordingly, the Board's decision is unreasonable and warrants intervention by this Court. Simply put, the Board cannot accept the applicant's version of events, which demonstrates that they made reasonable efforts to seek police protection and that the police acted unreasonably, and then reach a finding that the efforts were not diligent or that the claimants failed to produce persuasive evidence. If in referring to the lack of persuasive evidence the Board meant that it did not believe the applicants, then it was incumbent on it to conduct a credibility analysis and set out its reasons for not accepting the applicants' testimony.

[22] While this determination is sufficient to dispose of this application, I also note that the Board's treatment of the country documentation is unsatisfactory and largely unintelligible. In this regard, the reasons reflect a litany of problems in respect of the adequacy of state protection for the Roma in the Slovak Republic, note some of the efforts made by the Slovakian authorities – without commenting on the efficacy of these efforts – and then somehow conclude that there is “adequate state protection in the Slovak Republic for victims of crime” (decision at para 23). This Court has repeatedly held that evidence of ineffective efforts on the part of a state to provide protection will not support a finding of adequate state protection being available (see e.g. *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at para 5; *Bors v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1004 at paras 60-63). Rather, what is required is that the efforts bear some fruit in order to be held to be effective.

[23] It may well be that the mixed evidence before the Board regarding the efficacy of the efforts of the Slovakian state – as opposed to the mere fact of making efforts – might have afforded the RPD a basis for concluding that adequate state protection exists in the Slovakian Republic for those

of Roma ethnicity. The problem with the decision is that the RPD did not address this issue or analyze the efficacy of the efforts of the Slovakian state.

[24] For these reasons, the decision must be set aside.

[25] No question for certification was posed under section 74 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and none arises in this case as my decision turns on the facts and reasoning adopted by the Board.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the RPD's decision is granted;
2. The decision of the Board is remitted to the RPD for re-determination by a differently constituted panel of the Board;
3. No question of general importance is certified; and
4. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT:** GLEASON J.

DATED: February 15, 2013

APPEARANCES:

Aadil Mangalji FOR THE APPLICANTS

Teresa Ramnarine FOR THE RESPONDENT

SOLICITORS OF RECORD:

Long Mangalji, LLP FOR THE APPLICANTS
Toronto, Ontario

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