

Federal Court



Cour fédérale

**Date: 20130905**

**Docket: IMM-6542-12**

**Citation: 2013 FC 908**

**Ottawa, Ontario, September 5, 2013**

**PRESENT: The Honourable Mr. Justice Simon Noël**

**BETWEEN:**

**DANA DAVIDOVA,  
MIROSLAV DAVID,  
DAGMAR DAVIDOVA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Protection Division [RPD], dated June 4, 2012 denying the Applicants refugee protection.

**I. Facts**

[2] The Applicants are a family from a village near Ostrava, Koprivnice, which is populated mostly by Roma. The principal Applicant is a single mother of three children, who divorced from her husband in 1996 because of his gambling problem. She has another daughter who remains in the Czech Republic and who tells her that the situation is becoming worse. The principal Applicant's daughter also has a daughter [the principal Applicant's granddaughter]; a Canadian citizen whose medical condition and disability related needs form part of the factual and legal basis of her mother's claim.

[3] Once, in 1996, her husband was followed home by skinheads who broke into the apartment and beat them. The police were called but the perpetrators were gone when they arrived.

[4] The principal Applicant described other incidents where she was shoved by skinheads who were verbally assaulting her when she was on the street, particularly when she was bringing her children to and from school. She testified that she attended the police 8 to 10 times to complain and that they took her statement but did nothing else.

[5] In May 2008, when she was walking home, a group of skinheads assaulted her. She sought medical care from a clinic but did not report the incident to the police.

[6] The principal Applicant's daughter was attending high school studying hotel management and was once followed by two students who slapped her and spat on her. She did not report the incident to the police but the principal Applicant attended the school the following morning and

spoke with the principal who suspended the two students as well as the principal Applicant's daughter in order for the situation to calm down.

[7] The daughter continued to attend school for about three weeks after this but she finally left in March or April 2008 because she was the only Roma in the class and she was afraid of threats from other students. She indicated that she did not feel comfortable leaving school and that she would assist the family as her mother was the only one supporting them.

[8] After she stopped going to school, they decided to leave for Canada. They obtained passports on May 26, 2009. The principal Applicant's son, who was a minor, continued to attend Grade 7 until the end of the school year in June 2009. The principal Applicant, her children and her daughter's common law spouse departed by way of Prague and arrived in Canada on July 12, 2009 and made a claim the following day.

## **II. Decision under review**

[9] The RPD determined that the Applicants are neither Convention refugees nor persons in need of protection.

[10] The RPD considered that the Czech Republic is a functioning democracy that benefits from the presumption of state protection and that the Applicants needed to demonstrate that they did more than merely showing that they went to see members of the police force and that these attempts were unsuccessful. The RPD determined that they did not rebut the presumption of state protection.

[11] The principal Applicant stated that she was verbally assaulted and shoved by skinheads a number of times and that she attended the police station approximately 8-10 times to complain but that the police would only take her statement and did nothing else. However, the RPD concluded that there is insufficient evidence showing that the police denied taking her reports.

[12] In May 2008, the principal Applicant was assaulted but did not provide corroborating evidence showing that she attended a clinic to seek medical treatment. The RPD, however, accepted that the incident happened. The RPD noted that she was never able to identify the perpetrators of the crimes and determined that based on the evidence provided, it cannot be established that the police would have been unwilling to investigate the complaint had they been provided with sufficient information. Therefore, it cannot be established that state protection is inadequate. If the principal Applicant considered that the police did not investigate properly the incident, she could have filed a complaint against them.

[13] The principal Applicant explained that she was scared for her children and that it would restrict their activities and her daughter stopped going to school. However, the RPD noted that the family left more than a year after the May 2008 incident, as shown by their passports.

[14] The RPD determined that the Applicants failed to establish that they have taken all reasonable steps to access state protection, as the Czech Republic is a functioning democracy and it is making significant efforts to correct its historical discrimination against the Roma.

[15] The RPD indicated that although no police report has been submitted, it did not draw a negative inference but considered that the police's inability to conduct an investigation was due to poor identification.

[16] The RPD added that the evidence of the government's efforts is mixed as the police at occasions, discriminate against the Roma but, however, participates in activities to foster better relations with younger Roma and more Romani police officers are recruited since a recruitment campaign was launched in 2006.

[17] Moreover, the RPD reviewed evidence showing that there are a number of non-governmental organizations [NGOs] in the Czech Republic that may provide help to the Applicants, namely to address cases of misconduct by the police. Such organizations would be of assistance to the Applicants.

[18] The RPD, therefore, concluded that the evidence demonstrates that the Czech Republic is making efforts to protect the Roma, which has resulted in operational effectiveness.

[19] The RPD also considered the programs put in place by the government to support the education of the Roma. It also noted that the principal Applicant's children were never denied the opportunity to attend school.

[20] With regards to the concerns raised by the principal Applicant's granddaughter's illness, the RPD determined that the evidence shows that she has significant health issues since her birth and that should the daughter experience discrimination or inadequate delivery of healthcare, assistance

would be available from NGOs. Additionally, the Applicants could turn to the Public Defender of Rights who has many problems brought to his attention.

### **III. Applicants' submissions**

[21] The Applicants argue that the RPD's finding that state protection is adequate in the Czech Republic is unreasonable as it is contrary to the evidence. The RPD ignored key evidence presented by the principal Applicant in her testimony regarding the fact that the police did not take notes with regards to her home invasion by skinheads nor was she asked to go to the police station. The RPD erred in ignoring her credible testimony with regards to state protection.

[22] Moreover, failure to provide personal documentation attesting to each allegation should not by itself undermine the principal Applicant's credibility unless there is evidence contradicting the allegations. The RPD did not have credibility concerns.

[23] The RPD committed an error in stating that it is unable to find that, based on the evidence, the police in these circumstances were unwilling to assist the principal Applicant if she were to have provided sufficient reliable and probative evidence upon which they could investigate. The RPD made a finding based on speculation as there is no evidence supporting the fact that the police was not able to conduct an investigation because of poor identification. To the contrary, the RPD had evidence on the record that pointed to other explanations for the lack of police action and ignored it. The principal Applicant stated in her Personal Information Form that the police have links with the skinheads. There was evidence to the effect that there is institutional racism in the Czech Republic police and inadequate investigation of crimes against the Roma. In cases where the police fail to

investigate serious complaints of racial harassment or hate crimes and where there is evidence of systemic discrimination in the police force, the RPD should not infer good faith on the part of the police.

[24] Moreover, the test puts the burden of police protection on the shoulders of the principal Applicant, to establish “reliable and probative” evidence for the police to act upon. The tribunal then retrospectively puts itself in the position of deciding whether the principal Applicant met this test. It is unreasonable to fault the Applicants for the failure of the police to conduct an investigation.

[25] The Applicants submit that the fact that the state is making serious efforts is irrelevant as the correct legal test to be applied is whether such efforts resulted in operational effectiveness. The RPD committed an error in considering the willingness of the police to help throughout the decision and not whether they can and do provide protection to the Roma victims. The Applicants provided evidence that despite the presence of police in Northern Bohemia, riots broke out in 2011 which shows that state protection has not reached an operational level.

[26] Furthermore, the Applicants submit that the RPD made a number of errors regarding its determination that the principal Applicant’s daughter would be able to access adequate medical care for her child in the Czech Republic. The RPD erred by considering that she could get assistance from NGOs that are tasked with dealing with issues faced by the Roma community. The NGOs, which assist in making human rights complaints for discrimination, do not demonstrate the adequacy of state protection, in particular in accessing health care. The RPD erred by collapsing state protection with NGOs’ support as NGOs may not replace state protection and if NGOs are the

only option for the daughter, it means state protection is inadequate. The evidence does not demonstrate that services of NGOs would result in a hospital being bound to address the incident of discrimination. There was no evidence that the services provided by the NGOs would result in incidents of discrimination not being repeated.

[27] In addition to this, the RPD erred in concluding that the principal Applicant's granddaughter would get appropriate medical support in main city centres as it disregards the evidence submitted by the Applicants that medical treatment is unaffordable and employment is inaccessible to them. Since the nature of the health care system was necessary in part to determine whether the principal Applicant's fear was objectively reasonable. The RPD erred in presuming that health care would be provided because there was insufficient evidence presented by the Applicants to demonstrate that it would not. The presumption of state protection does not include a presumption that a particular state provides publicly funded health care. Whether the principal Applicant would be able to pay for specialized health care and whether she would be required to pay for those services does not appear to figure in the finding on the health care issue at all.

[28] Moreover, the Applicants argue that the RPD was precluded from determining that state protection was adequate with regards to the health care aspect of their claim. Having expressed concerns at the hearing regarding the sufficiency of evidence on this issue, the Member was required to at a minimum address how this evidentiary problem was resolved in coming to a decision on the health care issue.



[29] Finally, the Applicants submit that the exemption in subparagraph 97(1)(b)(iv) of the IRPA does not apply to the aspect of the claim regarding the principal Applicant's granddaughter's health care issue as the RPD determined that they were discriminated against on the basis of a Convention ground.

[30] The principal Applicant submits, alternatively that if subparagraph 97(1)(b)(iv) of the IRPA does apply to this aspect of the claim, the RPD's determination is erroneous as the principal Applicant's claim falls within the narrow range of claims contemplated as widespread discrimination against the Roma in the Czech Republic cannot be considered a "legitimate" reason for the government's inability to provide health care.

#### **IV. Respondent's submissions**

[31] The Respondent first submits that the RPD did consider the effectiveness of state protection before considering that the Applicants had failed to rebut the presumption of adequate state protection. The RPD considered the mixed evidence and operational effectiveness.

[32] Second, the Respondent argues that the Applicants bear the onus of rebutting the presumption of state protection in the Czech Republic. The Applicants have not established that state protection is inadequate.

[33] Third, the Applicants' efforts to seek state protection were inadequate. The Czech Republic is a functioning parliamentary democracy. Consequently, the Applicants must do more than simply allege that the police did not do enough to help them. The RPD reasonably determined that the

Applicants had not made all reasonable efforts to seek state protection before seeking it internationally as there are a number of ways to seek redress for police inaction, including the possibility for the Ministry of the Interior and the Public Defender to investigate complaints against the police. Moreover, the principal Applicant did not seek help from agencies other than the police, which can provide help.

[34] The Respondent further submits that the police were unable to investigate the principal Applicant's complaint as the identity of the skinheads, who assaulted her in May 2008, was unknown, making it difficult to conduct an investigation and determined that it could, therefore, not find on the basis of the evidence that the police were unwilling to act. The same reasoning stands with regards to the home invasion. The case law is to the effect that such impossibility to conduct an investigation does not amount to inadequate state protection.

[35] Fourth, with regards to the home invasion, the Respondent submits that the RPD did not ignore the evidence regarding the adequacy of state protection that the principal Applicant provided about the home invasion. The RPD is not required to mention each piece of evidence in its reasons as it is presumed to have taken into consideration all of the evidence. As for the principal Applicant's allegation that the RPD did not consider the incident when the police did not take notes, the Respondent submits that it is sufficient for the RPD to consider whether the police responded to the call about the home invasion based on the information they had when assessing the adequacy of state protection. Moreover, there are a number of agencies available to the Applicants to seek redress for police inaction, which were not accessed.

[36] The Respondent finally submits that the RPD did consider the evidence in relation to the Canadian born child. The RPD reasonably determined that although the child's return to the Czech Republic raises some concerns, there is insufficient evidence showing that the state would not provide adequate health care. Contrary to what is alleged by the principal Applicant, state protection can be available from state-run agencies such as NGOs. The RPD also noted the possible assistance from the Public Defender and the Secretariat of the National Minorities Council which are not NGOs. The Respondent also argues that the Applicants did not meet their onus under subparagraph 97(1)(b)(iv) of the IRPA as the lack of medical care in the Czech Republic will not support a claim for refugee protection, though it may well constitute undue hardship in the humanitarian and compassionate context. Inability to pay for medical care, without more, will not support a claim for protection. Proof on a balance of probabilities that care will be denied on a discriminatory ground is necessary and it is lacking in the present case.

**V. Parties' supplementary written arguments**

[37] At the hearing, this Court directed the parties to produce to the Court supplementary written submissions on the health care issue of the Applicant's granddaughter. The Applicants' additional written submissions were filed on July 7, 2013, and put forward the argument that RPD has made findings concerning the fear of discrimination in health care without regard to the evidence submitted, more specifically concerning the insufficient evidence on the health care issue and the relevance of NGOs in assessing state protection.

[38] In its supplementary written submissions, filed on July 12, 2013, the Respondent argued that the RPD decision in question was reasonable. Relying on the limited material with which it had

been presented, the RPD rightly followed jurisprudence on subparagraph 97(1)(b)(iv). The Respondent argues that the Applicants failed to meet the onus under this subparagraph and that they were free to litigate this issue under another forum, i.e. seek humanitarian and compassionate relief.

[39] The Applicants replied to the Respondent's submissions on July 24, 2013. In addition to specifying their claims, they indicated that the subparagraph 97(1)(b)(iv) exclusion clause does not apply to this health care issue, as it was a component of the Applicants' refugee claim. The Respondent did not reply to the Applicants' supplementary written arguments.

#### **VI. Issue**

1. Did the RPD make an error in its state protection analysis?

#### **VII. Standard of review**

[40] State protection findings are to be reviewed under the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

#### **VIII. Analysis**

[41] The Applicants argue that they have demonstrated that state protection is not efficient as the police did not appropriately respond to their complaints.

[42] As stated by the Supreme Court in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 20 Imm LR (2d) 85, a state is presumed to be able to protect its citizens. The RPD's determination that the Czech Republic is a democratic state, presumed to be capable of protecting its citizens is

reasonable. Indeed, the RPD reviewed the mixed evidence and concluded that the Czech Republic provides adequate protection to the Roma citizens.

[43] It is a well-established law that state protection does not have to be perfect and a state is presumed to protect its nationals unless the contrary can be shown. In *Canada (Minister of Employment and Immigration) v Villafranca*, (1992) 18 Imm LR (2d) 130, 99 DLR (4th) 334, the Federal Court of Appeal suggested that protection need not be perfect:

No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil. ... where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection.

[44] Therefore, the fact that a government has not always succeeded in protecting people in the situation of a particular refugee claimant is not sufficient to establish that state protection is not available to the claimant in his or her home country. In the present case, it has not been possible for the principal Applicant to give any information leading to the identification of the perpetrators of the crimes for any of the incidents. Therefore, had the authorities been provided with additional information, they would have been in a position to investigate the matters. The RPD's state protection finding on this point is therefore reasonable.

[45] However, the RPD committed an error in its analysis of whether the Applicant's granddaughter, who is seriously ill, would be able to access appropriate state protection.

[46] First, the RPD acknowledged the fact that there is insufficient evidence regarding the Czech Republic's capacity and willingness to provide medical treatments to a seriously ill Roma child and then determined that state protection would, however, be available to the principal Applicant's daughter should she face discrimination in receiving health care for her child, as a number of NGOs would be of assistance to them.

[47] The availability of adequate health care for the principal Applicant's granddaughter, or lack thereof, is a serious issue that warrants extensive consideration by the RPD. Whether it is considered that the principal Applicant's case should be examined under section 96 or subparagraph 97(1)(b)(iv) of the IRPA, the question of whether the principal Applicant's granddaughter would receive prompt and adequate medical support should her health condition require it and whether health care is publicly funded in the Czech Republic, needs to be looked at in greater detail by the RPD as it raises serious concerns. Therefore, a detailed review of the available evidence is necessary to make the appropriate determination. Indeed, it should be borne in mind that the principal Applicant's granddaughter is a Canadian citizen and her right to life and security is protected by section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*.

[48] Second, in its state protection analysis, the RPD committed an error in determining that NGOs would provide appropriate protection to the principal Applicant's granddaughter. It

considered that adequate protection would be provided by a number of NGOs in the Czech Republic and made the following determination:

“While I appreciate that these are not government bodies, they are partially funded by the government in order to ensure operational effectiveness of legislation that has been enacted. I find that should the PC’s daughter experience discrimination or inadequate delivery of healthcare for her daughter that there is assistance available to her from NGO’s who have mandates to deal with issues faced by the Roma community and could be helpful in providing assistance to ensure sufficient care is provided to her daughter, similar to that of the catholic Children’s Aid Hamilton, who have assisted her while in Canada. Additionally, the claimants could turn to the Public Defender of Rights who has many problems brought to his attention, including people in economic hardship such as those asking for his assistance in finding housing. Given the seriousness of the PC’s daughter’s child’s illness, there is no evidence to show that the Public Defender would not assist her in her particular circumstances were she to experience difficulties. Rather the evidence shows that the Public Defender has repeatedly dealt with cases of hardship and inquired into the practices of Municipal authorities such as those of public health, employment and housing centers. They could also turn to the Secretariat of the National Minorities Council for assistance should the need arise.”

[49] A reading of the RPD’s finding shows that it considered the main source of protection to be the NGOs providing assistance to the Roma population in the Czech Republic. Indeed, the RPD first extensively discussed the activities of a number of NGOs that ensure the effective implementation of anti-discrimination legislation enacted by the government. It then clearly concluded that they consist in the first mean by which to obtain proper protection, should the principal Applicant’s daughter experience discrimination when trying to access medical treatment for her child’s serious illness. Although the RPD mentioned that the Public Defender of Rights and the Secretariat of the National Minorities Council may be able to assist, it is clear that in the RPD’s reasoning, the NGOs

that were put in place to ensure compliance with the anti-discrimination laws consisted in the main body that would provide protection to the principal Applicant's granddaughter.

[50] However, there is extensive case law supporting the proposition that non-state actors, which include NGOs, may not replace the protection that should primarily be provided by the state (see *Dominguez Hernandez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211 at para 23, 164 ACWS (3d) 842; *Thakur v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 600; *Molnar v Canada (Minister of Citizenship and Immigration)*, 2002 CFPI 1081 at paras 24-30; *Balogh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 809 at para 44, 22 Imm LR (3d) 93). Moreover, as stated by this Court, "it is exceedingly difficult, from an evidentiary standpoint, to determine whether a non-governmental organization can be a surrogate for the state to provide protection" (*Aurelien v Canada (Minister of Citizenship and Immigration)*, 2013 FC 707 at para 17, [2013] FCJ No 752).

[51] It is necessary for the RPD's decision to stand, that its determination that the young daughter would be protected from discrimination resulting in denial of medical treatment for her serious illness based on the availability of protection by a state actor. Such is not the case in the RPD's analysis, as it focused on the assistance that can be provided by NGOs. It is unreasonable to conclude that the availability of NGOs assisting the Roma population amounts to adequate state protection as it is highly unlikely that those organizations would be able to make arrangements for the principal Applicant's granddaughter to receive prompt medical assistance in a context of emergency.



[52] For all of these reasons, the decision needs to be sent back for reconsideration but only for the state protection determination concerning the young daughter which is unreasonable. As noted at paragraphs 42 to 44, the remaining findings on state protection are reasonable. Since the RPD member that dealt with this application is knowledgeable about the facts and the issues of the case concerning the young daughter, it should be sent back to that same member. The reasons rendered concerning the young daughter shall be helpful to the RPD.

[53] The parties were invited to submit questions for certification but none were proposed.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. This application for judicial review is granted in part.
2. The RPD’s decision concerning the young daughter’s state protection finding is set aside and the matter is referred back to the same RPD panel for a new determination.
3. No question is certified.

“Simon Noël”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-6542-12

**STYLE OF CAUSE:** DANA DAVIDOVA et al v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** July 8, 2013

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

**DATED:** September 5, 2013

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