

Federal Court



Cour fédérale

**Date: 20150309**

**Docket: IMM-4954-13**

**Citation: 2015 FC 293**

**Ottawa, Ontario, March 9, 2015**

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

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**SONA BEDNARIKOVA  
FILIP BEDNARIK  
TOMAS BEDNARIK**

**Respondents**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application under s. 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 of the Immigration and Refugee Board [Board], dated June 26, 2013 [Decision], which accepted the Respondents' application to be deemed Convention refugees under s. 96 of the Act.

## II. BACKGROUND

[2] The Respondents are citizens of the Czech Republic. They are a mother [Principal Respondent or Ms. Bednarikova], her eight-year-old son, and her fifteen-year-old son. They came to Canada with Ms. Bednarikova's ex-husband on September 20, 2008. They sought refugee protection based on their fear of persecution at the hands of Skinheads due to their Roma ethnicity.

[3] On August 2, 2011, the Board granted the Respondents' request to separate their claims from Ms. Bednarikova's ex-husband's claim. The ex-husband had been the driving force of the family's refugee claim. While Ms. Bednarikova says that his description of the family's persecution due to their Roma ethnicity is true, his description of the basis of their claim provided an incomplete picture of the persecution and harm that Ms. Bednarikova faces personally.

[4] Ms. Bednarikova says that she was forced to marry her ex-husband when she was seventeen-years-old. She says that she was not allowed to leave their home without his permission. She was beaten repeatedly and required medical treatment as a result of some of these beatings. She recalls one particular beating taking place in public. Nobody came to her assistance.

[5] In 1999, Ms. Bednarikova says that she went to the police to seek protection from her husband's abuse. The police said it was a private matter and declined to get involved. When Ms.

Bednarikova insisted that she was afraid her husband would kill her, the police officer made racist comments regarding her Roma ethnicity. She received no assistance.

[6] Ms. Bednarikova says that her family was also persecuted because of their Roma ethnicity. She says that her ex-husband, ex-brother-in-law, and ex-father-in-law were each beaten because of their ethnicity on different occasions. She was forced to drop out of college because her classmates assaulted her. Her oldest son was beaten by children at school, and Ms. Bednarikova says that he began to suffer psychologically. The family left the Czech Republic because of the persecution they were experiencing and, particularly, the effect that it was having on their son.

[7] Ms. Bednarikova says that the domestic violence continued in Canada. In March 2009, Ms. Bednarikova had a miscarriage after her husband beat her. Her ability to leave the home remained restricted.

[8] In June 2009, she went to pick up her son from school. While waiting at the school, her ex-husband attacked her from behind. A bystander called the police. Her ex-husband was detained and charged with a number of criminal offences. When he was released on bail in August 2009, he went to her home and threatened to kill her. Ms. Bednarikova called the police and her ex-husband was arrested again. He has since pled guilty to two counts of assault. As of 2012, there were outstanding criminal charges related to Ms. Bednarikova's ex-husband uttering death threats against her.

[9] Ms. Bednarikova appeared for refugee hearings five times between May 2012 and June 2013. The first four hearings did not proceed because Ms. Bednarikova's psychological state prevented her from testifying. On June 13, 2013, her common-law spouse was appointed the Respondents' Designated Representative and their claim was heard.

### III. DECISION UNDER REVIEW

[10] The Board determined that the Respondents were Convention refugees on June 26, 2013. The Board found that Ms. Bednarikova would be unable to access state protection if she returned to the Czech Republic. As a result, the presumption of state protection was rebutted.

### IV. ISSUES

[11] The Applicant raises two issues in this application:

1. Did the Board apply the correct test for state protection?
2. Did the Board ignore evidence in concluding that the Principal Respondent would be unable to access protection in the Czech Republic?

### V. STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the

reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[13] The Applicant submits that whether the Board applied the proper test for state protection should be reviewed on a standard of correctness: see *Cosgun v Canada (Citizenship and Immigration)*, 2010 FC 400 at para 30; *Koky v Canada (Citizenship and Immigration)*, 2011 FC 1407 at para 19. The Applicant submits that the standard of review for the Board's findings of fact and mixed fact and law is reasonableness: *Dunsmuir*, above, at para 53; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 52-62 [*Khosa*].

[14] The first issue raises the question of whether the Board applied a proper legal test. This Court has affirmed that when the jurisprudence has established a clear legal test, it is not open to the Board to apply a different test. See particularly Chief Justice Crampton's analysis in relation to the definitions of persecution and state protection in *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 20-22 [*Ruszo*]. I adopted this analysis in relation to the test for state protection in *Buri v Canada (Citizenship and Immigration)*, 2014 FC 45 at paras 16-18 [*Buri*]. The Board's application of the test to the facts before it remains reviewable on a standard of reasonableness as it involves a question of mixed fact and law: see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420 at para 199, aff'd 2007 FCA 171 at para 38; *Ruszo*, above; *Buri*, above; *Rusznyak v Canada (Citizenship and Immigration)*, 2014 FC 255 at para 23; *Bari v Canada (Citizenship and Immigration)*, 2014 FC 862 at para 19.

[15] The second issue raises a question of whether the Board ignored evidence. This is a factual inquiry and is reviewable on a standard of reasonableness: see *Malveda v Canada (Citizenship and Immigration)*, 2008 FC 447 at para 19; *Flores v Canada (Citizenship and Immigration)*, 2011 FC 359 at para 26; *De Jesus Aleman Aguilar v Canada (Citizenship and Immigration)*, 2013 FC 809 at para 19.

[16] 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 para 47; *Khosa*, above, at para 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.”

## VI. STATUTORY PROVISIONS

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

### **Convention refugee**

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,

### **Définition de « réfugié »**

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 themselves of the protection of each of those countries; or

(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.

### **Person in need of protection**

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals

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) 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.

### **Personne à protéger**

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

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

(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

in or from that country,

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

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

**Person in need of protection**

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

**Personne à protéger**

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. ARGUMENT

A. *Applicant*

[18] The Applicant submits that the test for state protection requires a two-pronged analysis. A refugee claimant must establish a well-founded fear and that he or she is unable or unwilling to avail him- or herself of state protection: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 712, 723 [*Ward*]. The Applicant says that the Board identified the proper test for state protection at the hearing (Certified Tribunal Record [CTR] at 675). However, the Decision shows that the Board failed to consider the second prong of the test and reached its conclusion solely based on the Principal Respondent's psychological state. The Federal Court has held that a



claimant's psychological state is irrelevant in assessing whether or not a claimant's fear is objectively well founded: see *Johnson v Canada (Citizenship and Immigration)*, 2010 FC 311 at para 17; *Gallo Farias v Canada (Citizenship and Immigration)*, 2008 FC 578 at para 15; *Contreras Martinez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 343 at para 16; *Varga v Canada (Minister of Citizenship and Immigration)*, 2005 FC 617 at para 30.

[19] The Applicant says that if a claimant's fear is relevant to whether his or her fear is objectively well founded, then the Board reached its conclusions without regard to contradictory facts. The Board concluded that the Principal Respondent's psychological state had deteriorated so severely that she would be unable to access state protection in the Czech Republic. However, the Board failed to explain how it reached this conclusion in light of the fact that the Principal Respondent called the police after her most recent assault. The fact that the Principal Respondent was willing and able to call the police in Canada is relevant to the question of whether or not she can and would do so in the Czech Republic. The Applicant submits that this is a sufficient basis to allow the application.

[20] The Applicant also submits that the Board failed to consider the objective documentary evidence and the Principal Respondent's efforts to access state protection in the Czech Republic. The fact that evidence was before the Board is insufficient to prove that the Board actually considered the evidence. The Applicant says that the Respondents have failed to refer to anything in the Decision to support their claim that the Board considered both the Principal Respondent's oral evidence and the objective documentary evidence.

B. *Respondents*

[21] The Respondents submit that the Decision shows that the Board examined both the subjective and objective elements of the Respondents' fear of persecution.

[22] The Board is presumed to have considered and weighed all of the evidence before it: see *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 598 (CA)(QL); *Ortiz v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1163, [2002] FCJ no 1558 at para 7 (QL). The Principal Respondent's evidence was accepted by the Board and established that she was the victim of domestic violence both in the Czech Republic and Canada. This evidence included hospital records, police reports, and a record of the ex-husband's assault convictions. The Respondents submit that the objective evidence clearly established both the agent of the persecution and the ongoing nature of the persecution.

[23] The Board also considered the Principal Respondent's evidence that she unsuccessfully sought state protection in the Czech Republic. The Board made no adverse credibility finding and the Principal Respondent's evidence forms part of the record before it: *Precectaj v Canada (Citizenship and Immigration)*, 2010 FC 485. The Principal Respondent's evidence is substantiated by the Board's documentary evidence which shows that victims of domestic violence do not receive adequate state protection in the Czech Republic.

[24] Further, the Respondents submit that Ms. Bednarikova's psychological state is a significant factor in determining how exhaustive she would have to be in seeking state

protection: *Simpson v Canada (Minister of Citizenship and Immigration)*, 2006 FC 970 at para 36; *Taterski v Canada (Minister of Citizenship and Immigration)*, 2010 FC 660. The Respondents submit that the Applicant misstates the Court's jurisprudence regarding the significance of a claimant's psychological state. Three out of four of the cases that the Applicant cites relied on *Chinchilla v Canada (Minister of Citizenship and Immigration)*, 2005 FC 534 at para 18 [*Chinchilla*]. In *Chinchilla*, Justice Layden-Stevenson said that the psychological report in issue spoke only to the applicants' subjective fear and did not assist in the objective state protection analysis. The Respondents submit that this case is distinguishable because the psychological report says that the Principal Respondent is unable to access state protection given her psychological condition.

[25] The Respondents also take issue with the Applicant's contention that the Principal Respondent would be able to access state protection in the Czech Republic because she called the police after the most recent assault in Canada. That conclusion cannot be reached on the documentary evidence.

## VIII. ANALYSIS

[26] The Applicant raises two issues in this proceeding. First, the Applicant says that the Board applied the incorrect test for state protection.

[27] The reasons for the Decision are very short but inadequacy of reasons is not these days a stand-alone ground for review. The Supreme Court of Canada has directed that a reviewing Court should try to make sense of a decision and that the Court is entitled to look at the whole

record before the Board in order to do so: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 15-16 [*Newfoundland Nurses*].

[28] The Board appears to take persecution and risk as a given. When I examine the record in this case, it is clear that a strong case could be made for refugee protection. The Principal Respondent's ex-husband is likely to cause her serious harm in the Czech Republic and the evidence suggests that women are not adequately protected there. The psychological evidence is also clear that the Principal Respondent is in an extremely fragile state. At the hearing, the Member identified what he needed to decide (CTR at 686) and accepted the domestic abuse situation faced by the Principal Respondent (CTR at 671), so that the "only issues that I have is whether there is state protection for her if she were to return to her country of origin." The Board connects state protection and the Principal Respondent's psychological state in the following way (CTR at 675):

... we need to look at the question of given the psychological state of mind that she is in, can she ... would she be able... would she be able to access state protection in the Czech Republic. And secondly, is there any state protection for her based on her Roma background and the domestic abuse.

[29] Counsel's submissions before the Board were to the effect that the "police do not react the same way to Roma in domestic violence as they do to ethnic Czechs." So the Principal Respondent's position was not just that her psychological state placed her at a disadvantage in seeking state protection, but also that her past approaches to the police and the country documentation revealed that the police do not adequately protect Roma women in domestic abuse situations.

[30] It is unclear from the Decision why the Board says the Principal Respondent “would not be able to access state protection” in the Czech Republic. It could be, as the Applicant argues, that the Board concludes that the Principal Respondent’s subjective psychological state prevents her from doing this; or it could be because, as the Respondents argue, the Czech Republic does not provide protection for vulnerable Roma women who are victims of domestic abuse.

[31] To resolve this ambiguity, the CTR suggests to me that the Board was fully aware that it had to address the objective availability of protection and not just the Principal Respondent’s subjective ability to access protection (see CTR at 675, 686, lines 29-30). This is the correct test for state protection. The Board certainly could have made its application of the legal test clearer in the reasons, but on the basis of the record as a whole, I am not convinced a reviewable error has occurred.

[32] I am also not convinced that the Board ignored evidence in reaching its conclusion. The Applicant says the Board erred in failing to explain how it addressed the evidence that the Principal Respondent called the police after her most recent assault in Canada. The Applicant says this is evidence of the Principal Respondent’s ability to access state protection in the Czech Republic and should have been discussed.

[33] The jurisprudence is clear that the Board is presumed to have considered all of the evidence before it: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35. In addition, as discussed above, the Supreme Court of Canada has advised that reasons need not be fulsome and need “not include all the arguments, statutory provisions,

jurisprudence or other details the review judge would have preferred” (*Newfoundland Nurses*, above, at para 16).

[34] I see no reason that the Board should have been expected to reconcile the Principal Respondent’s call to the police with its finding that she would not be able to access state protection in the Czech Republic. The Principal Respondent called the police when her ex-husband was outside of her apartment threatening to kill her. This was four months after she received police assistance when a bystander called the police because her ex-husband beat her outside of their son’s school and threatened to kill her. Her ex-husband was released from detention on conditions and the police had been in contact with the Principal Respondent regarding criminal proceedings relating to the assault. I do not see how the Principal Respondent’s willingness to call the police in these circumstances could lead to any conclusions regarding the Principal Respondent’s ability to call the police in the Czech Republic, where her uncontested evidence is that she did not receive police assistance when she sought it.

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

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed.
2. There is no question for certification.

"James Russell"

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Judge

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

**DOCKET:** IMM-4954-13

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION v SONA BEDNARIKOVA, FILIP  
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**DATED:** MARCH 9, 2015

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