Federal Court Cour fédérale

**Date: 20150421**

**Docket: IMM-1792-12**

**Citation: 2015 FC 512**

**Toronto, Ontario, April 21, 2015**

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

**BETWEEN:**

**TOMAS LACKO**
**MARCELA BALAZOVA**
**TOAMS LACKO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## ORDER AND REASONS

[1] With respect to the present Application, the Applicants are a family composed of a father, (the claimant), mother (the female claimant), and their dependent child, who are Roma citizens of the Czech Republic and who claim protection pursuant to s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, on the basis of their ethnicity, and protection pursuant to

s. 97 on the basis of fear of right-wing racist extremists. In a decision dated February 3, 2012, the Refugee Protection Division (RPD) rejected the Applicants' claim.

[2] I find two reasons to set aside the RPD's decision: a breach of a duty of fairness owed to the claimant, and a significant erroneous finding of fact.

## I. Breach of a Duty of Fairness

[3] A central finding in the RPD's decision is a negative credibility finding based on a perceived discrepancy between the claimant's statements in his PIF and his testimony at the hearing of his claim. The following emphasized passage from the decision is the finding:

> There were some credibility concerns. For example, the claimant was asked, between 1999 and November 2008, how many times he was attacked by skinheads; he replied many times. Then he indicated that he did not include all the times he was attacked. Asked if he was saying that they [sic] were other attacks by skinheads that he didn't mention his PIF narrative (instead of answering the question directly), he replied, "What I wrote down is what I wrote down, and what I didn't, I didn't; the interpreter I had we just put in what we had time to put in." The panel finds his answer to what was simply a straightforward question to be evasive.
>
> The panel, however, repeated the question to which the claimant replied, "Yes," He was then asked why he didn't write down all the attacks against him in his PIF narrative (the panel notes that he went back to being evasive); he replied, "Whatever we wrote down is what we wrote down." But later he added that "Whatever I remembered at that time we wrote down." The claimant was asked how many times he wrote (in his PIF narrative) that he was attacked; he replied, five times. The panel notes that his PIF narrative indicates that he was attacked seven times. Noting that in his oral testimony the claimant said he was attacked seven times, and in his PIF narrative the number of times he was attacked amount to seven times, but when he was asked how many times he wrote in his PIF narrative that he was attacked, he replied

> five times; the panel did not pursue an adverse credibility finding with respect to that discrepancy. The panel believes the claimant was credible with respect to the number of times he stated that he was attacked by skinheads in his PIF narrative which largely corresponded with the number of times in his oral testimony. <u>However, the panel does not believe that he was indeed attacked and assaulted by any skinheads at any time, particularly as he now claimed that he was assaulted more times than he wrote in his PIF narrative</u>. If indeed he was attacked by skinheads as he stated, especially more than the seven times over the nine year period (1999-2008) indicated in his Personal Information Form (PIF) narrative, on a balance of probabilities, he would not have been evasive in his response to the question when he was asked "if he was saying that they [sic] were other attacks by skinheads that he didn't mention his PIF narrative." He would have simply answered the question directly. Therefore, the panel finds his evasiveness to undermine his credibility and rejects his allegation that he was ever attacked by skinheads in his country.
>
> [Emphasis added and footnotes in the original omitted]
>
> (Decision, paras. 9 and 10)

[4] During the course of the hearing, out of fairness to the record, Counsel for the Respondent drew my attention to the following critical passage from the transcript of the hearing before the RPD:

> **COUNSEL:** Mr. Board Member at the last sitting there were a number of questions, how many times you were attacked, how many times did you go to the police and so forth, like that. Does…I just want to focus my questioning…<u>does the Board have any significant issues in terms of the claimant's recounting of the number of times he was attacked</u>, the number of times he went to the police or anything of that nature or is that evidence, whether identical to the [PIF], close enough that there is not serious credibility concerns?
>
> **MEMBER:** There is no…I can go on record and tell you that there is no real..I..I was reviewing the evidence in preparation for today and when I..I..I was going through it I am realizing that there is no serious discrepancy. When I count the amount of incidents

> there were about nine and he said seven, but…but I..I do not see that as…as the number of times. There might be issues around some of the information he provided in regards to the..the..the incidents, but I, going through it I did not foresee a problem with how many times he said he was assaulted or his relatives were assaulted. And I do not think it would be fair for me to use that to…even if there were some slight discrepancy there, because he is saying that he was assaulted but also his relatives were assaulted.
>
> [Emphasis added]
>
> (Certified Tribunal Record at p. 680)

[5] The breach of the duty of fairness owed to the claimant is the RPD's commitment made during the course of the hearing, which had the potential of limiting evidence and argument in support of the claimant's claim, and the subsequent breach of the commitment, by making a finding which is used to reject the claimant's claim.

## II. Erroneous Finding of Fact

[6] In the decision, the RPD used documented general descriptions of practices and procedures in the Czech Republic to find, as a fact, that those practices and procedures were actually applied in the scenario at hand without a shred of evidence to support the finding. In the following paragraphs of the decision, the RPD finds that, because police are required to respond to a complaint, it is implausible that the police did not respond to the Applicant's complaint:

> In addition, the panel also notes that the claimant testified that despite making several complaints to the police - at least three times by telephone and two times in person at the police station - yet he received no assistance from the police. The panel does not believe that if he was attacked these [sic] many times by skinheads and made these several reports to the police, he would not have received some form of assistance. The panel prefers the documentary evidence over the claimant's testimony since they are drawn from a wide range of publicly

> accessible documents from reliable non-government and government organizations which states that by law, police must respond to all distress calls and notify parties of the outcome of their complaints. […]
>
> [Emphasis added]
>
> (Decision, para. 11)

## III. Conclusion

[7] Given the breach of fairness, and the erroneous finding of fact, I find that the decision is made in reviewable error.

[8] Independent from the findings made with respect to the content of the decision, I have an *obiter* comment to make regarding the process used by the RPD to make implausibility findings.

[9] The RPD begins its analysis of the Applicants' claim by making the following statements of law regarding implausibility findings:

> With regard to credibility, the panel is guided by the Federal Court of Appeal which has ruled that testimony given under oath is presumed to be true, unless there is a valid reason to doubt its truthfulness. The assessment the panel must use to test the truth of a story of a witness is that it be in harmony with the preponderance of probabilities which <u>a practical and informed person</u> would readily recognize as reasonable in that place and in those conditions. Furthermore, the panel cannot be satisfied that, "the evidence is credible or trustworthy unless satisfied that it is probably so, not just possibly so". [*Faryna v Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357, per O'Halloran, J.A.)
>
> […] The panel is entitled to make reasonable findings based on implausibility, <u>common sense and rationality</u>, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole.

The RPD's statements do not fully reflect the now long-standing accepted approach to the making of implausibility findings as stated in the decision of *Valtchev v Canada (MCI)*, 2001 FCT 776 at paragraph 7 as follows:

> A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu.
>
> [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]

[10] While the RPD's quote from the decision in *Faryna v. Chorny* does speak to the need for a decision-maker to be objectively "informed", the present evidentiary standard makes more precise demands. To avoid the application of speculation, implausibility findings must be made on the basis of evidence on the record through a process of fact finding which produces verifiable results. This point is expressed in the decision in *Zakhour v Canada (MCI)*, 2011 FC 1178 at paragraph 5:

> Therefore, in the present case, from evidence on the record, the RPD was required to: first, clearly find what might reasonably be expected by way of a Hezbollah response to the Applicant's actions; then make findings of fact about the response that was made by Hezbollah; and, finally, conclude whether the response conforms with what might be reasonably suspected. In the present case this process of critical analysis was not followed. On this basis I find that the RPD's implausibility findings are unsupported speculations, and, therefore, the decision under review is not defensible on the law and the facts.

**ORDER**

**THIS COURT ORDERS that** the decision under review is set aside and the matter is referred back to a differently constituted panel for redetermination.

There is no question to certify.

"Douglas R. Campbell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1792-12 |
| **STYLE OF CAUSE:** | TOMAS LACKO, MARCELA BALAZOVA, TOAMS LACKO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 15, 2015 |
| **ORDER AND REASONS:** | CAMPBELL J. |
| **DATED:** | APRIL 21, 2015 |

**APPEARANCES:**

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| Zakir Mashadi | FOR THE APPLICANTS |
| David Joseph | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Zakir Mashadi<br>Barrister & Solicitor<br>Toronto, Ontario | FOR THE APPLICANTS |
| William F. Pentney<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |