

Federal Court



Cour fédérale

Date: 20170906

Docket: IMM-767-17

Citation: 2017 FC 803

Toronto, Ontario, September 6, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**CYRIL KOCKO
JOLANA SIMONICOVA
VLADIMIR KOCKO
NINA KOCKOVA
SIMON KOCKO
KRISTIAN KOCKO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated February 10, 2017, which

confirmed the decision of the Refugee Protection Division [RPD] that the Applicants are not Convention refugees or persons in need of protection.

[2] As explained in greater detail below, this application is dismissed because the Applicants have demonstrated no reviewable error by the RAD in its analyses of their credibility or the availability of state protection.

II. Background

[3] The Applicants are citizens of the Slovak Republic of Roma ethnicity. They are a family consisting of Mr. Cyril Kocko, his wife Ms. Jolana Simoncova, their son Vladimir Kocko, his wife Nina Kockova, and their two children.

[4] Their claims of persecution due to their Roma ethnicity were heard by the RPD on July 15, 2014 and September 8, 2016. In a decision dated September 21, 2016, the RPD rejected their claims due to adverse credibility findings and a finding that they had not rebutted the presumption of the availability of state protection. The Applicants appealed to the RAD, arguing that the RPD erred in these credibility findings and in its state protection analysis. In the decision that is the subject of this application for judicial review, the RAD affirmed the RPD's credibility findings and agreed with the RPD that the Applicants had not rebutted the presumption of state protection.

III. Issues and Standard of Review

[5] The Applicants raise the following issues for the Court's consideration:

- A. Was the RAD's analysis of credibility unreasonable?
- B. Was the RAD's analysis of state protection unreasonable?

[6] As reflected in the articulation of the issues, the parties agree, and I concur, that these issues are reviewable on the standard of reasonableness.

IV. Analysis

A. *Was the RAD's analysis of credibility unreasonable?*

[7] The Applicants allege that the RAD made reviewable errors in its credibility findings with respect to three of the Applicants: Jolana Simonicova, Vladimir Kocko, and Nina Kockova.

(1) Jolana Simonicova

[8] Ms. Simonicova alleges that, in the course of surgery to remove a growth following the birth of her last child, she was sterilized without her consent. She also notes that there is documentary evidence to indicate that doctors in the Slovak Republic have performed sterilization procedures on Roma women without their consent. Like the RPD, the RAD did not find her allegations credible and gave little weight to the allegation that she was sterilized without her consent.

[9] In reaching this conclusion, the RAD was influenced significantly by the fact that Ms. Simonicova did not provide any medical reports to confirm that she had been sterilized. The Applicants argue this was an error, given Ms. Simonicova's explanation that medical reports are not given to Roma people in the Slovak Republic and that, since arriving in Canada, she has not had the financial resources to obtain such a report.

[10] I do not find the RAD's analysis of this issue to be unreasonable. The RAD concluded that it was reasonable to expect that Ms. Simonicova would have made an effort to obtain a medical report to provide medical evidence at least that she had in fact been sterilized, and it noted that other members of her family had been able to obtain their medical records. While the RAD did not expressly comment on Ms. Simonicova's explanation that she was not in a financial position to obtain a medical report in Canada, it noted that she had not made an effort to obtain such a record in either country. Moreover, the RAD noted that, even if it were to accept her oral testimony that her tubes were tied during the surgery to have the growth removed, there was no evidence that the sterilization process was performed for reasons other than to resolve the medical condition which necessitated the surgery in the first place.

[11] I read the RAD's decision as turning on the lack of medical evidence of either the sterilization itself or the reason it was performed. While Ms. Simonicova provided explanations for the absence of such evidence, the RAD noted but did not accept those explanations. Applying the deference to the RAD's analysis of the evidence which is mandated by the reasonableness standard, I find no reviewable error in the RAD's findings with respect to Ms. Simonicova's allegations.

(2) Vladimir Kocko

[12] Mr. Kocko testified that in 2012 he was assaulted in the city of Kosice, as a result of which he attended a hospital in Kosice and had stitches placed on his lips. The RAD had concerns about his credibility, because his written testimony stated that the incident occurred in 2012 without giving a specific date, he stated in his oral testimony that the incident occurred on June 26, 2012, and the report from the hospital indicated he was first seen on April 27, 2012. Also, while Mr. Kocko testified that he had been in Kosice only once, the hospital report indicated he was also seen five days later on May 2, 2012 to remove the stitches. The RAD found that these contradictions undermined Mr. Kocko's credibility.

[13] In challenging this finding, the Applicants note that the RAD stated that the inconsistency as to the date of the alleged assault was over three months, which is an error as the difference between April 27 and June 26 is just under two months. I agree that this is a factual error but cannot conclude that it undermines the reasonableness of the RAD's credibility analysis. That analysis turned on the inconsistency in dates and the RAD's expectation that Mr. Kocko would have remembered when he attended the hospital in a city away from his hometown, and the number of times he attended there, particularly since he had submitted to the RPD the hospital report which contained this information.

[14] The Applicants submit that the transcript of Mr. Kocko's testimony before the RPD demonstrates that he did not really know the exact date and that when he testified that he did not ever return to Kosice, it was not clear that he was being asked about whether he returned to the

hospital. I do not find these arguments to assist the Applicants. The fact Mr. Kocko could not recall when he attended the hospital in Kosice formed part of the RAD's credibility analysis, and it is clear to me from reviewing the transcript that Mr. Kocko initially testified that he did not return to the city where the hospital was. The RAD stated that it could not agree with the responses given by Mr. Kocko with respect to the contradictions in his evidence, and I can find no fault with its conclusions in this regard.

[15] The Applicants also take issue with the RAD noting that the hospital report does not indicate that Mr. Kocko's injury was caused by an assault. I acknowledge the Applicants' argument that any such statement in the report would merely represent a hearsay repetition of what Mr. Kocko had told hospital staff. However, I read the RAD's point, which follows its analysis of the credibility concerns arising from the inconsistencies in Mr. Kocko's evidence, as being that the hospital report did not serve to corroborate his evidence that his injuries resulted from an assault. I find nothing unreasonable in this analysis.

(3) Nina Kockova

[16] Ms. Kockova testified that when she gave birth to her first son at the hospital she was placed in a dirty segregated room with four other Roma women and kept there for two weeks without proper healthcare. She distinguished her treatment from that of non-Roma women, who were placed two to a room in clean facilities with their own washroom. She stated that she was very sick while she was in the hospital, that she turned yellow and that "the water inside of me was not good enough". Ms. Kockova testified that she was not sure she would have lived if the

other Roma women in the room had not run to get the doctor to explain that something was wrong with her.

[17] The RAD referred to Ms. Kockova's testimony and allegation of discriminatory treatment but concluded from reading the transcript of her testimony that she had been ill just prior to the delivery date of her first child, that she gave birth two weeks after having been admitted to the hospital, and that she was admitted two weeks prior to the due date to be treated for her illness. The RAD found that, although the hospital conditions may not have been acceptable to her, there was no indication that she was discriminated against because of her Roma ethnicity.

[18] In challenging this finding, the Applicants note country condition evidence referring to widespread discrimination against Roma in healthcare and the segregation of Roma women in maternity wards in several hospitals. The Applicants also point out that Ms. Kockova's evidence was that, while she did not give birth to her son until October 10, 2010, her due date was September 26, 2010 and she was admitted to the hospital on September 25, 2010. It was therefore not strictly accurate for the RAD to state that she was admitted to the hospital two weeks prior to her due date. She submits that she was not admitted because she was ill but rather contracted her condition while in the hospital. In response, the Respondent notes Ms. Kockova's evidence that she went into the hospital, even though she was not experiencing labour pain, because her gynecologist told her she had to go there, which the Respondent argues supports the RAD's conclusion that she was admitted to the hospital because she was ill.

[19] I find that little turns on the question whether Ms. Kockova was ill before she entered the hospital and then worsened, as opposed to becoming ill after she entered the hospital. Rather, as the Applicants' counsel emphasized in both written submissions and argument, the Applicants' point is her allegation that she did not receive proper care while in the hospital, such that other Roma patients had to find the doctor to tell him that something was wrong with her. In combination with the documentary evidence establishing discriminatory treatment and segregation of Roma women in hospitals in the Slovak Republic, the Applicants argue that it was unreasonable for the RAD to reach the conclusion it did on this issue. However, the question in applying the reasonableness standard is whether the RAD's conclusion falls outside the range of possible, acceptable outcomes, defensible on the facts and the law. My conclusion is that it was available for the RAD to find, as had the RPD, that the evidence did not establish that she received discriminatory substandard healthcare because of her Roma ethnicity. The record does not disclose a basis for the Court to interfere with this finding.

B. *Was the RAD's analysis of state protection unreasonable?*

[20] Even without successfully disturbing any of the RAD's adverse credibility determinations, the Applicants argue that it erred in its state protection analysis. They note that the RAD accepted that Mr. Cyril Kocko was assaulted by skinheads in 2014, attended the police station to report the assault, and followed up with the police but was advised that the investigation have been closed. The Applicants argue that the RAD erred in its application of the law surrounding state protection to the evidence of this incident.

[21] In particular, the Applicants take issue with the RAD's statement that, in democratic countries such as the Slovak Republic, an applicant for refugee status must do more than merely show that he went to see members of the police force and that those efforts were unsuccessful. However, the Applicants acknowledge that the RAD was correct in subsequently stating that local failures by authorities to provide protection do not mean that the state as a whole fails to protect its citizens, unless the failures form part of a broader pattern of the state's inability or refusal to provide protection.

[22] The Respondent disagrees with the Applicants' position that the RAD misstated or misapplied the law surrounding state protection. The Respondent refers to the decision in *Canada (Minister of Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94, in which the Federal Court of Appeal restored an RPD decision which noted that the more democratic a state's institutions, the more a claimant must have done to exhaust all courses of action open to him (paras 32-34). The RPD in that case concluded that the claimant had not made additional efforts to seek protection from the authorities when the local police officers allegedly did not provide the protection she was seeking. The Federal Court of Appeal found that it was not unreasonable for the RPD to have concluded that the claimant failed to establish that state protection was inadequate.

[23] The Respondent agrees with the Applicant's position only to the extent that it is correct to say that there is a range within which states can be considered democratic, and whether a claimant can successfully rebut the presumption of state protection is a function of both the objective documentary evidence, which describes the functioning of the particular state's

democratic institutions and the availability of protection therein, and the evidence of the claimant's particular experiences and efforts to seek protection.

[24] I find no reviewable error in the RAD's statement of the law surrounding state protection. Rather, the question for the Court's consideration is whether the RAD's conclusion, that the Applicants had not rebutted the presumption of state protection, was reasonable in the context of the country condition evidence applicable to the Slovak Republic and the Applicants' own evidence.

[25] The RAD acknowledged that there was information in both the country condition documentation and the arguments submitted by the Applicants to indicate that there is widespread reporting of incidents of intolerance, discrimination and persecution of Romani individuals in the Slovak Republic. However, the RAD also noted that being a member of the Roma community does not automatically confer refugee status based on the documentary evidence of the general profile for the Roma. Rather, the question was whether the Applicants in this particular appeal to the RAD had rebutted the presumption of state protection. In addressing this question, the RAD reviewed its various adverse credibility findings and, with respect to the 2014 assault upon Cyril Kocko, noted that he was unable to identify the assailants, providing the police with only a general description. The RAD concluded that, if the police did close the investigation of the 2014 incident, it was due to Mr. Kocko's inability to provide a proper description of the assailants and that there was no evidence that he was denied protection with respect to this incident because of his Roma ethnicity.

[26] I find no reviewable error by the RAD in this component of its decision. The Applicants referred to the transcript of Mr. Kocko's testimony, in which he stated that he provided the police officers with the basics of what his assailants looked like, that they had shaved hair, black clothing and heavy boots. The Applicants argue that this was enough information for the police to conclude that this was an attack by members of the far right element in the Slovak Republic and to investigate further. They rely on the decision in *Pinter v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1119 [*Pinter*], in which the Court allowed an application for judicial review of an RPD decision rejecting claims for protection made by a Roma family from Hungary. The Applicants refer in particular to Justice Zinn's comment at paragraph 14 of this case that accepting a report of criminal conduct does not establish adequate police protection where no steps are taken to investigate the complaint.

[27] I do not find this case to assist the Applicants. The error identified by Justice Zinn was in the RPD's analysis of the response of the police to the claimants' reports of assaults against them. One of the claimants testified that, although the police took their reports, they did not investigate the complaints, and the RPD stated that it did not accept the claimants' allegation that the police did not even try to investigate. Justice Zinn noted that the RPD provided absolutely no explanation as to why this evidence had been rejected as there was nothing in the record to indicate there had been any police investigation.

[28] The case at hand does not involve an unsupported conclusion by the RAD that the police investigated the complaint made by Cyril Kocko. Rather, the RAD's conclusion was that the police closed the investigation because Mr. Kocko did not provide the police with a sufficient

description of the assailants. Given the limited information about the assailants referred to in Mr. Kocko's testimony, I cannot conclude this finding is unreasonable.

[29] The Applicants also fault the RAD for failing to refer to the recent decision by this Court in *Stojkova v Canada (Minister of Citizenship and Immigration)*, 2017 FC 77 [*Stojkova*], in which Justice Shore referred to documentary evidence of Roma suffering discrimination and violence in Slovakia as well as police mistreatment of Roma suspects and detainees. The Applicants argue that the RAD should have explained why the availability of state protection for Roma in the Slovak Republic in this case was different than as found in *Stojkova*.

[30] With respect, I find that this argument does not raise a reviewable error on the part of the RAD. The Applicants did not refer the RAD to *Stojkova*. Moreover, *Stojkova* is a decision based on the particular evidence that was before the pre-removal risk assessment officer and the Court in that case. As pointed out by the Respondent, Justice Shore's analysis at paragraphs 21 and 22 of his decision refers to the claimants' personal evidence of persecution being linked to the country condition evidence and notes that each case must be considered on its own merits based on the personal and country condition documents.

[31] This leads to the Applicants' final argument, that the RAD's conclusions with respect to the RPD's treatment of the documentary evidence are not transparent. The RAD concluded that the RPD carried out a fair and independent analysis of the state protection documents and conducted a proper analysis of the documentary evidence, and the RAD agreed with the RPD's conclusion that the Applicants had failed to rebut the presumption of state protection. However,

the Applicants argue that the RAD's reasons do not disclose an analysis as to how it arrived at these conclusions. They submit that the RAD failed to conduct an independent assessment as required by the correctness standard of review prescribed by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

[32] My conclusion is that the RAD's reasons do not demonstrate an error in its application of the standard of review. If the RAD showed deference to the RPD's analysis, this would reflect an improper application of the standard of reasonableness. However, this was not the nature of its analysis. Rather the RAD expressed agreement with the RPD's conclusion that the Applicants had not rebutted the presumption of state protection, which I consider to represent an application of the correctness standard of review.

[33] I acknowledge the Applicants' point that the RAD's reasons do not set out an extensive analysis of the state protection documents or the alleged errors in the RPD's state protection analysis set out in the Applicant's appeal submissions. However, the basis for the RAD's conclusion is intelligible, given its review of the legal principles surrounding state protection, its acknowledgement of the widespread persecution of Romani people disclosed by the documentary evidence, and in particular its review of the Applicants' personal evidence, the adverse credibility findings, and the limited information provided by Cyril Kocko with respect to the assailants in the 2014 assault. I read the decision as concluding that the very limited personal evidence found credible by the RAD, in combination with the country condition evidence, was not sufficient to rebut the state protection presumption. I find the analysis to be transparent and

within the range of possible, acceptable outcomes by which the reasonableness standard is defined.

V. Conclusion

[34] In conclusion, applying the reasonableness standard of review, I find that the Applicants have demonstrated no reviewable error by the RAD in its analyses of their credibility or the availability of state protection.

[35] The parties raised no question for certification for appeal, and none is stated.

JUDGMENT in IMM-767-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-767-17

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