

Federal Court



Cour fédérale

Date: 20190508

Docket: IMM-4388-18

Citation: 2019 FC 626

Ottawa, Ontario, May 8, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

**KATARZYNA JAWOROWSKA AND
ROBERT DYSZKO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Ms. Katarzyna Jaworowska and Mr. Robert Dyszko, are Polish citizens of Roma ethnicity. They seek judicial review of a decision (Decision) of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada. The RAD confirmed the decision of the Refugee Protection Division (RPD) that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97, respectively, of the

Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA). The adequacy of state protection for the Applicants was the determinative issue in both instances.

[2] This application is brought pursuant to subsection 72(1) of the IRPA.

[3] For the reasons that follow, the application will be dismissed.

I. Background

[4] The Applicants arrived in Canada from Poland on February 7, 2017 and claimed refugee protection on June 5, 2017.

[5] The Applicants lived in Kutno, Poland, where they traded used items at the local market. They state that they were frequently harassed at the market by skinheads who would damage their merchandise and call them names due to their Roma ethnicity. They also state that there were often fights at the market but, if security or the police were called, potential witnesses would disappear and no action would be taken.

[6] In December 2014, the Applicants were attacked by a group of skinheads in Lodz, Poland, while buying goods for their market stall. Both of the Applicants were hospitalized due to the severity of their injuries. Ms. Jaworowska remained in hospital for seven days and suffered a miscarriage as a result of the incident. Mr. Dyszko was hospitalized for two days. The hospital called the police and Mr. Dyszko gave information regarding the attack to the officers but the police took no follow-up action.

[7] Mr. Dyszko attempted to find a job and registered as unemployed with the Polish employment office. The Applicants believe that he received no offers of employment because of his ethnicity. Mr. Dyszko subsequently resumed his work as a trader at various markets in Kutno.

[8] In January 2016, Mr. Dyszko travelled to England. There, he worked briefly in construction before returning to Poland. Shortly thereafter, both Applicants travelled to England and worked for a few months. They then moved back to Poland.

[9] The Applicants remained in Poland until 2017 when they departed for Canada.

II. RPD Decision

[10] The RPD's decision is dated August 24, 2017. The RPD panel focused on the issue of whether adequate state protection would be available to the Applicants in Poland. The panel began by stating that it had assessed all the information presented to it, including a recent decision by another RPD panel (Prior RPD Decision) that related to a Roma refugee claimant from Poland who was granted convention refugee status. The RPD stated:

To summarize Counsel's submission: the Roma face discrimination in all facets of their lives. The claimants, in a forward-looking manner, would not get protection from the police. The panel read the [Prior RPD Decision] but finds it does not agree with counsel's findings as it relates to state protection. The panel finds that each case is decided on a case-by-case review and consideration of the facts presented. The information in each claim is dependent upon the personal circumstances of the claimant. The panel finds that not every Roma in Poland has experienced what amounts to persecution. The panel agrees with Justice Harrington as stated in *Varga v Canada (Minister of Citizenship and Immigration)*, 2014 FC 510 [*Varga*] at paragraph 20:

Each case turns on the particular history of the claimant, the record, the adequacy of the analysis by the Tribunal and, indeed, the appreciation of that evidence by various judges of this Court: *Banya v Canada (Minister of Citizenship and Immigration)*, 2011 FC 313, [2011] FCJ No 393 (QL), at para 4.

[11] The RPD noted that, in the absence of complete breakdown, states are presumed to be capable of protecting their citizens. Further, a claimant who alleges inadequate state protection bears the onus of establishing, on a balance of probabilities, the inadequacy of the available protection. As Poland is a democracy with functioning security and judicial processes, the burden placed on the Applicants to demonstrate the inadequacy of state protection was significant.

[12] The panel acknowledged that the Roma as a population in Poland face discrimination. However, it concluded that the documentary evidence showed that the Polish government was making serious efforts in policy and at the operational level to combat violence and discrimination against its Roma population.

[13] With respect to the Applicants' claim, the RPD stated that the police were called when they were hospitalized in December 2014 but that the call was made by hospital officials and not the Applicants. The fact that the police did not pursue the case was a function of the lack of witnesses and not police inaction. When questioned why he had not pursued redress, Mr. Dyszko testified that he could not approach the higher levels of state authorities because he feared retaliation. However, the RPD concluded that there were recourses available to the Applicants that they did not utilize. Although the panel did not question the December 2014 assault, it did

not agree that the police were unwilling to aid the Applicants. There was no denial of protection; rather there was reluctance on the part of the Applicants to seek protection.

[14] The RPD reviewed in detail the documentary evidence before it and the availability of assistance to Roma individuals in Poland. The panel referred to the Applicants' limited education but noted a number of Roma organizations funded by both the Polish government and the European Union were available to assist them. The panel also set out the actions taken by the government to address discrimination and the arrests made by police in cases involving attacks on the Roma population. The RPD concluded:

Even where the protective services of the home state have gaps or deficiencies, a claimant who alleges a subjective fear must, in the absence of a compelling justification, take reasonable steps to access those services. The claimants have failed to demonstrate they have taken reasonable steps to access any services as it relates to the police.

[15] With respect to the Applicants' claims of discrimination due to their Roma ethnicity, the RPD acknowledged that there is a high level of Roma unemployment in Poland but noted that the government has funded education, healthcare, employment and better living conditions for Roma. Further, there was no evidence before the RPD that the Applicants could not return to Poland to the home they had shared with Mr. Dyszko's grandfather.

III. Decision under review – RAD Decision

[16] The Decision is dated August 14, 2018. The RAD summarized the Applicants' submissions regarding the RPD's decision as follows:

1. The RPD erred in failing to enunciate credibility and factual findings as a basis for its state protection analysis;
2. The RPD erred by conducting its state protection analysis in a factual vacuum;
3. The RPD erred by relying on selective, general and dated country condition evidence;
4. The RPD erred by failing to mention and properly consider the Applicants' country documents; and,
5. The RPD erred by failing to clearly articulate reasons why its analysis of the same country condition evidence led to a different conclusion from that of the Prior RPD Decision.

[17] The RAD reviewed the record independently and found that the RPD had correctly concluded that the Applicants had failed to rebut the presumption of state protection.

[18] The RAD stated that the onus was on the Applicants to rebut the presumption of adequate state protection. In order to do so, they were required to provide clear and convincing evidence of the Polish state's inability to protect them. The panel noted that it was not sufficient for a claimant to go to the police and say the police did nothing. The RAD emphasized that "the appellants must provide information as to what steps they took to obtain protection".

[19] The RAD found that the RPD provided clear and specific reasons as to why the Applicants had not rebutted the presumption of state protection. The panel reviewed the RPD's consideration of the December 2014 incident and the Applicants' failure to either report the incident or to follow up once the police had been called by the hospital. The RAD stated that even where there may be gaps or deficiencies in a state's protection, a refugee claimant cannot merely allege a subjective fear but must take reasonable steps to access the available services or

provide compelling reasons for not doing so. The RAD concluded that the RPD did not err in finding that the Applicants' responses about why they did not seek protection in Poland did not evidence a failure of state protection.

[20] The RAD then addressed the Applicants' allegation that the RPD had failed to adequately consider their country documentation. The RAD reviewed the available documentation and found that the RPD panel made no error in giving greater weight to the current objective and comprehensive information from March 2017 in the National Documentation Package (NDP) than to the Applicants' dated and general country documents. The RAD also independently reviewed the available country documentation and agreed with the RPD's conclusion that the objective evidence did not rebut the presumption of state protection in Poland.

[21] The RAD found that the RPD did not make its state protection analysis in a factual vacuum. The RPD panel considered the Applicants' particular circumstances, including their employment history, levels of education, family support and periods of employment in London, England. The RAD concluded:

Accordingly, the RPD demonstrated that it not only considered the current, objective country conditions, but also proceeded to analyze the appellants' particular circumstances *and* failure to seek protection, and properly concluded that the appellants had not provided clear and convincing evidence to rebut the presumption of adequate state protection.

[22] The RAD also independently analyzed the country documentation, concluding that Roma in Poland face serious challenges but that the government had "made serious efforts, with concrete results, to provide protection to the Roma".

[23] Finally, with regards to the Prior RPD Decision, the RAD cited the above-noted excerpt from the RPD's decision and concluded that:

One panel of the RPD is not obligated to follow the reasoning or factual findings of another; here, the RPD provided clear and specific reasons for its own state protection analysis based upon the particular history of these appellants.

IV. Issues

[24] The Applicants raise two issues in this application:

1. Did the RAD apply the incorrect test for adequate state protection?
2. Was the RAD's conclusion that adequate state protection would be available to the Applicants reasonable?

V. Standard of review

[25] The question of whether the RAD applied the wrong test for adequate state protection is reviewed by this Court for correctness while its application of the test to the facts of the case is reviewed against the standard of reasonableness (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 38; *Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 16).

[26] The standard of reasonableness requires me to accord deference to the RAD's decision. This Court will only interfere if the RAD's conclusion regarding the availability of adequate state protection to the Applicants in Poland lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of this case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

1. *Did the RAD apply the incorrect test for adequate state protection?*

[27] The Applicants submit that both the RAD and the RPD erred in applying the proper state protection test. The Applicants cite a number of excerpts from the RPD decision which they allege demonstrate that the RPD panel may have identified the correct test but misapplied it to their circumstances.

[28] The Applicants' submissions focus on the RPD's decision but the decision under review in this application is that of the RAD. In any event, I find that both the RAD and the RPD correctly identified and applied the test for adequate state protection. The RPD and RAD panels stated that the onus was on the Applicants to rebut the presumption of adequate state protection by providing clear and convincing evidence of the Polish state's inability to protect its citizens. The panels returned to the test a number of times in their respective decisions, relating both the documentary evidence for Poland and the Applicants' evidence to the test. In my view, the Applicants' submissions regarding the identification and application of the state protection test by the RAD and, at first instance, the RPD, are better considered as submissions questioning the reasonableness of the RAD's Decision.

2. *Was the RAD's conclusion that adequate state protection would be available to the Applicants reasonable?*

[29] The Applicants submit that that the Decision was unreasonable for three reasons:

1. The RAD's analysis of the RPD's decision ignored the factual basis of the Applicants' claim and misstated certain aspects of their evidence.

2. The RAD failed to address the operational aspects of the Polish government's protection of its Roma population against the documentary evidence and against the Applicants' circumstances.
3. The RAD and the RPD did not explain their conclusion regarding the adequacy of Polish state protection for the Applicants against the Prior RPD Decision.

[30] I will consider the Applicants' first two submissions together as they rest on an assertion that the RAD failed to apply its state protection analysis to the facts of their case. I will then address the third submission regarding the Prior RPD Decision.

RAD's Factual Analysis

[31] The Applicants submit that the RAD and RPD assessed the adequacy of state protection in a factual vacuum. They argue that the panels did not address certain of the incidents the Applicants recounted, focusing solely on the December 2014 attack that resulted in their hospitalization. The Applicants also submit that both panels unduly relied on the fact that it was hospital personnel who called the police in December 2014. Further, they argue that the RAD and RPD erred in not addressing the Applicants' explanation for their failure to follow up with the police. Finally, the Applicants submit that the RAD did not assess the operational effectiveness of the Polish state protection apparatus against their specific circumstances.

[32] The Respondent submits that the RAD specifically considered the Applicants' submission that the RPD made its decision in a factual vacuum. In the Respondent's view, the RAD and RPD panels considered the Applicants' personal circumstances in assessing the adequacy of state protection and gave clear and specific reasons as to why they failed to rebut the presumption of state protection. The Respondent submits that the panels did not commit a

reviewable error by describing only some of the incidents raised in the Applicants' Basis of Claim (BOC) narrative. The Respondent states that, in upholding the RPD's decision, the RAD did not place an unreasonable burden on the Applicants. Rather, the RAD correctly stated that it was the Applicants' burden to demonstrate that they took all reasonable measures to seek protection.

[33] I find that the RAD did not assess the availability of state protection for the Applicants in a factual vacuum. While I agree with the Applicants that both the RAD and RPD panels unduly focussed on the fact that the hospital, and not the Applicants, called the police after the December 2014 attack, I find that the RAD's analysis of the Applicants' failure to engage with Polish authorities was reasonable when considered in its entirety.

[34] The RAD considered the Applicants' argument that the RPD made its decision in a factual vacuum:

[16] The RAD further does not agree with the appellants' argument the RPD erred by basing its state protection analysis in a "factual vacuum". In its reasons for decision, the RPD clearly demonstrated that it considered the appellants' particular circumstances, including their employment history, levels of education, family support remaining in Poland, former residence and housing, and period of employment and former residence in London, England. Accordingly, the RPD demonstrated that it not only considered the current, objective country conditions, but also proceeded to analyze the appellants' particular circumstances *and* failure to seek protection, and properly concluded that the appellants had not provided clear and convincing evidence to rebut the presumption of adequate state protection.

[35] The Applicants state that the factual vacuum to which they refer is the fact that neither the RPD nor the RAD considered the reasons for which they did not seek police protection in

Poland. However, it is clear in the Decision and in the RPD's decision that the two panels did consider the Applicants' explanation but found that it did not rebut the presumption of state protection. More specifically, the RAD reviewed the RPD's consideration of the December 2014 incident and the Applicants' explanation that their failure to follow up with Polish authorities was due to their fear of retaliation and the lack of responsiveness on the part of police. The RPD stated:

[12] The panel notes that the police were called when the claimants were hospitalized. The hospital officials called the police, not the claimants. The male claimant testified he gave information but did not follow up with the police as he was fearful of the men who assaulted him. The male claimant believes that none of the witnesses came forth due to the fear of the men who assaulted the claimants, and it appears the case was closed, as there were no witnesses. The panel does not find this nor the fact that no one came forth due to the claimants' ethnicity as a shortcoming of the police, it appears it was the fear of retaliation.

[36] The RAD noted that the RPD addressed the question of why the Applicants did not seek redress beyond the local police. Mr. Dyszko had testified that he could not approach other, higher level authorities due to his fear of retaliation and his lack of education. The Applicants also testified that there were no witnesses and that they did not see their attackers again. The RAD emphasized the RPD's statements that, even where there are deficiencies in state protection, a "refugee claimant who alleges a subjective fear must, in the absence of a compelling justification, take reasonable steps to access those services". The RAD concluded:

[14] The RPD determined that the appellants failed to demonstrate they took reasonable steps to access any services as it relates to state protection. In particular, the RPD concluded the appellants' responses about why they did not seek protection did not evidence a failure in state protection. Having independently reviewed the evidence, the RAD finds no error in the RPD's analysis or finding.

[37] Although the RAD panel's consideration of the Applicants' explanation for their reticence to go to the police was brief, it was reflective of the evidence before it.

[38] The Applicants submit that the RAD failed to consider the other discriminatory and violent incidents referred to in their narrative. The Applicants' BOC refers to fights occurring at the market where they sold their merchandise. The Applicants state that market security would not take action and, if police arrived, potential witnesses would disappear and the police would accuse the Applicants of calling them for no reason. The Applicants state that Mr. Dyszko often came home with black eyes but they provide no specific information regarding these incidents and make no reference to any involvement of the police or other authorities.

[39] The Applicants' references to fights in the market were general in nature. It is not clear whether the Applicants themselves were involved in any of the fights, particularly those in which either market security or the police were involved. Their evidence does not indicate who summoned the police or whether the Applicants spoke with the police. The only incident described in detail by the Applicants is the December 2014 attack. In light of the lack of information regarding the other incidents described in the BOC, I find that the RAD did not err in basing its state protection analysis on the December 2014 attack.

[40] The Applicants also submit that the RAD failed to assess the operational adequacy of state protection for Roma in Poland but the argument is not persuasive. The RPD undertook an extensive review of the operational elements of the protections and resources available to the Roma population in Poland. The RAD considered the RPD's analysis of the information in the

NDP and its discussion of the Applicants' personal circumstances and experiences in light of that information.

[41] The RAD also conducted its own assessment of the documentary evidence regarding the treatment of the Roma population in Poland. The panel considered the Applicants' evidence relating to the December 2014 attack and the reasons they provided for why they did not seek police protection or action. The RAD referred to the Applicants' background, employment history, education and living arrangements in Poland. The RAD noted both the efforts of the Polish government to provide protection and the concrete results of those efforts as confirmed in the documentary evidence.

[42] In my view, the RAD did not make its Decision in a factual vacuum. Its consideration of the documentary evidence for Poland and the Applicants' narrative and evidence was transparent and intelligible. Its conclusion regarding the Applicants' failure to rebut the presumption of adequate state protection was based on the lack of clear and convincing evidence of attempts to involve the police or other authorities outside of the statement Mr. Dyszko gave to police in the hospital. The RAD's assessment of the weight of this statement against the additional recourses available to the Applicants was reasonable and its denial of the Applicants' appeal was within the possible outcomes for the case.

The Prior RPD Decision

[43] Turning to the Prior RPD Decision, the Applicants submit that the RAD and RPD panels did not adequately explain why their state protection analyses and conclusions differed from

those of the Prior RPD Decision. They argue that the RAD could not reasonably come to an opposite conclusion regarding the adequacy of state protection in Poland for Roma based on the same objective country evidence. Counsel for the Applicants emphasized that they are not contesting the fact that the RPD and RAD could come to a different conclusion based on the facts before them; their focus is on the general finding in the Prior RPD Decision that state protection is not available to the Roma population in Poland. They position the argument as one of requiring consistency among RPD and RAD panels.

[44] I have carefully considered the Applicants' submissions in this regard and reviewed the Prior RPD Decision. I acknowledge the distinction drawn by the Applicants between a general finding as to state protection and the application by a decision-maker of the test for adequate state protection to the facts in a particular case. However, I find that the RAD made no reviewable error in its treatment of the Prior RPD Decision.

[45] The adequacy of state protection is in each case highly fact dependent. Almost inevitably, the adequacy of protection in a country is linked to the circumstances of the particular claimant(s) before a decision-maker and their ability to access state resources. Generally, a finding that adequate state protection is not available to a claimant in one case is not determinative of the adequacy of that protection to other claimants who belong to the same group or segment of a country's population. The analysis of state protection is too complex to give rise to a single answer of general application. A decision-maker is required to begin its analysis with an assessment of the nature of the state in question and its security and judicial processes; to then assess the operational effectiveness of those processes in the context of an identified group to

which the claimants belong; and to analyse the ability and actions of the particular claimants in accessing the available state protection.

[46] The Applicants rely on the case of *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6 (*Siddiqui*) in support of their argument. However, the nature of the finding at issue in that case contrasts sharply with that of a state protection finding. In *Siddiqui*, two RPD panels had addressed the same question: whether a division of the Mohajir Quomi Movement (MQM) was engaged in terrorism. The finding in each case was based solely on documentary evidence. In *Siddiqui*, the second of the two cases, the RPD made no reference to the contradictory findings of the other panel. The parties in *Siddiqui* confirmed that “the packages of documentary evidence in the two cases were the same, the timeframe the same, and the issue to be determined was the same” (*Siddiqui* at para 14). While the second RPD panel was not bound to follow the factual findings of another panel, Justice Phelan stated that its “failure to explain the basis for the different conclusion undermines the integrity of Board decisions and gives them an aura of arbitrariness which is no doubt not intended nor is it acceptable” (*Siddiqui* at para 19).

[47] In my opinion, the finding regarding MQM in *Siddiqui* was a discrete, objective determination that was not based on the particular facts before either of the RPD panels. As stated above, a state protection finding is necessarily linked to the circumstances of the claimants in question other than in cases involving exceptional country conditions.

[48] The Respondent cites the case of *Mendoza v Canada (Citizenship and Immigration)*, 2015 FC 251 (*Mendoza*), as an example of the narrow circumstances in which the concern regarding arbitrariness is present in state protection decisions. The court in *Mendoza* was assessing an RPD decision in which a Columbian applicant's claim for refugee protection was denied. The applicant's brother had previously been granted refugee protection in Canada. Justice Zinn stated (*Mendoza* at paras 24-25):

[24] Although there are some differences, Mauricio's refugee protection claim was based on the same agents of persecution, the same conduct in seeking state protection, and largely on the same facts, as Edwin's claim. Moreover, since it was accepted, the RPD must have found that state protection was not available to Mauricio in Colombia. As the applicants submit, at the very least, Mauricio was a similarly situated individual. However, there is no mention at all in the decision under review of the successful RPD decision regarding Mauricio's claim.

[25] This court has held that it is incumbent on the RPD Member when reaching a different result than was previously reached by another Member regarding a claim by a family member under similar circumstances, to explain why a contrary result was reached: *Mengesha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 431 at para 5, 184 ACWS (3d) 193, and *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6 at paras 18 – 20, 154 ACWS (3d) 673 [*Siddiqui*].

[49] Justice Zinn then referred to *Siddiqui* and stated that the different conclusion in the case before him undermined the integrity of the RPD's decisions and gave rise to the aura of arbitrariness.

[50] In the present case, there is no factual overlap between the Applicants' circumstances and those of the claimants in the Prior RPD Decision. In addition, I note that the panel in the Prior RPD

Decision did not conduct a comprehensive review of the available documentary evidence for Poland. The panel's conclusion was based on the experiences of the particular claimants.

[51] I find that the RAD did not err in conducting its own analysis of the Applicants' circumstances against the objective country documentation regarding the treatment of Roma in Poland. In the Decision, the RAD addressed the Prior RPD Decision and the RPD panel's reliance on *Varga v Canada (Citizenship and Immigration)*, 2014 FC 510. The RAD stated that one RPD panel is not required to follow the reasoning or factual findings of another. As the RAD noted, "the RPD provided clear and specific reasons for its own state protection analysis based upon the particular history of these appellants". Absent the type of factual overlap identified by Justice Zinn, the adequacy of state protection must be assessed in each case based on the facts, circumstances and country documentation presented to the decision-maker.

VII. Conclusion

[52] The application will be dismissed.

[53] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-4388-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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