Federal Court  Cour fédérale

Date: 20101222

Docket: IMM-2091-10

Citation: 2010 FC 1319

Ottawa, Ontario, December 22, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ROBERT ZUPKO
ZANET BENDIGOVA
(a.k.a. BENDIGOVA, ZANET)
KAMILA ZUPKOVA
SARA ZUPKOVA
ESTER ZUPKOVA
ROBERT ZUPKO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Principal Applicant, Mr. Robert Zupko, his common-law wife and children (collectively, the Applicants) are citizens of the Czech Republic. Because of alleged persecution in

the Czech Republic, due to their Roma ethnicity, the family seeks protection in Canada pursuant to ss. 96 and 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*).

[2] During their hearing before the Refugee Protection Division of the Immigration and Refugee Board (the Board), the Applicants were heard regarding their refugee claims. In addition, they presented evidence of statements made by the Minister of Citizenship and Immigration (the Minister), the Respondent in this application. These statements, in their view, establish that there was a reasonable apprehension of bias that the Board would be unable to reach a fair decision on their application.

[3] In a decision dated March 16, 2009, the Board determined that there were no grounds for the allegation of a reasonable apprehension of bias. In addition, having considered the balance of the evidence before it, the Board concluded that the Applicants were neither Convention refugees nor persons in need of protection under *IRPA*. In addition to some concerns about credibility of the Principal Applicant and his wife, the Board concluded that the Applicants had failed to rebut the presumption of state protection.

II. Issues

[4] The Applicants seek to overturn the Board's decision, raising the following issues:

1. Did the Board err in concluding that there was no reasonable apprehension of bias?

2. Did the Board err by relying on the wrong test for state protection?

3. Did the Board err:

a. in basing its finding that the Female Applicant's claim of sterilization lacked credibility on a misapprehension of the evidence and on an unreasonable negative inference drawn from the omission of the forced sterilization in the Personal Information Form (PIF) of both the Female and Principal Applicant;

b. in failing to consider the most recent documentary evidence on the lack of state protection for Roma persons; or

c. in failing to conclude that the failure of the police to attend the scene of a crime was evidence of the inadequacy of state protection?

III. **Analysis**

A. *Standard of Review*

[5] The first issue is a pure question of law; the Board's conclusion will be reviewed on a standard of correctness. The second issue – the application of the correct test to the issue of state protection – can also be considered to be a question of law reviewable on the standard of correctness. However, the final issues involve the overall conclusion of the Board as to the credibility of the Applicants and the existence of adequate state protection. The Board's reasons and

conclusions, on this issue, will be reviewed on a standard of reasonableness. On this standard, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

[6] I turn to the five issues argued by the Applicants.

B. *Did the Board err in concluding that there was no reasonable apprehension of bias?*

[7] At the hearing before the Board, the Applicants asserted that the statements by the Minister raised a reasonable apprehension of institutional bias. In their submissions, the Board could be unduly influenced by statements made by the Minister. It was argued that, since the Minister is directly involved with the appointment and reappointment of members of the Immigration and Refugee Board of Canada, an informed person viewing the matter realistically and practically would conclude that the decision maker would not be able to decide Czech Roma claims fairly.

[8] The Applicants relied on an April 2009 article containing the Minister's comments, a July 2009 magazine piece commenting on the Minister's comments, and statistical information comparing the results of the Czech Roma cases before the Board from 2008 and parts of 2009.

[9] In its decision, the Board provides an analysis of all of the arguments and supporting documents of the Applicants. The Board also had regard to relevant jurisprudence (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716,

Valente v. The Queen, [1985] 2 S.C.R. 673, 19 C.R.R. 354, *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, 2003 SCC 36, *Mohammad v. Canada (Minister of Employment & Immigration)*, [1989] 2 F.C. 363, 55 D.L.R. (4th) 321). On this issue, the Board concluded that:

> . . . I am satisfied that I, the IRB, and in particular, the Refugee Protection Division, have sufficient institutional independence, and that the circumstances outlined by counsel do not give rise to a reasonable apprehension of bias.

[10] Before me, the Applicants argue that the Board's conclusion was incorrect and that this Court should determine that the comments by the Minister give rise to a reasonable apprehension of bias.

[11] As the parties before me were aware, this very issue of reasonable apprehension of bias has been considered and dealt with in three separate decisions:

- *Dunova v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 438, 367 F.T.R. 89 (*Dunova*) (Justice Crampton);

- *Gabor v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1162 (*Gabor*) (Justice Zinn); and

- *Cervenakova v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1281 (*Cervenakova*) (Justice Crampton).

[12] In each of these cases, the Court rejected the arguments of the applicants. In the words of Justice Zinn, in *Gabor*, above, at paragraph 35:

> An informed person, viewing the matter realistically and practically and having thought the matter through, would not think it more likely than not that the Board would consciously or unconsciously decide a refugee claim of a Czech Roma unfairly.

[13] I also note that counsel for the Applicants before me acknowledged that he was counsel in the hearing of *Gabor* and that his arguments in that case were based on the same evidence.

[14] In light of the existing jurisprudence on this very issue, I am of the view that this case is one where the principle of judicial comity is directly applicable. As stated by Justice Lemieux in *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1025, 316 F.T.R. 49 at paragraphs 61-62:

> The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law. . . . [citations omitted.]
>
> There are a number of exceptions to the principle of judicial comity as expressed above they are:
>
> 1. The existence of a different factual matrix or evidentiary basis between the two cases;
>
> 2. Where the issue to be decided is different;
>
> 3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and
>
> 4. The decision it followed would create an injustice.

[15] In this case, none of the exceptions apply. As admitted by counsel for the Applicants, the "factual matrix" and the issue to be decided are identical. While the Applicants expressed disagreement with the decision in *Gabor*, they presented no argument that Justice Zinn had failed to consider legislation or binding authorities that would have produced a different result. Finally, I can see no injustice in the decisions of my colleagues.

[16] As a result, I adopt the reasoning and conclusion of Justices Zinn and Crampton in *Dunova*, *Gabor* and *Cervenakova*. That is, I conclude that an informed person, viewing the matter realistically and practically and having thought the matter through, would not think it more likely than not that the Board would consciously or unconsciously decide a refugee claim of a Czech Roma unfairly.

[17] However, even if I were not to apply the principle of judicial comity, I would still reach the same conclusion. Rather than set out an extensive analysis, that would be, in large part, repetitive of the reasons of my fellow judges in *Dunova*, *Gabor* and *Cervenakova*, I will highlight the key reasons for concluding that a reasonable apprehension of bias has not been demonstrated.

[18] The source of the Minister's comments is two news articles:

- In a National Post news article dated April 15, 2009, it was reported that the Minister, during an interview with Canwest News Service, made certain remarks about Roma refugee claimants from the Czech Republic, including that, "it is hard to believe that the Czech Republic is an island of persecution in Europe."

- The July 22, 2009 edition of the web edition of Embassy Magazine (http://embassymag.ca/page/printpage/political_interference-7-22-2009) reported comments of the Minister, including the following comment made on June 24, 2009: "If someone comes in and say the police have been beating the crap out of them, the IRB panelists can then go to their report and say, 'well actually, there's been no evidence of police brutality'." This article also referred to remarks of others, including Professors Peter Showler and Audrey Macklin, who were critical of the comments of the Minister.

[19] Without a first-hand account of the entire interview or speech of the Minister (for example, either a transcript or affidavit from someone who was present when the comments were made), I have no knowledge of the context in which the remarks were made. Similarly, comments attributed to Professors Peter Showler and Audrey Macklin have not been confirmed by the alleged authors. In the presence of the very serious allegation of apprehension of bias, one would expect better evidence than selective statements taken from media sources.

[20] I accept that the Minister influences Governor-in-Council appointments and reappointments of Board members. However, this is insufficient to found a claim of a reasonable apprehension of bias. Under *IRPA*, the Board is independent from Citizenship and Immigration Canada (CIC). The Board has its own chairperson. Every member of the Board is statutorily required to swear an oath of office requiring him or her to "faithfully, impartially and to the best of my knowledge and ability, properly carry out the duties of a (member) of the Immigration and Refugee Board". Members of the Board are appointed for set terms and are paid remuneration that is not dependent on how they

decide cases. They can only be removed from office for incapacity, misconduct, incompetence or conflict of interest (See, for example, *IRPA*, ss. 152, 153, 156, 161, 162 and 170; *Oath or Solemn Affirmation of Office Rules (Immigration and Refugee Board)*, SOR/2002-231.). I have no evidence, beyond bare speculation, that appointments are made on the basis of prospective members' views of the Minister's speeches or that the renewal of Board member appointments is made on the basis of, or influenced by, their refugee claim acceptance rates.

[21] Much reliance is placed by the Applicants on the reported statistics. The Applicants submit that the drop in the accepted refugee claims from Roma citizens of the Czech Republic is evidence of the negative impact that the Minister's statements have had. The Applicants allege that the Board's statistics show that such refugee claims had a 94% acceptance rate in 2008 and an 81% acceptance rate between January and March 2009, the first full quarter prior to the impugned statements. The acceptance rate in the quarter after the statements were made (July to September 2009) dropped to 30%, and the rate dropped to 0% in the last quarter of 2009.

[22] The problem with this argument is that there are other factors that could have affected the decline in acceptance rates. I do not intend to embark on an extensive statistical analysis (in part, because no such analysis was presented by an expert in such analyses). However, I observe that the acceptance rate could well have been a result of updated documentary evidence or by a number of abandoned claims. Indeed, the rate of acceptance had begun (albeit not markedly so) to decline even before the Minister's comments. Without expert guidance, it would be difficult to draw conclusions from such evidence unless the statistics were overwhelming conclusive on their face or unless the statistics were clearly supported by other reliable evidence. Statistics alone cannot establish a

reasonable apprehension of bias (see, *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, 52 Imm. L.R. (3d) 163 at para. 72; *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1043, [2002] 1 F.C. 559 at para. 130).

[23] The case of *Geza*, above, where the Court of Appeal found a reasonable apprehension of bias, is clearly distinguishable. In that case, the Court of Appeal examined the Board practice of developing a "lead case" which would be followed by subsequent panels. The "factual matrix" in *Geza* involved an internal process in which various Board members, lawyers and staff of CIC apparently contributed to and guided the decision-making process on certain cases. The situation before me is far different, in that there is no evidence – beyond a few reported comments and some questionable statistics – that impugns the independence of the individual members of the Board.

[24] In sum, there is simply insufficient reliable and persuasive evidence to conclude that the Minister's comments raise a reasonable apprehension of bias in the decision making of the Board on Czech Roma claims.

C. *Did the Board err by relying on the wrong test for state protection?*

[25] The Applicants argue that the Board erred in its analysis of state protection by applying a "serious efforts" test. The Applicants assert that the correct test requires that the Board consider whether "effective" protection has been or is being provided to the Roma community (*Bobrik v. Canada* (1994), 85 F.T.R. 13, [1994] F.C.J. No. 1364 (QL),; *Kraitman v. Canada (Secretary of State)* (1993), 27 Imm. L.R. (2d) 283, [1994] F.C.J. No. 1063 (QL); *Wisdom-Hall v. Canada*

(Minister of Citizenship and Immigration), 2008 FC 685, [2008] F.C.J. No. 851 (QL); *Deheza v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 521, [2010] F.C.J. No. 639 (QL)).

[26] Contrary to the submission of the Applicants, the test for state protection is whether there is "adequate" state protection (*Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, 69 Imm. L.R. (3d) 309). Further, the Federal Court of Appeal stated in *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130, 99 D.L.R. (4th) 334 at paragraph 7:

> 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.

[27] The Applicants have not persuaded me the Board erred in applying the wrong test for state protection.

D. *Did the Board err in its finding that the Female Applicant's claim of sterilization lacked credibility?*

[28] A central element to the Applicants' claim of persecution was the allegation that the Female Applicant had been forced to undergo a tubal ligation after the birth of her child. In its decision, the Board found that the Female Applicant's claim of having undergone forced sterilization lacked credibility. In particular, the Board drew a negative inference from the fact that the Applicants had not attempted to obtain any documentation from the hospital or from the psychiatrist whom she saw subsequently, which could have supported her claim. Moreover, the Applicants had not included this alleged event, which was central to their claim, in their original PIF. The Board was only

informed of the alleged sterilization two days prior to the hearing through a letter from the Applicants' counsel.

[29] The Applicants claim that they did ask for documents at the time of the alleged sterilization but were refused and that the Board's statements that "she did not try" to obtain the supporting document were wrong in fact. I do not agree with the Applicants' interpretation of the Board's reasons on this point. A review of the reasons make it clear that the Board understood that the Female Applicant had asked for and been refused a copy of the document at the time of the surgery. However, the point made by the Board is that she did not ask for the hospital documentation for purposes of this hearing. Moreover, the Board also noted that the Applicants could have requested corroborating documentation from her treating psychologist "who was in fact helping her". In the absence of any corroborating documentation, the Board's inference was not unreasonable.

[30] The Applicants claim the Board ought to have considered the demeanour of the Female Applicant when she testified and taken into account the shame suffered by her when the sterilization took place without her consent. According to the Female Applicant's affidavit, when she described the alleged events before the Board, she was "trembling and crying". The shame felt by the Female Applicant and her demeanour do not alter the fact that either she or the Principal Applicant could have tried to obtain documents from the hospital or the psychiatrist to support this critical element of their claim. I also note that the Applicants were given an opportunity to provide further documentation after the hearing and failed to do so; this failure certainly cannot be explained by the demeanour of the Female Applicant.

[31] Finally, the Applicants submit that the Board erred by drawing a negative inference from their failure to include the alleged forced sterilization on their PIFs. They point to s. 6(4) of the *Refugee Protection Division Rules*, SOR/2002-228, which permits the Applicants to make amendments to their PIFs prior to the hearing. In their view, once informed of the change (two days before the hearing), the Board could not draw any negative inference from the omission in the original PIF.

[32] It is well-established that the Board is entitled to draw a negative inference from the omission of a critical element of a claim in the PIF. In *Basseghi v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1867 (QL), 52 A.C.W.S. (3d) 165 at paragraph 33, Justice Teitelbaum provided a concise statement on the law on the issue of PIF omissions:

> It is not incorrect to say that answers given in a PIF should be brief but it is incorrect to say that the answers should not be complete with all of the relevant facts. It is not enough for an applicant to say that what he said in oral testimony was an elaboration. All relevant and important facts should be included in one's PIF. The oral evidence should go on to explain the information contained in the PIF.

[33] I see no principled reasons why the disclosure of a critical element two days before a hearing should prevent the Board from drawing a negative inference from the absence of such element in the original PIF. The point made by Justice Teitelbaum is not changed; claimants should include all important facts in the PIF and the Board is entitled to draw a negative inference from a failure to do so.

[34] In sum on this issue, the Board’s finding that the Female Applicant’s claim of forced sterilization was not credible was reasonably supported by the record.

E. *Did the Board err in failing to consider the most recent documentary evidence on the lack of state protection for Roma?*

[35] The Applicants submit that the Board erred by failing to consider relevant documentary evidence. In their view, this recent evidence demonstrates that violent attacks on the Roma are in fact on the rise.

[36] The Board is presumed to have considered all of the evidence before it. As stated by Justice Evans in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL)(*Cepeda-Gutierrez*) at paragraph 16:

> [T]he reasons given by administrative agencies are not to be read hypercritically by a court (Medina v. Canada (Minister of Employment and Immigration) (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, Hassan v. Canada (Minister of Employment and Immigration) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.

[37] The obligation of a tribunal was succinctly described by the Ontario Court of Appeal in *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, [2009] O.J. No. 3900 (QL) at paragraph 40:

> . . . the majority faulted the Tribunal for not referring to evidence that could have led it to decide differently. Again, I disagree. As I have described, reasons need not refer to every piece of evidence to be sufficient, but must simply provide an adequate explanation of the basis upon which the decision was reached. [Emphasis added.]

[38] Nevertheless, I do accept that the failure to refer to a specific and critical document (such as an individual's psychological report) may raise a presumption that the Board did not consider the document (*Cepeda-Gutierrez*, above, at para. 16). However, on the facts before me, the documentary evidence cited by the Applicants was not directed to the Applicants personally. The Board, in its reasons, demonstrated that it had read and understood the nature of the contrary documentary evidence and provided an adequate explanation of the basis upon which the decision was reached. I conclude that the evidence referred to by the Applicants was not ignored.

F. *Did the Board err in failing to conclude that the failure of the police to attend the scene of a crime was evidence of the inadequacy of state protection?*

[39] Before the Board, when dealing with one alleged attack, the Applicants claimed that the failure of the police to attend at the scene of the crime impugned the state's ability to protect its citizens from racially-motivated attacks. In responding to this argument, the Board commented that, "It is difficult to understand what benefit it would have been for police to go to the scene well after everyone had left." The Applicant asserts that the failure of the police to attend a crime scene is clear evidence of the inadequacy of the state protection and that the Board's conclusion was unreasonable.

[40] I might agree with the Applicants if the evidence had demonstrated that police always refuse to attend crime scenes. However, that is not the situation here. Reading the balance of the paragraph in which the impugned statement is contained provides context for the remark. In the specific situation, where the Applicants were unable to provide any details of the alleged crime, the Board

concluded that this one-time failure to attend a crime scene did not bring the overall ability or willingness of the state to provide protection into question. There is no error.

IV. Further Submissions

[41] Because the case of *Cervenakova*, above, was released on the day of oral submissions in this case, I allowed parties to make further written submissions on how the decision in *Cervenakova* could impact on this judicial review. Both parties provided comments. The Applicants drew to my attention a reference in the decision to "a further inflammatory remark made by the Minister" and provided arguments on how this remark could be seen to raise a reasonable apprehension of bias. I have disregarded this attempt to augment the record before me in this case. However, even if I were inclined to consider this new evidence, it would not change my decision in this judicial review.

[42] Further, in their written submissions, the Applicants asserted that the Court, in *Cervenakova*, and the Respondent, in this case, incorrectly applied the test for actual bias rather than the test for a reasonable apprehension of bias. The arguments made by the Applicants may be improper as they could have been made in the hearing of this matter. However, to the extent that they are proper response to the request for submissions and having carefully read the decision in Cervenakova, I am not persuaded that Justice Crampton applied the incorrect test. Accordingly, the principle of judicial comity remains applicable.

V. Conclusion

[43] For these reasons, the application for judicial review will be dismissed.

[44] The Applicants have proposed the following question for certification:

> Do unequivocal comments made by the Minister of Immigration [*sic*], namely that "it's hard to believe the Czech Republic is an island of persecution in Europe" give rise to a reasonable apprehension of bias, notwithstanding the contemporaneous release of IRB issue papers that are not unequivocal and are inconclusive on the same issue, and given the dramatic drop in the acceptance rate of Czech Roma claims over the relevant period."

[45] Alternatively, the Applicants propose the following question:

> Can opinions expressed by a Minister about the resolution of cases assigned to an independent tribunal give rise to a reasonable apprehension of bias, even where those opinions draw selectively on internal documents produced by the independent tribunal?

[46] The Respondent opposes certification of either question.

[47] As acknowledged by the Applicants' counsel, these are the same questions that were proposed to Justice Zinn in *Gabor*, above. In *Gabor v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1231, Justice Zinn declined to certify either of these questions. For the same reasons provided by Justice Zinn, I also decline to certify these questions.

[48] In a letter to the Court dated December 21, 2010, counsel for the applicants proposed three revised questions for certification. No further time was requested by counsel or provided by the Court for proposing questions for certification. The Court rejects the newly formulated questions.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2091-10
STYLE OF CAUSE:	ROBERT ZUPKO ET AL. v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 14, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	DECEMBER 22, 2010

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