

Federal Court



Cour fédérale

**Date: 20130910**

**Docket: IMM-11329-12**

**Citation: 2013 FC 942**

**Ottawa, Ontario, September 10, 2013**

**PRESENT: The Honourable Mr. Justice Simon Noël**

**BETWEEN:**

**MUKHAILO DUCHKO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Protection Division [RPD], dated August 13, 2012 denying the Applicant refugee protection.

**I. Facts**

[2] The Applicant is a 52-year-old man from Sambor, Ukraine. He came to Canada once in 1998 to buy dentistry equipment and stayed for a week.

[3] He fears the Ukrainian nationalists who beat him in May 2007 as he was coming back home from work. Following the incident, he was hospitalized in Sambor for six days.

[4] His house's front door was also defaced in mid-November and his car was stolen in December 2007.

[5] He left Ukraine on November 19, 2008, went to Moscow to purchase a false Israeli passport and traveled to Canada.

## **II. Decision under review**

[6] The RPD did not believe the Applicant's fear to be well-founded and noted credibility issues with regards to the story presented.

[7] First, at the hearing, when the Member asked the Applicant if the Ukrainian nationalists he fears have a name, he said that he did not know them. In his narrative, he referred to this group as the "Ukrainian Nationalist Army," and the Member therefore drew a negative credibility determination from this contradiction.

[8] Second, the RPD noted that the Applicant contradicted himself, as he explained at the hearing that he had previously come to Canada in 2000 but indicated in his Personal Information Form [PIF] that he came in August 1998 for the purpose of visiting a cousin and buying dentistry equipment.

[9] The Applicant claims that he is targeted by the nationalists because he is Jewish. He also explained that his father was Ukrainian and his mother was Jewish, that they were not very religious and that his former wife was Armenian. The RPD determined that the Applicant and his family were not practicing Jews or at least were not identifiable as Jewish people, and that he was therefore not targeted because of his Jewish ethnicity.

[10] The RPD also noted that the Applicant had no corroborative evidence showing that he had been hospitalized, absent from work, and interviewed by the police at the hospital, and that he had no photographs of the injuries he claims to have sustained during the attack by the nationalists in May 2007 after work in Turka. Moreover, the Applicant has no evidence that his door was defaced with anti-Jewish marks in November 2007. The RPD did consider that a claimant's testimony is presumed to be true by virtue of *Maldonado v Canada (Minister of Employment and Immigration)*, (1979), 31 NR 34, 1 ACWS (2d) 167, but nonetheless determined that the utter lack of documentary evidence fuels enough doubt against the credibility of the Applicant. The RPD further considered that even if it had been shown that he had been attacked, nothing suggests that it was a racially-motivated attack rather than a beating motivated by robbery, as he was leaving a dental clinic where he worked. The RPD also reviewed documentary evidence showing that, as of 2011, hate crimes directed against non-Slavic ethnic and religious minorities, including the Jewish community, continued to decrease. The RPD therefore determined that his fear is not well-founded.

[11] As for the Applicant's car that has been stolen in December 2007, the RPD concluded that it cannot be established, on the balance of probabilities, that the incident was linked to his Jewish ethnicity, and it also found that it could as well be due to criminality, as discussed above.

[12] Moreover, the Applicant indicated that there were not too many Jewish people who worked in Turka, which made him noticeable there. When asked why he did not work in Sambor, where he lived and where many Jewish people work, he simply answered negatively. The Applicant decided to move to the Carpathian Mountains, an act that the RPD found did not make sense since he had the alternative of working in Sambor, where he lived. The Applicant indicated that it would be hard for him, as a Jew, to register to work in Sambor, which the RPD found to be not credible as the Applicant explained that a number of Jewish people work there. The RPD therefore concluded that the Applicant could have found work in Sambor, albeit not in his specialty and that his allegation that he moved to the Carpathian Mountains was solely an embellishment of his story.

[13] Finally, the RPD considered that his two adult sons still live in his home area of Sambor and have not experienced any problems with the nationalists.

[14] The RPD added that although the Applicant provided a letter from a Jewish community centre, it was not satisfied that it corroborates the risk he would face should he return to Ukraine.

### **III. Applicant's submissions**

[15] The Applicant first submits that in coming to the conclusion that the Applicant was not identified as a Jew in the Ukraine, the RPD ignored the fact that his accent and pronunciation in Russian make him easily identifiable, that the attackers were members of an anti-Semitic nationalist paramilitary group, that other Jews have been harassed and the targets of racist insults by the same group, that the Applicant was the target of anti-Semitic vandalism, and that the Applicant has begun to practice his faith in Canada, as he felt that he was finally free to do so for the first time in his life.

It was therefore unreasonable to conclude that the Applicant was not targeted because of his Jewish identity.

[16] Moreover, the RPD needed to consider the evidence of his religious practice in Canada in order to properly assess his prospective risk of persecution.

[17] The Applicant argues that it was unreasonable for the RPD to examine the 2007 attack against the Applicant in light of documentary evidence for the year 2010, which establishes that hate crimes against non Slave have decreased. A decrease in hate crimes would mean that the rates were higher in the previous years, when the attack actually occurred. In addition to this, the same report states that hate crimes directed at minorities increased through 2008, and other reports, which were not considered by the RPD, indicate that hate crimes against Jews were at record-high levels at the time of the attack and that the Ukrainian government was not able to protect its citizens.

[18] The Applicant adds that the RPD committed an error in stating that he was attacked while leaving a professional dental clinic, as he was in Sambor when it occurred, which is where he lives. Moreover, there is no evidence that he was robbed. The Applicant further submits that the RPD failed to raise its suspicion that the attack was not a hate crime at the hearing and therefore breached procedural fairness.

[19] Second, the Member ignored the fact that the Applicant's attack took place in Sambor, and it seems from his decision that the Member thought the attack occurred in Turka. Indeed, the RPD states in its decision that he could have found work in Sambor although the Member never

questioned the Applicant about this possibility and, moreover, it would be illogical to seek work in the city where he was attacked. The RPD further failed to consider that it was his apartment door in Sambor that was vandalized.

[20] The Applicant also argues that, contrary to what is indicated in the decision, the Member never asked him whether he sought work in Sambor but rather whether he moved to Sambor, to which he replied negatively and explained that he could not move to Sambor, as he was already living there. Moreover, contrary to the RPD's decision, the Applicant never stated that he would not be able to work in Sambor.

[21] Third, the Applicant argues that the RPD came to an unreasonable conclusion when it found that he did not know the name of the group of men who attacked him when asked at the hearing, which is inconsistent with his PIF, in which he stated that the group of men was the Ukrainian Nationalists Army. Indeed, the Member did not ask whether the group had a name but wanted to know the names of the attackers. The Member was under an obligation to raise his concern about inconsistencies relating to the credibility findings during the hearing, which he did not.

[22] Fourth, the Applicant submits that the RPD's determination that the Applicant lacks credibility because he testified having previously come to Canada in 2000 but wrote in his PIF that he came in 1998 is unreasonable, as the Applicant clearly explained at the hearing that he came to Canada ten years before his second trip in 1998. Moreover, the timing of the Applicant's first visit in Canada has no relation to the persecution which the Applicant fled in 2007-2008.

[23] The Applicant also argues that the RPD's determination according to which he has submitted no evidence to support the fact that he was attacked in 2007 was drawn without regard to the evidence to the effect that he missed work in May 2007. Moreover, the RPD did not say anything about the explanations provided by the Applicant as to why no hospital records, photographs of his injuries, and no police reports were submitted.

[24] The Applicant further submits that the RPD's finding that his sons were not in danger in Sambor is erroneous, as he failed to ask him whether they can be identifiable as Jews.

[25] Finally, the Applicant argues that it was procedurally unfair of the RPD to draw conclusions on the matters related to the non identification of the Applicant as Jewish, on whether or not the May 2007 attack was religiously motivated, and the identity of the attackers without raising them with the Applicant so as to give him an opportunity to respond.

#### **IV. Respondent's submissions**

[26] The Respondent submits that the determination of a claimant's credibility is within the jurisdiction of the RPD. It has well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility and the subjective fear of persecution of a claimant.

[27] The Applicant was not able to relay information about his alleged persecutors, nor could he establish that his sons are unsafe in the region where he was persecuted.

[28] Moreover, the Applicant did not provide corroborative evidence of the one attack on which his claim is based. There is no record of hospitalization, no record of missed work, no photographs of the alleged injuries, and no evidence of an interview by police. It has been recognized that the Court may draw a negative credibility finding from a lack of corroborating evidence where there is a reason to doubt an applicant's claim, as in the present case. Such evidence was arguably available. Furthermore, there was also no corroborative evidence for the front door incident and theft of the Applicant's car.

[29] On the finding that the Applicant was not identifiable as a Jew, the Respondent submits that it is well supported by the fact that only one of the parents was Jewish, that they were not very religious and that he did not attend a Jewish Temple in the Ukraine.

[30] On the question of whether or not the May 2007 attack was economically or religiously motivated, it is argued that since there is a lack of corroborative evidence, it was not unreasonable to conclude that it may not have been caused for a religious purpose.

[31] In response to the documentary evidence of 2010, argument showed that hate crimes had decreased, it is noted by the Respondent that the report indicates that hate crimes have declined and that this is relevant to any future risk of persecution.

[32] On the location of the May 2007 assault, the Respondent blames the Applicant for presenting unclear evidence as to where it occurred and that, therefore, the Board's interpretation is reasonable. Having said that, counsel does admit that the RPD "mistakenly believed" that the



Applicant was assaulted in Turka, his place of work, when in reality it was in Sambor. For the Respondent, it is an innocent error caused by the Applicant's imprecise testimony.

[33] In reply to the argument of the Applicant based on ambiguous questioning on the part of the RPD (asking for the names of attackers rather than the name of the group), the Respondent explains that the Applicant had opportunities to specify the group in question and that the end result shows that the oral testimony was inconsistent with his written statement.

[34] The Respondent also suggested that it was reasonable for the RPD to make negative inference arising from his oral testimony about his 1998 visit to Canada (he said at one time that it was in 2000 before correcting himself).

[35] Finally, on the question of procedural fairness, the Respondent considers that when required, the RPD's concerns were communicated and that there is no obligation to put all concerns before the Applicant for comments.

## **V. Issues**

1. Did the RPD commit an error in determining that the Applicant's fear is not well-founded and that he is not credible?
2. Did the RPD deal procedurally fairly with the Applicant when concluding on certain matters without informing the Applicant?

**VI. Standard of review**

[36] The RPD's determination regarding the credibility of the Applicant and whether he established that he has been subjected to persecution in the Ukraine are to be reviewed under the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). The standard of correctness will be used to assess the arguments of the Applicant that raise issues of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

**VII. Analysis**

[37] Since this judicial review shows that some of the findings made by the RPD were based not only on erroneous facts but also on wrong premises, these findings are such that they render the decision unreasonable. Therefore, it will not be necessary to deal with the procedural fairness issue.

[38] The RPD came to the conclusion, on a balance of probabilities, that the Applicant was not identifiable as a Jewish person. This finding is determinant. It is the basis for the decision made. Without it, all of the findings made could have been different. The RPD determined, on that finding, that the Applicant had not been targeted because of his Jewish heritage.

[39] The finding was made because only his mother was Jewish, because the family was not "very religious," as admitted by the Applicant, and also because he was married to an Armenian lady. The RPD did not mention nor comment on the PIF information of the Applicant that he was identifiable as a Jew because of his accent or pronunciation in Russian.

[40] Since this finding is so crucial to the decision, this Court considers that, at a minimum, the RPD should have noted this fact before concluding. Not having done so renders this vital conclusion unreasonable.

[41] But, also as important, the RPD clearly shows a misconception of important facts which brings it to draw a wrong conclusion.

[42] Although being told by counsel for the Applicant at the hearing that the May 2007 attack occurred in Sambor on his way back from work in Turka, the RPD wrote its decision as if the incident had occurred near his place of work in a dental office. From this lack of understanding, two important findings were made without any supporting evidence.

[43] Because the RPD wrongly associated the attack to have occurred near the Applicant's place of work in Turka, a professional dental clinic, "a scenario no doubt attractive to criminal elements," it then concluded that it was economically motivated rather than religiously based. This is wrong and of significant importance to the decision-making process.

[44] The RPD also drew another negative inference based on this same misconception of the location of the May 2007 attack when it reproached the Applicant for not having worked in Sambor. Had the RPD understood that Sambor was the location of the attack, this negative inference could not have been made, or it would have been dealt with differently.

[45] In light of all of these important flaws in the decision rendered by the RPD, it is just impossible to give it a reasonable qualification.

[46] It is in the interest of the parties that this decision be quashed so that a new panel deals with all pertinent matters arising from this application.

[47] The parties were asked to submit a question for certification if they so decide but none have been submitted.

**JUDGMENT**

**THEREFORE, THIS COURT ORDERS AND ADJUGES that:**

1. This judicial review be granted.
2. The decision of the RPD dated October 17, 2012 is quashed.
3. A new panel will reconsider the matters.

“Simon Noël”

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Judge

Federal Court



Cour fédérale

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-11329-12

**STYLE OF CAUSE:** DUCHKO v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** August 28, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** NOËL J.

**DATED:** September 10, 2013

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