

Federal Court



Cour fédérale

**Date: 20140527**

**Docket: IMM-1673-13**

**Citation: 2014 FC 506**

**Ottawa, Ontario, May 27, 2014**

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

**BETWEEN:**

**EUGENIUSZ KOZLOWSKI  
DAWID GRZESKIEWICZ  
MALGORZATA KOZLOWSKA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. and Mrs. Kozlowski and their nephew Dawid, over whom they have custody, are Polish citizens of Roma origin. They have sought asylum here as they say they fear persecution by skinheads should they be returned to Poland. A member of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada dismissed their application. He held they were not to be believed and might not even be who they claim to be. However, he

purportedly left credibility aside and determined that, in any event, adequate state protection was available to them in Poland. This is the judicial review of that decision.

[2] The Member made a number of errors in his findings of fact, errors on the face of the record. Counsel for the Minister submits that these errors were not determinative and, in any event, the analysis of state protection stands up to judicial scrutiny.

[3] I disagree. Many of the findings which pertain to credibility arise from confusion in the mind of the Member. He got some things right during the hearing, but said quite the reverse in his decision. He also raised a point in his decision which he had not put to Mr. Kozłowski during the hearing. This smacks of procedural unfairness.

[4] With respect to state protection, his suspect findings on credibility permeated his analysis. While there may well be adequate state protection in Poland, one would not know it from the Member's analysis as he applied the wrong test.

[5] Consequently, this application for judicial review shall be granted and the matter shall be referred back to another Member of the RPD for redetermination.

#### I. Standard of Review

[6] The standard of review on findings of fact is reasonableness. Although assessment of state protection is a mixed finding of fact and law, it is also subject to review on the reasonableness standard. Section 18.1 of the *Federal Courts Act* should be kept in mind.

Subsection 4 provides that this Court may grant relief if satisfied, among other things, that the Tribunal: "...failed to observe a principle of natural justice, procedural fairness" or "...based its decision or order on an erroneous finding of fact...without regard for the material before it."

## II. The Facts

[7] Some care had to be exercised in ascertaining the facts. On marriage, Mr. Kozłowski took the surname of his wife. Consequently, the surname of his two brothers, who figure in this application, Adam and Robert, is different. The transcript of the hearing shows that the Member had got it right, but in his reasons for decision got it wrong. This error had to greatly influence the Member's thinking with respect to credibility.

[8] Mr. Kozłowski's brothers, Adam and Robert, were twins. Robert is alive. Adam is dead. Adam, not Robert, was the father of Dawid.

[9] Robert's medical information was produced. The transcript shows that it was produced to show what had happened to a similarly placed individual. The medical reports indicate personal injury, which may have been caused by skinheads. However, the Member thought these reports were produced to show that Robert was dead.

[10] Dawid's medical report indicates that his father is Piotr. This was one of the factors which led the Member to conclude that he was not satisfied as to the identity of the claimants. However, the applicants were not questioned with respect to the medical report. There may well be an innocent explanation. Perhaps Piotr is a patronym. It is a principle of procedural fairness

that one cannot undermine the credibility of a witness by not questioning him on a document which is in the record. This is consistent with the principle set out more than a century ago by the House of Lords in *Browne v Dunn* (1893) 6 R 67.

[11] One of the events which caused the family to leave Poland was an attempted rape on Mrs. Kozłowska. The Member referred to her testimony. However, she did not testify at all!

[12] I cannot segregate the Member's findings of lack of credibility from the errors in his own mind, and so have to hold that the decision on this issue is unreasonable.

### III. State Protection

[13] The Member should have considered Robert's medical reports as possibly supporting the proposition that the applicants would face persecution if returned to Poland because of what happened to a similarly situated individual.

[14] The Member said that Mrs. Kozłowska should have reported the attempted rape to the police. She did not. However, he did not take into account gender sensitivities.

[15] While there may well be adequate state protection available to the Kozłowskis should they return to Poland, one would not know it from the Member's analysis. He focused on steps taken by the Polish government to improve the daily life of its Roma citizens. This is most commendable, but it is not the issue before the Court. The issue is state protection and there was no adequate analysis in that record.

**JUDGMENT**

**FOR REASONS GIVEN;**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted.
2. The decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated January 30, 2013, in file numbers TB1-20929, TB1-20930 and TB1-20939, is quashed.
3. The matter is referred back to another Member of the RPD for redetermination.
4. There is no serious question of general importance to certify.

“Sean Harrington”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1673-13

**STYLE OF CAUSE:** EUGENIUSZ KOZLOWSKI ET AL v MCI

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 22, 2014

**JUDGMENT AND REASONS** HARRINGTON J.

**DATED:** MAY 27, 2014

**APPEARANCES:**

Geraldine MacDonald

FOR THE APPLICANT

Aleksandra Lipska

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Geraldine MacDonald  
Barrister & Solicitor  
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General of  
Canada  
Toronto, Ontario

FOR THE RESPONDENT