| Federal Court |  | Cour fédérale |
|---|---|---|

**Date: 20100511**

**Docket: IMM-5553-09**

**Citation: 2010 FC 512**

**Ottawa, Ontario, May 11, 2010**

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

**BETWEEN:**

**IMRICH DUDA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

## I. INTRODUCTION

[1] This judicial review on a negative pre-removal risk assessment (PRRA) raised a number of issues concerning state protection for Romas in the Czech Republic and procedural fairness. It also raised as an issue the scope of s. 101(1)*(c)* of the *Immigration and Refugee Protection Act* (IRPA) which has the effect of depriving the Applicant as an adult of a right to file a refugee claim because his parents, while the Applicant was a minor, withdrew the family's refugee claim.

[2] A stay of deportation had been granted by Justice Snider.

## II. FACTS

[3] The Applicant, a Czech citizen, claimed a fear of persecution due to his Roma ethnicity. CIC had concluded that the Applicant was ineligible to file a refugee claim by reason of s. 101 of IRPA. That judicial review was late by eight months and Justice Russell denied leave. However, the issue was raised in the context of the challenge to the PRRA decision.

[4] At the age of 11, in October 1997, the Applicant came to Canada with his parents, fleeing alleged persecution in the Czech Republic. The parents withdrew the claim in December 1997 and returned home.

[5] In 2009, the Applicant, his wife and children fled to Canada. Upon being advised that he was not eligible, due to s. 101(1)*(c)*, to file a refugee claim, the Applicant requested a PRRA.

[6] In the Applicant's PRRA, he alleged that Romas were refused public services and personal service in the Czech Republic. The Applicant and his wife outlined numerous instances of abuse to them and their children.

[7] In the negative PRRA decision, the Officer cited at length from the European Commission against Racism and Intolerance Report (ECRI Report). That report was issued 10 days before the

PRRA decision. The Applicant was not given notice of the ECRI Report and afforded an opportunity to comment upon it.

## III. ANALYSIS

[8] The Applicant raised a number of procedural fairness and jurisdiction arguments which are subject to the "correctness" standard of review as directed in *Dunsmuir v. New Brunswick,* 2008 SCC 9. While the actual finding of state protection is subject to deference and must meet the "reasonableness" standard of review, failure to consider relevant factors or reliance on irrelevant factors is a legal error.

[9] A PRRA officer is not required to give a copy of every document referred to by the officer where those documents reiterate or consolidate existing information already available to an applicant. However, *Mancia v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [1998] 3 F.C. 461 holds that fairness dictates that documents not generally available or not in the documents centre must be disclosed.

[10] The Applicant's case on non-disclosure/fairness is intertwined with the arguments concerning the failure to consider evidence or reliance on improper evidence.

[11] The ECRI Report is not just a consolidation of existing evidence but contains references to several documents which are internal government documents. These non-standard documents

played an important role in the ECRI Report and yet the Applicant had no access to either the ECRI Report or these non-standard sources.

[12] The principle applicable in this situation is set forth in *Zamora v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1414 at paragraph 18:

> **18** The documents in question were not standard documents such as Human Rights Watch, Amnesty International or country reports issued under governmental authority, but rather the result of specific research on the internet carried out by the PRRA officer. That research, including such documents she may have found were beneficial to Mr. Aguilar Zamora, should have been disclosed and he should have been given an opportunity to respond. It cannot be said with any confidence that the documents were not novel, or significant.

[13] The Respondent is unable to explain the reason for the failure to notify the Applicant of the existence of the ECRI Report. While that Report may not be the only documentary evidence relied upon by the Officer, it is evident from the decision that it played a critical role in the decision. The administrative convenience or efficiency (a benefit to the public) in issuing the PRRA decision quickly does not justify withholding the existence of the Report issued 10 days before and then relying upon it in such large measure.

[14] The reliance on the ECRI Report and its non-disclosure is compounded by the failure to address the Applicant's evidence that state protection did not exist or was not generally effective. This is particularly important given the Officer's treatment of the nature, type and effectiveness of efforts in respect to law enforcement and anti-discrimination.

[15] The Officer's decision exhibited selective reading of the ECRI Report. It is trite law that not all evidence need be referred to but where the evidence is critical, the Court must be assured that there is a legitimate basis for concluding that the important evidence was considered.

[16] In the wide-ranging reliance on the ECRI Report, there are a number of failures to reference matters in the ECRI Report which pointed to significant deterioration of conditions for Romas. These included:

- omission of comments showing the limitations on the ability of the Ombudsman to address problems for Romas;
- failure to mention the Report's negative or critical comments toward the Czech government;
- the acceptability of negative comments directed towards Romas and made by high ranking officials;
- ignoring the failure to establish a police complaints organization; and
- the absence of comprehensive non-discrimination legislation.

[17] Although the Officer does refer to some negative comments, the critical comments are screened out and there is no evidence that they were considered.

[18] Therefore, the decision cannot withstand a review of either the fairness of the process or a proper consideration of relevant evidence. On those grounds, judicial review must be granted.

[19] The Applicant raised the issue of s. 101(1)*(c)* with particular focus on the failure to appoint a designated representative. Justice Russell has already denied leave on this issue which was raised well outside the applicable time limits.

[20] Whether s. 101(1)*(c)* is sustainable in law may be an important issue, as it may apply to children whose parents' conduct may forever foreclose their own independent refugee claim. The Respondent's response that a PRRA takes care of any conceptual difficulties with that issue, given the recognized differences between s. 96 and 97 of IRPA, is a matter for serious debate. However, it is unnecessary to decide those issues in order to resolve this judicial review.

[21] As the Respondent's concern about the certification of a question was dependent on a decision in respect to s. 101(1)*(c)*, it is not necessary for the Court to afford the parties a right to comment on a "question".

## IV. CONCLUSION

[22] Therefore, this judicial review will be granted, the PRRA decision quashed and the matter remitted for a new determination before a different officer.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the application for judicial review is granted, the PRRA decision is quashed and the matter is to be remitted for a new determination before a different officer.

"Michael L. Phelan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-5553-09 |
| **STYLE OF CAUSE:** | IMRICH DUDA<br><br>and<br><br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | May 3, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Phelan J. |
| **DATED:** | May 11, 2010 |

**APPEARANCES:**

| | |
|---|---|
| Ms. Katherine Ramsey | FOR THE APPLICANT |
| Ms. Nicole Rahaman | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| MS. KATHERINE RAMSEY<br>Barrister & Solicitor<br>Toronto, Ontario | FOR THE APPLICANT |
| MR. MYLES J. KIRVAN<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |