Federal Court  Cour fédérale

Date: 20101222

Docket: IMM-1864-10

Citation: 2010 FC 1322

Ottawa, Ontario, December 22, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

**ZDENA DUNKOVA, KLARA DUNKOVA,
JAROSLAV DUNKA, DOMINIK DUNKA,
NATALIJA DUNKOVAV, DAVID DUNKA,
JAROSLA DUNKA**

Applicants

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 4, 2010, concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the applicants

do not have a well-founded fear of persecution in the Czech Republic on a Convention ground, nor would their return to the Czech Republic subject them personally to a risk to their lives, or to a risk of cruel and unusual treatment or punishment, or of torture.

FACTS

Background

[2] The applicants are a family of six citizens of the Czech Republic: Zdena Dunkova, the principal applicant, her husband, Jaroslav Dunka, and their four minor children, David Dunka, Klara Dunkova, Natalija Dunkova and Dominik Dunka. They arrived in Canada on July 17, 2008, and claimed refugee status. The claims of all six individuals were heard jointly by the Board.

[3] The applicants claim that they have been persecuted in the Czech Republic because of their Roma ethnicity. On her personal information form (PIF), which was relied upon by all six applicants, the principal applicant provided examples of ill treatment, discrimination, and physical violence suffered by the applicants in the Czech Republic, which formed the basis of their claim for protection. As listed on the PIF, these incidents included the following:

1. An ongoing pattern of ill treatment and discrimination:

    i. At paragraph 1 of the PIF narrative: “Every shopping trip for us meant abuse, either on the street or in the stores (assuming we were even allowed in).”
    ii. At paragraph 4 of the PIF narrative: “On numerous occasions my wife and small daughter were standing alone at a bus stop. When the bus appeared, it would drive by and not stop for her. However, if there were other non gypsy people waiting for the bus with her, the bus would stop”.
    iii. At para 5 of the PIF narrative: “When I was looking for work, I would call about a job opening and have an interview set up. When I got to the interview and the place saw I was a gypsy I was told the job was no longer available. This happened many times.”

2. Isolated physical attacks upon the applicants:

i. Shortly after the birth of her daughter in 2001, the principal applicant was beaten in the street by a group of people. The beating was severe enough that it required her to seek treatment at a hospital. At the hospital, she was made to wait in an isolated room for a very long time before anyone attended to her.

ii. On April 27, 2006, the principal applicant was again attacked by a group of people, this time on a bus. She reported the incident to the police but no investigation was conducted. When she went to the police station to follow up on the incident, she was told to leave the station.

iii. On June 6, 2007, the principal applicant and her husband were verbally attacked at a shopping centre. When he responded to the taunts, her husband was beaten. Visitors at the mall did not come to their assistance; rather, a store owner complained that Roma shoppers caused problems. The couple reported the incident to the police but received no follow-up.

[4] At her interview with an immigration officer at the port of entry, the principal applicant stated that she lost a child as a result of the attack on her in 2006.

[5] At the hearing before the Board, the principal applicant's testimony expanded upon the incidents of physical injuries suffered by the applicants in the Czech Republic. She provided the following additional details:

1. The principal applicant testified that her husband went to the hospital for his injuries following the June 2007 incident, where he was subjected to the same treatment to which she had been subjected in 2001 – namely, isolation in a separate waiting room and a long delay before attendance. She stated that she asked for a medical report but was not given one.

2. The principal applicant testified that she went to the police to report the 2001 incident and injuries. She further testified that she followed up with the police approximately two months later, but was told that they could not find any report of the incident.

3. The principal applicant testified that there were skinheads in the Czech police force.

4. When questioned by the Board about her statement to the immigration officer regarding losing her child in 2006, the principal applicant testified that she had lost a child. She stated that she was forced to wait in a separate waiting room for eight hours after arriving at the hospital, despite repeatedly telling hospital staff that she was bleeding and needed help. The doctor who finally attended told her that she had lost her baby. She testified that she went to

> the police but they told her that they would not do anything to help. She testified that she considered going to a lawyer but did not have enough money.

Decision under Review

[6] On March 4, 2010, the Board dismissed the applicants' refugee claims because it found that they did not establish a well-founded fear of persecution based on a Convention ground should they be returned to the Czech Republic, nor did they establish that they would be personally subjected to a risk to life, or cruel or unusual punishment, or a danger of torture if returned to the Czech Republic.

[7] At paragraph 11 of its reasons, the Board stated the determinative issue before it:

> ¶11. The determinative issue is whether there is a serious possibility that the claimants will be persecuted if they return to the Czech Republic by reason of their Roma ethnicity.

[8] The Board considered the principal applicant's testimony and found discrepancies among (1) the principal applicant's testimony at the hearing, (2) her PIF, and (3) her port of entry interview. Based upon these discrepancies, the Board found the principal applicant to be not credible for the following reasons:

1. The Board considered the principal applicant's testimony regarding the June 2007 incident in which her husband was beaten while responding to taunts. In particular, the Board considered the principal applicant's explanations for why she had failed to mention that her husband had gone to a hospital to seek treatment following the incident, and why she did not have documentary evidence corroborating the visit. The Board rejected the principal applicant's explanation that she was under stress when she prepared the PIF and that the hospital refused to provide her with a report:

> ¶13. . . . I do not accept this explanation. If the third claimant had gone to the hospital the FC would have put the details in her PIF and there would have been a medical report that

> she could try and access. I conclude that the FC embellished the incident.

2. The Board also considered and rejected the principal applicant's allegation that there were skinheads in the Czech police force. At paragraph 14 the Board held:

> ¶14. . . . The FC could not provide any evidence to support this contention and there is nothing in the documentary evidence to corroborate this allegation.

3. The Board considered the principal applicant's explanation for why she had failed to mention in her PIF that she had reported the 2001 attack on her to the police and that she subsequently followed up on that report to no avail – namely that, again, she was under stress when she prepared the PIF:

> ¶15. . . . I do not accept this explanation. If the FC had gone to the police this would have been an important part of her story and she would have remembered that detail. I conclude that she did not go to the police on that occasion.

4. Finally, the Board considered the principal applicant's evidence regarding whether she had lost a child following the attack on her in 2006. The applicant had mentioned this incident to the immigration officer upon arrival, but did not include it in her PIF or in her initial testimony. She provided details in response to questions from the Board. When asked why she initially had not included these details, the principal applicant stated that the person who helped her to complete her PIF must have missed it. At paragraph 16 the Board concluded:

> ¶16. . . . I do not accept this explanation. The loss of the baby is certainly a very traumatic experience. If the FC lost a baby in the circumstances she described, she would certainly remember it and put it in the PIF and voluntarily testify about the matter. I am sympathetic to the loss of a baby, but if it was connected to discrimination or persecution it would have been in her PIF and included in her testimony.

[9] At paragraph 17, the Board stated the law regarding when incidents of discrimination may singularly or cumulatively amount to persecution:

> ¶17. . . . To be considered persecution, the mistreatment suffered or anticipated must be serious. In order to determine whether a particular mistreatment would qualify as "serious", one must examine what interest of the claimant might be harmed; and to what extent the subsistence, enjoyment, expression or exercise of that

> interest might be compromised. “Persecution”, for example, undefined in the Convention, has been ascribed the meaning of sustained or systemic violation of basic human rights demonstrative of a failure of state protection.[1] In the case of *Chan*,[2] La Forest J. (in dissent) reiterated that the essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way.

[10] Applying its evidentiary findings to the law, the Board concluded that the applicants had failed to establish persecution:

> ¶18. As mentioned above, I find that the FC has embellished many parts of her story. I find that this impacts the credibility of the incidents that she describes. I acknowledge that the documentary evidence[3] shows that there is discrimination against the Roma and the claimants may have been discriminated against because of their ethnicity but because of the embellishment of the incidents I do not find that this rises to the level of persecution either singularly or cumulatively.

[11] Finally, the Board found that the applicants had failed to provide persuasive evidence that they would face a risk to their lives, or of cruel and unusual treatment or punishment, or of torture, if they were to return to the Czech Republic.

LEGISLATION

[12] Section 96 of the Act grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée

[1] James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 104-105, cited with approval in *Canada (Attorney General) v Ward*, [1993] 3 F.C. 675 (C.A.).
[2] *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593; affirming *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675 (C.A.).
[3] Exhibit R/A-1, *National Documentation Package – Czech Republic*, March 30, 2009.

religion, nationality, membership in a particular social group or political opinion,	du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[13] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a	b) soit à une menace à sa vie

risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[14] The applicants raise five issues:

1. Given the Board's finding that the applicants did not have a well-founded fear of persecution under section 96 of the Act, did the Board analyze the country conditions evidence prior to determining that the applicants were not persons in need of protection under section 97 of the Act?

2. Did the Board err when it failed to conduct an analysis of whether the applicants are persons in need of protection, pursuant to section 97(1) of the Act, especially in view of the fact that the Board found that the applicants' identity is that of Czech Roma and that they were discriminated against in the Czech Republic, and in view of the fact that the country conditions are such that the applicants might be at personal risk there?

3. Did the Board err by failing to meaningfully consider whether the various incidents of discrimination experienced by the applicants cumulatively amounted to persecution?

4. Did the Board ignore evidence, use irrelevant considerations, make an unreasonable decision, and fail to indicate the evidentiary basis upon which its decision was made?

5. As a result of the Minister's public comments about Czech Roma, was there created a reasonable apprehension of bias, or institutional bias at the applicants' hearing, and as a

> consequence was the Board biased or did the Board conduct an unfair hearing, in a tainted and biased environment, thereby denying the applicants' right to natural justice and procedural fairness?

[15] I will consider the first two issues together, considering whether the Board erred by failing to properly consider whether the applicants are persons in need of protection pursuant to section 97(1) of the Act. This will be Issue 1.

STANDARD OF REVIEW

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[17] It is clear as a result of *Dunsmuir* and *Khosa* that questions of fact or mixed fact and law are to be reviewed on a standard of reasonableness: see, for example, *Liang* at paragraph 15; and my decisions in *Corzas Monjaras v. Canada (Citizenship and Immigration)*, 2010 FC 771 at paragraph 15; and *Rodriguez Perez v. Canada (Citizenship and Immigration)* 2009 FC 1029 at paragraph 25.

[18] The determination of whether the Board has properly applied the evidence to the question of whether the applicant is a person in need of protection under section 97 of the Act is a question of mixed fact and law. It is therefore reviewable on a standard of reasonableness: see, for example, my

decision in *Amare v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 228, at paragraph 10.

[19] The determination of whether incidents of discrimination or harassment amount to persecution is also a question of mixed fact and law: *Liang v. Canada (Citizenship and Immigration)*, 2008 FC 450 at paragraph 12.

[20] In reviewing the Board's decision using a standard of reasonableness, the Court will consider “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir*, at paragraph 47; *Khosa* at paragraph 59.

[21] The issue of whether the facts of the case give rise to a reasonable apprehension of bias is a an element of the duty of fairness to be determined on a standard of correctness: *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at paragraph 44; *Dunsmuir*, above at paras. 55 and 90; and *Khosa*, above at paragraph 43.

ANALYSIS

Issue No. 1: Did the Board err by failing to properly consider whether the applicants are persons in need of protection pursuant to section 97(1) of the Act?

[22] The evidence necessary to establish a refugee claim under section 96 of the Act is different from that required to establish a claim under section 97 of the Act. As I held in *Amare*, above, section 97 requires the Board to consider the generally known country conditions and how those might affect an applicant’s situation:

> ¶12. An analysis under section 97 is different from the Board's determination of whether a refugee claimant is a Convention refugee under section 96 of the IRPA. Under section 96, the claimant must establish the existence of a well-founded fear of persecution tied to a Convention ground. However, under section 97 a claimant must show whether, on the balance of probabilities, their removal from Canada would subject them personally to the dangers and risks stipulated in paragraphs 97(1)(a) and (b) of the IRPA. This is a wholly objective analysis, and must be evaluated in light of all relevant considerations and with a view to the country's human rights record: see *Kandiah*, above, at paragraph 18 per Martineau J.
>
> ¶13.. Further, the jurisprudence is clear that a negative credibility determination in respect of a refugee claim under section 96 is not necessarily dispositive of the consideration of subsection 97(1): see *Bouaouni*, above; *Nyathi*, above; *Kandiah*, above; and *Ozdemir v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 1008, 256 F.T.R. 154 (F.C.). For example, Mr. Justice Martineau held in *Kandiah* at paragraph 18 that:
>
> > ¶ 18 ... There may well be instances where a refugee claimant, whose identity is not disputed, is found to not to have a valid basis for his alleged subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative subjective fear determination, which may be determinative of a refugee claim under section 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. ...

[23] In this case, the Board's assessment of the applicants' risks under section 97 was lacking. Although the Board made negative credibility determinations regarding the principal applicant, it accepted the applicants' identity as Roma from the Czech Republic. The Board's only comment regarding objective country conditions for Roma in the Czech Republic consisted of an acknowledgment, at paragraph 18, that Roma face discrimination in the Czech Republic:

> ¶18. . . . I acknowledge that the documentary evidence[4] shows that there is discrimination against the Roma and the claimants may have been discriminated against because of their ethnicity but because of

[4] Exhibit R/A-1, *National Documentation Package – Czech Republic*, March 30, 2009.

> the embellishment of the incidents I do not find that this rises to the level of persecution either singularly or cumulatively.

[24] The Board's only consideration of whether the applicants would face a risk to their lives, or of cruel and unusual treatment or punishment, or of torture if they were to return to the Czech Republic, and thus of whether section 97(1) of the Act applies, is contained in the final paragraph of its decision:

> ¶19. . . . There is also no persuasive evidence that, on a balance of probabilities, they are at risk to their lives or at risk of cruel and unusual treatment or punishment or torture if they return to the Czech Republic.

[25] The Board had an obligation to address the question of the risks identified in section 97(1) that may be faced by the applicants if they return to the Czech Republic. The Board's acceptance of the fact that the applicants were Roma constituted a sufficient link to documentary evidence regarding what the applicants claim is persecution of Roma in the Czech Republic. The Board further acknowledged that the documentary evidence revealed discrimination against Roma in the Czech Republic.

[26] Before the Board, the applicant presented over 100 pages of documentary evidence reciting incident after incident of Roma being physically assaulted in the Czech Republic. One article, dated December 2007, reported on a Czech court hearing about racist attacks on "several Romani people" which caused serious injuries to Roma youth. Another article reported on a Czech senator and mayor of a district in the Czech Republic who publically spoke at a housing meeting of the mayor's district about the "excessively multiplying Romanis" and using "dynamite" to blow them up as a means of solving problems in a Romani settlement.

[27] The Amnesty International report for 2009 on the Czech Republic reported in August that four Roma were assaulted by Czech racists in a bar. The Board's Issue Paper on State Protection in the Czech Republic, dated June 2009, found that the police have a negative view of the Roma and do not protect htem as they do other citizens. The Boards second issue paper, the Issue Paper on State Protection in the Czech Republic, dated July 2009, set out the awful situation for the Roma with respect to:

1. societal discrimination;
2. inadequate housing;
3. poor education;
4. high unemployment; and
5. far-right extremism.

The issue paper describes physical attacks targeting Roma which result in serious injury.

[28] Accordingly, the objective evidence before the Board discloses section 97 risks of personal injury to Roma in the Czech Republic, and the Board therefore had an obligation to consider the documentary evidence before it, to determine whether the objective evidence indicated that the ill treatment of people sharing the applicants' profiles would subject the applicants personally to a section 97 risk in the Czech Republic: *Kaleja v. Canada (Citizenship and Immigration)*, 2010 FC 252, at paras. 23-25. The failure of the Board to conduct this analysis constitutes a reviewable error.

[29] In view of the Court's finding, this application for judicial review will be allowed and the Court need not consider the third and fourth issues raised by the applicants. The Court will, however, nevertheless deal with the important issue of bias raised by the applicants.

Issue Regarding Bias: **As a result of the Minister's public comments about Czech Roma, was there created a reasonable apprehension of bias, or institutional bias at the applicants' hearing, and as a consequence was the Board biased or did the Board conduct an unfair hearing, in a tainted and biased environment, thereby denying the applicants' right to natural justice and procedural fairness?**

[30] The applicants submit that as a result of comments made by the Canadian Minister of Immigration in April 2009 there is a reasonable apprehension of bias on the part of members of the Board with regard to their determinations of refugee claims of claimants from the Czech Republic.

[31] Procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 45. Allegations of bias are therefore serious and impugn the decision-making process and the decision-maker.

[32] The test for determining the existence of a reasonable apprehension of bias was expressed by Justice Crampton in *Dunova v. Canada (Citizenship and Immigration)*, 2010 FC 438:

> ¶48. The classic articulation of the test for what constitutes a reasonable apprehension of bias was enunciated by Justice de Grandpré in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394. In the course of dissenting on the issue of whether the facts in that case gave rise to a reasonable apprehension of bias, Justice de Grandpé observed that "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information." He added that the "test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude…"
>
> ¶49. *In R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 111 to 113, Mr. Justice Cory adopted Justice de Grandpré's statement of the test, observed that "the threshold for a finding of real or perceived bias is

> high", and emphasized that "the reasonable person must be an informed person."
>
> ¶50. In *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at paragraph 76, the high test to be met when alleging bias was confirmed. In a unanimous judgment, the Supreme Court observed that "the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality." The Court then proceeded to approvingly note that Justice de Grandpré added to "the now classical expression of the reasonable apprehension standard" when he observed: " The grounds for this apprehension must, however, be substantial, and I … refus[e] to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'."
>
> ¶51. In *Geza*, above, at paras. 52 -53, it was held that the approach described above applies to the determination of refugee claims by the Board, given the Board's independence, its adjudicative procedure and functions, and the fact that its decisions affect the rights of claimants under the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11. . . .

[33] The applicants submit the following "facts" would create a reasonable apprehension of bias in the mind a right-thinking person:

1. over one dozen comments by the Minister that Czech Roma are false refugee claimants demonstrate that he does not want Board members to make positive decisions in refugee cases involving Czech Roma;

2. the Board members depend on the Minister to appoint and reappoint them;

3. the Federal Court of Appeal in *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, found that the Board was biased against Roma in Hungary as a result of the "lead case" strategy adopted by the Board;

4. the acceptance rate for Roma refugee claimants from the Czech Republic consistently declined following the Minister's comments. The applicant submits that the Board's acceptance rate for Czech Roma refugee claimants was 97 percent in 2008. Following the Minister's comments in April of 2009, the applicant submits that the Board's acceptance rate for Czech Roma refugee claimants plummeted to zero percent. The applicant submits that there was no improvement in country conditions for Czech Roma during that period.

[34] An allegation of bias must be raised at the earliest possible opportunity; otherwise, the party waives the right to later raise bias as a ground for judicial review: *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at paragraph 66. See also *Chamo v. Canada (Mininster of Citizenship and Immigration)*, 2005 FC 1219, [2005] F.C.J. No. 1482 (QL), at paragraph 9; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 35, [2005] F.C.J. No. 59 (QL), at paragraph 18; *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1367, [2003] F.C.J. No. 1741 (QL), at paragraph 15.

[35] The Board hearing in this case took place on January 22, 2010. The applicants were represented by counsel. The Court has no doubt that counsel knew about the Minister's public comments about Czech Roma being false refugee claimants. Counsel had a duty to raise the bias objection at the hearing on January 22 or waive the right to do so after the hearing if the applicants lost their refugee claim.

[36] The Court is remitting this claim back to the Board for determination for failure to conduct an adequate section 97 analysis. The applicant can then raise the issue of bias before the Board at the new hearing. The Court and the parties are aware of three recent decisions from this court which have dismissed the allegation of a reasonable apprehension of bias based on the same ground as in this case.

CONCLUSION

[37] I agree with the applicants' argument that the Board had a duty to canvass the country conditions materials if it came to the conclusion that the applicants are members of a potentially

persecuted group. The Board dismissed this claim on the sole basis of credibility. Once it accepted the applicants' identity as Czech Roma, the Board had a duty to consider whether that identity would subject the applicants to persecution or to the treatment specified in section 97(1) of the Act. By failing to specify which aspects of the claimants' evidence it was rejecting and by failing to consider the objective documentary evidence, the Board therefore made a reviewable error. The decision of the Board must be set aside and the matter referred to a differently constituted panel of the Board for redetermination.

CERTIFIED QUESTION

[38] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is allowed and the matter is remitted to a different panel of the Board for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1864-10
STYLE OF CAUSE:	*Zdena Dunkova et al. v. The Minister of Citizenship and Immigration*
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