

Federal Court



Cour fédérale

Date: 20111129

Docket: IMM-5522-10

Citation: 2011 FC 1376

Toronto, Ontario, November 29, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**TEREZA VOZKOVA AND NICOLE
VOZKOVA, BY THEIR LITIGATION
GUARDIAN SUSAN WOOLNER**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the August 31, 2010 decision by the Immigration and Refugee Board's Refugee Protection Division (RPD) which found that the Applicants, Roma children from the Czech Republic aged three and five, were not Convention refugees or persons in need of protection.

[2] The Applicants are two Roma children, Tereza Vozkova, age five, and Nicole Vozkova, age three, who are citizens of the Czech Republic. Their father was granted Convention refugee status on the basis of his Roma ethnicity and having a well-founded fear of persecution in the Czech Republic. Their mother, Zdenka Vozkova, had made a refugee claim in Canada but withdrew the claim on September 21, 2004 to return to the Czech Republic. She is ineligible for refugee status for having withdrawn her previous refugee claim.

[3] The children had a designated representative for the RPD hearing held on July 13, 2010. Their mother testified about one incident of persecution where Tereza, an infant, was present.

[4] The RPD found that the Applicants' claim failed because no subjective or objective fear of persecution had been established as there was no evidence linking the persecution to their specific situations. Although the Applicants' counsel submitted documentary evidence regarding the treatment of Roma persons in the Czech Republic, the RPD found that documentary evidence on general country conditions was insufficient in itself to ground a refugee claim.

[5] I am granting judicial review because I find the RPD erred in requiring the Applicants to show personalized risk in the s.96 analysis of whether they would face persecution on return. I also find the RPD erred in stating that the documentary evidence was not enough to ground a claim, absence evidence linking it to the Applicants' specific situation. My reasons follow.

Background

[6] The Applicants, Tereza Vozkova, age five, and Nicole Vozkova, age three, are citizens of the Czech Republic.

[7] Their mother, Ms. Zdenka Vozkova, had made a refugee claim in Canada but withdrew her claim on September 21, 2004 to return to the Czech Republic. There, the Applicants' mother says she experienced discrimination and persecution due to Roma ethnicity. She says she was assaulted by a man in August 2005 while she was pushing Tereza's stroller. She left the Czech Republic with Tereza for Ireland in March 2006 where Nicole was born in March 2007. Nicole is not entitled to Irish citizenship due to Irish naturalization laws.

[8] The Applicants arrived in Canada on May 1, 2008 with their parents. They have been included as dependents on their father's permanent residence application; however, this application has not yet been processed. Their mother is ineligible to make a refugee claim, as she had withdrawn her previous refugee claim. The Applicants' refugee claim was initiated on May 5, 2008, and their PIF was filed on May 30, 2008 with a short narrative by their mother.

[9] Ms. Susan Woolner was appointed as the designated representative for the Applicants, as the parents were found to be not suitable to act as designated representatives. The hearing was held on July 13, 2010. At the hearing, the Applicants' mother was called to testify as a witness to an alleged incident of persecution concerning Tereza.

Decision Under Review

[10] The RPD found that the Applicants' claims did not have a credible basis.

[11] The RPD accepted that the Applicants had a nexus to the Convention as persons of Roma ethnicity, but decided the Applicants' mother, lacked a well-founded fear of persecution.

[12] The RPD found that it was not credible that the Applicants' mother had been assaulted in the Czech Republic or that anyone was looking for the Applicants to harm them. The RPD found that the statements made by the mother were not credible due to a number of issues:

- The Applicants' mother's re-availment two times, in returning to the Czech Republic twice, allegedly to care for her own mother. The RPD found that this showed that she did not possess a subjective or well-founded fear of persecution;
- The Applicants' mother testified that during the assault she was slapped and pushed by the assailant. Later on, she testified that she was punched. The RPD took this to be a significant inconsistency;
- The Applicants' mother testified that she was injured and received a black eye after the incident, but did not mention any injuries in her Personal Information Form (PIF);

- The Applicants' mother could not explain why the police officers called for two more police officers when the man was not acting out at the time. The RPD took this to find that she was neither punched nor did she receive any injuries during the incident;
- The Applicants' mother testified that she waited seven months before leaving the Czech Republic due to her mother's needs as well as arrange to meet with her husband in Canada. The RPD pointed out that the Applicants' mother moved to Ireland instead of moving to Canada despite her husband having status in Canada. The RPD found that this delay undermined her allegation that she faces harm in the Czech Republic.

[13] The RPD found that the Applicants' mother had not established the Applicants' claim, noting that no persuasive evidence was placed before the RPD to support the allegation that the Applicant children would face persecution upon being returned to the Czech Republic. The RPD observed that the only allegation of persecution supporting Tereza's claim was found to be implausible and embellished, and Nicole had never been to the Czech Republic before.

[14] The RPD acknowledged that the documentation established that Roma persons do face discrimination and persecution, but documentary evidence on general country conditions is insufficient to ground a claim if there is no evidence linking it to the applicant's specific situation.

[15] As such, the RPD found that there was no evidence that could be deemed credible and trustworthy other than that the Applicants are citizens in the Czech Republic, and therefore no basis to the witness's fear of persecution.

[16] The RPD rejected the Applicants' claims on the grounds that the Applicants were not Convention refugees, nor were they persons in need of protection.

Legislation

[17] The *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)* provides:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

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) 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.

country.

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves 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...

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) 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) soit à une menace à sa vie 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,

Issues

[18] The Applicants raise several issues but two in my view are determinative:

1. *Did the RPD misapply the test under s.96 in refusing to consider evidence of similarly situated persons and in requiring an individualized set of facts to ground the Applicants' claim for refugee protection?*

2. *Did the RPD unreasonably fail to apply the Guidelines on Child Refugee claimants?*

Standard of Review

[19] The RPD's findings of fact and conclusion on questions of mixed fact and law are to be assessed on the standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The credibility findings of the RPD are entitled to a high degree of deference: *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at paras 3-4.

[20] The standard of review for whether the RPD applied the proper test for refugee protection under s.96 of *IRPA* is a question of law and to be assessed on a standard of correctness: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 43 Imm LR (2d) 117.

Analysis

[21] The Applicants observe that although the RPD accepted the Applicants as being of Roma ethnicity and it was established that Roma persons face persecution in the Czech Republic, the RPD determined that documentary evidence on "general country conditions is insufficient in itself to ground a claim, absent any evidence linking it to the claimant's specific situation".

[22] The Applicants submit that the RPD foreclosed the possibility of finding that the Applicants were Convention refugees on the basis of the documentary evidence of similarly situated persons being the persecution faced by the Roma population, Roma children in particular, in the Czech Republic.

[23] The Applicants submit that the necessity of establishing a personalized risk applies to s.97 of *IRPA*, but not s.96. As a result, the RPD erred because it did not determine whether the Applicants would face persecution in the Czech Republic. Instead, the RPD required the Applicants to demonstrate evidence of past persecution and personalised risk, contrary to jurisprudence. A finding of generality does not prohibit a finding of persecution under s.96.

[24] The Respondent responded by pointing out that the central finding of the RPD was that the Applicants had not established that they would face persecution with sufficient credible evidence. The Respondent submits that the RPD's credibility findings were reasonable, as the RPD had found that the determinative issue in the claim was credibility, and the only witness called (the Applicants' mother) was not credible with respect to central elements of her testimony. The Respondent notes that the RPD supported this conclusion with multiple details and specific credibility findings. Given that the Applicants were too young to provide testimony, the credibility of this one witness was a pivotal factor in their claim.

[25] The Applicants in their reply point out that it is precisely because the credibility finding was the only determination made in the Applicants' claim that the RPD made a reviewable error. The Applicants emphasize that the Applicants' mother was neither a party to the claim nor their

designated representative. Instead, she was merely a witness with respect to one aspect of one of the Applicants' claims.

Did the RPD misapply the test under s.96 in refusing to consider evidence of similarly situated persons and in requiring an individualized set of facts to ground the Applicants' claim for refugee protection?

Credibility

[26] I agree the RPD failed to distinguish between a witness and a claimant. The RPD's analysis cannot end with the determination of the credibility of the witness; instead, it must examine the balance of the evidence before it. In addition, many of the events highlighted by the RPD as being problematic in its credibility analysis were events that occurred before either Applicant was born, and are irrelevant to their claim.

[27] In particular, the RPD emphasized that the Applicants' mother had re-availed herself twice in returning to the Czech Republic. Since she first returned to the Czech Republic before either Applicant was born, this is irrelevant to their claims.

Test for s. 96 under IRPA

[28] The Applicants observe that although the RPD accepted the Applicants as being of Roma ethnicity and it was established that Roma persons face persecution in the Czech Republic, the RPD determined that documentary evidence on "general country conditions is insufficient in

itself to ground a claim [under s. 96 of *IRPA*], absent any evidence linking it to the claimant's specific situation.”

[29] The Respondent suggests the RPD's reference to the country condition documents and personalized risk in paragraph 32 of the decision was not made in relation to s.96, but as part of the s.97 analysis. However, the section containing the RPD's remarks about documentary evidence and personalized risk was under the heading titled “Nexus, section 96, Immigration and Refugee Protection Act”.

[30] Professor James C. Hathaway wrote about the very situation faced by these child Applicants in *The Rights of Refugees under International Law*. He stated:

In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee. [Reference to *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 (CA) at paras 16-19].

(Emphasis added)

[31] In *Salibian*, the Refugee Protection Division had found that the applicant lacked a credible basis, and concluded that in order to be eligible for refugee status he had to personally

be a target of reprehensible acts directed at him in particular. The Federal Court of Appeal found it to be an error of law stating:

It can be said in light of earlier decisions by this Court on claims to Convention refugee status that

(1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;

(2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;

(3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or if necessary by all by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; and

(4) the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin (see *Seifu v. Immigration Appeal Board*, (12 January 1983), Doc. No. A-277-82, cited in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, 7 Imm. L.R. (2d) 169, 57 D.L.R. (4th) 153 (C.A.) at 683; *Darwich v. Minister of Manpower and Immigration*, [1979] 1 F.C. 365, 25 N.R. 462 (C.A.); *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129 (C.A.), at 133 and 134).

(Emphasis added)

[32] In *Dezameau v Canada (Minister of Citizenship and Immigration)*, 2010 FC 559, 89 Imm LR (3d) 169 [*Dezameau*], the Haitian applicant and her two daughters alleged fear of persecution in part on the basis of the fact that they would be targets of potential rapists as a result of the fact that they are women. The RPD pointed out that the principal applicant had never been a victim of

an attack related to her status as a woman. While the RPD noted the documentary evidence did refer to violence against women being a problem in Haiti, the RPD found that the risk feared by the applicants was one rooted in a general problem of criminality. Justice Pinard found that the RPD had accepted the applicant as a member of a social group, but erred in using its finding of widespread risk of violence to rebut the assertion of a nexus between the applicants' social group and the risk of rape; "A finding of generality does not prohibit a finding of persecution on the basis of one of the Convention grounds": *Dezameau* at para 23.

[33] More recently, in *Josile v Canada (Minister of Citizenship and Immigration)*, 2011 FC 39, 95 Imm LR (3d) 62 at paragraph 22, Justice Martineau found that a claim "cannot be rejected simply because the group in question or its members face general oppression and the claimant's fear of persecution is not supported by an individualized set of facts. Where the claimant has not, himself or herself, experienced the type of persecution, he or she fears, the claimant can use evidence of similarly-situated persons to demonstrate the risk...".

[34] I conclude the RPD committed a reviewable error when it required the Applicants to demonstrate evidence of past persecution and personalised risk contrary to the jurisprudence requiring consideration of similarly situated persons as well.

Documentary Evidence

[35] The Applicants submit that the RPD ignored the documentary evidence concerning the treatment of the Roma population in the Czech Republic which should have been considered,

given that it was central to whether the Applicant children would face persecution in the Czech Republic. The Applicants submit that the RPD was required to consider the documentary evidence describing the treatment of Roma children in the Czech Republic, even if the RPD disbelieved the Applicants' mother's story and account of a past persecution.

[36] In *Canada (Minister of Citizenship and Immigration) v Patel*, 2008 FC 747, [2009] 2 FCR 196 [*Patel*] which involved a thirteen-year-old-boy from India, the applicant (the Minister in this case) had submitted that it was not open to the RPD to assume that the minor child had a subjective fear of going back to India. Justice Lagace observed that certain claimants deemed incompetent, either by age or disability, may not be able to articulate their fear in a rational manner, and that the applicant's position would exclude all incompetent persons from being able to qualify as Convention refugees. Instead, Justice Lagace found that "Where a claimant is not competent, whether by age or disability, and the evidence establishes an objective basis for his fear, it is sufficient that the designated representative establish a subjective fear in his role as designated representative (*in loco parentis*), or that the subjective fear be inferred from the evidence:" *Patel* at para 33.

[37] In *Pacificador v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1462, 33 Imm LR (3d) 289 at paragraphs 76 and 77, Madame Justice Heneghan found it to be an error when the RPD only considered evidence of one person similarly situated to the applicant:

In my opinion, this decision supports a finding that the Board erred in the manner in which it concluded that the Applicant did not face a serious possibility of persecution in the Philippines. The Board erred by limiting the comparison of the Applicant to only one other similarly situated person, that is, his father. The fault was not in

looking for a comparator, as in *Salibian, supra*, but in defining the comparator group too narrowly.

Rather, the Board should have considered the objective basis of the Applicant's fear of persecution relative to his membership in a group consisting of persons in the Philippines who are prosecuted for political motives and whose prosecution appears to be tainted by corruption.

(Emphasis added)

[38] The RPD's analysis focused on the mother's conduct and similarly erred in limiting the Applicant children's comparator group too narrowly.

The RPD failed to apply the Guidelines on Child Refugee claimants, leading to a decision that is unreasonable.

Child Guidelines

[39] The Applicants refer to the IRB document titled "*Guideline 3: Child Refugee Claimants, Procedural and Evidentiary Issues*" [*Child Guidelines*] which address the evidentiary issues of eliciting and assessing evidence in the refugee claims of children. The Applicants point out that the RPD did not consider the *Child Guidelines* which outlines the importance of considering objective factors, such as documentary evidence on country conditions, where a child is too young to give testimony as to their subjective fear.

[40] The Respondent submits that the RPD was clearly aware that this was a case involving children, having made reference to their ages. Furthermore, the Respondent submits that the

Child Guidelines do not mandate a particular outcome and instead are devoted to ensuring that procedures used give priority to the best interests of the children.

[41] The *Child Guidelines* provides:

A child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant. Therefore, it may be necessary to put more weight on the objective rather than the subjective elements of the claim. The Federal Court of Canada (Appeal Division) has said the following on this issue:

I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.”

(Emphasis added)

[42] Although the Respondent is correct in pointing out that the *Child Guidelines* do not mandate a specific outcome, they provide a reason why the RPD should consider the objective documentary evidence in considering whether the Applicant children would face persecution as Roma children if deported to the Czech Republic.

[43] In *Kim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 149, [2011] 2 FCR 448 Justice Shore extensively discussed the *Child Guidelines* and among other things observed:

[61] The Court is in agreement with the Respondent that: “[t]he [CRC] does not change the definition on the standard by which a child can be found to be a Convention refugee”; however, the Court finds that the CRC and the Guidelines add nuances to the determination of whether a child fits the definition of a refugee

under section 96. These nuances are based on an appreciation that children have distinct rights, are in need of special protection, and can be persecuted in ways that would not amount to persecution of an adult.

(Emphasis added)

[44] In *Dong v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1151 Justice

Campbell found it to be an error to not have regard to the *Child Guidelines*:

[6] It is obvious that, in the rendering of the reasons quoted, the RPD gave absolutely no weight to the fact that, at the time the events occurred, the Applicant was mere youth, and at the time the Applicant testified, she was a young person. On the face of the record, the depth and breath of the explanations the Applicant gave should have given the RPD pause for making strong and unsubstantiated negative credibility findings. While the RPD states in its decision that “I have taken in into account the *Chairperson’s Guidelines on Child Refugee Claimants*”, there is no evidence of any accommodation shown to this youthful Applicant.

(Emphasis added)

[45] The RPD had dismissed the testimony of the mother of the Applicant children. The RPD observed that the only allegation supporting Tereza’s claim was found to be implausible and embellished, and Nicole had never been to the Czech Republic before. The RPD found no persuasive evidence was placed before it to support the allegation that the Applicant children would face persecution upon their return to the Czech Republic.

[46] The RPD acknowledged that the documentation established that Roma persons do face discrimination and persecution but documentary evidence on general country conditions is

insufficient to ground a claim if there is no evidence linking it to the applicant's specific situation in its s.96 analysis. Even if this were treated as applying to the s.97 analysis as the Respondent submits, there is no indication that the RPD considered documentary evidence as it related to treatment of Roma children in the Czech Republic.

[47] The RPD has two child Applicants before it. It cannot simply treat the children's claims as if they were adults with a capacity to endure a certain degree of prejudice and discrimination. It must assess the documentary evidence relevant to the circumstances these two Roma children would face if returned to the Czech Republic. How are Roma children treated? How would such treatment impact on their development? What are their educational prospects? Their prospects for a future livelihood? Most importantly, how vulnerable are children to the discrimination and persecution the RPD acknowledges Roma face?

[48] The RPD does not say it assessed or considered any evidence documentary concerning Roma children. Since it makes no mention of this evidence, I infer it did not consider documentary evidence relevant to the Applicant children's refugee claim and as such committed a reviewable error: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35.

Conclusion

[49] The application for judicial review is granted and the matter is remitted back for reconsideration by a differently constituted panel.

[50] The parties have not proposed and I do not certify any question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted back for reconsideration by a differently constituted panel.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5522-10

STYLE OF CAUSE: TEREZA VOZKOVA AND NICOLE VOZKOVA, BY
THEIR LITIGATION GUARDIAN SUSAN
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 14, 2011

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

DATED: NOVEMBER 29, 2011

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