

Federal Court



Cour fédérale

Date: 20150506

Docket: IMM-3259-14

Citation: 2015 FC 596

Toronto, Ontario, May 6, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**PETER CONKA
DOROTA CONKOVA
SOFIA CONKOVA
TINA CONKOVA
MAGGIE CONKOVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. On behalf of his family, Peter Conka challenges a decision of the Refugee Protection Division of the Immigration and Refugee

Board of Canada, whereby their joined claims for refugee protection were denied. For the reasons below, this application is dismissed.

I. Background

[1] The Conka family are citizens of Slovakia. Their ethnicity is Roma. They entered Canada on February 11, 2012 and immediately claimed refugee protection.

[2] Peter is 33 years old. He has acted as the family's representative in their immigration proceedings. His wife, Dorota, is 31 years old. They have three daughters aged 6, 10 and 14.

[3] The applicants alleged that they faced persecution in Slovakia due to their ethnicity. The Board rejected their five refugee claims in a decision dated April 4, 2014.

[4] In its decision, the Board explains that the principal claimant, Peter, lived in Levoca, Slovakia with his family. In his personal information form [PIF], he alleged that he went to the capital, Bratislava, in September 2010 for a job interview. The interviewer refused to hire him when she realized that he was Roma. On the way home, a group of five or six men approached him and shouted racist slurs. One of them hit him on the wrist with a baseball bat. The claimant ran away and found two police officers. They told him that if he wanted to make a complaint, he had to attend the police station and pay them. Instead, he went to the hospital to receive treatment. Afterwards, he went to the police station and explained what had transpired. A police officer told him that it would be difficult to find the perpetrators and sent him home.

[5] Mr Conka said that he was walking home with a friend in January 2012 when three skinheads approached them and began to shout racist slurs. They assaulted him with pepper spray and began to kick him. He allegedly sustained serious injuries such as broken ribs. The assailants scattered when a police car pulled up. The principal claimant gave the officers a description of the attackers. He then sought medical attention. When he visited the police station the next day with his medical report, an officer told him that he was too busy to write a report. He returned the day after but was told that it was too late to file a complaint. He went to complain to the mayor but received no assistance.

[6] That same month, Mrs Conkova was walking with their children when they were racially abused and threatened by four young men. She went to file a complaint with the police but they refused to write a report because she could not identify the assailants.

[7] In September 2011, one of the daughters came home from school crying because the school segregated Roma and non-Roma children.

[8] The Board begins with the issue of state protection. Citing *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], it explains that a presumption of state protection exists except where a state is in complete breakdown. A refugee claimant must persuade the Board, on the balance of probabilities, that state protection is inadequate.

[9] The Board finds that Slovakia is a functioning democracy. The principal claimant did not meet the onus of exhausting all reasonable courses of action. The Slovak security forces are

hierarchical and allow a person to complain to a higher authority, particularly the Bureau for the Inspection Service of the Police Corps.

[10] The Board cites *Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248 (FCA) [*Maldonado*] and acknowledges that the testimony of a refugee claimant must be presumed to be true unless there is a valid reason to doubt its truthfulness. The Board finds that the principal claimant was not a credible and trustworthy witness due to inconsistencies between his PIF narrative and oral testimony.

[11] First, in his PIF, Mr Conka alleged that he went to the hospital after speaking with two police officers in the wake of the baseball bat attack. There is absolutely no mention of him going to the police station with those officers before going to the hospital. At the hearing, the claimant offered a different story. He said that those officers drove him to the police station around 11:00 AM, that they did not help him there and that he afterwards went to the hospital. Upon being released, he went to the police station again at 3:30 PM with his medical report but was again refused service. Yet his PIF does not say that he brought any medical report to the station even after attending the hospital. Finally, at the hearing, the claimant omitted to mention that the two police officers had asked him for money, as he had alleged in his PIF. The panel concludes that the claimant changed his story to bolster his claim.

[12] There were inconsistencies between the principal claimant's PIF narrative and oral testimony on the issue of whether he had ever complained to police supervisors. In the Board's view, he offered confusing and evasive explanations for these inconsistencies. On the balance of

probabilities, the Board finds that the claimant never asked to speak to the officers' superiors. That further undermines his credibility.

[13] Mr Conka alleged that he told the police he could identify one of his attackers in Bratislava but they still wouldn't write a report. The Board expresses doubts that he could have given a description since he was in a city 400 km away from his hometown, being pounded by blows delivered by men he had never seen before.

[14] Mrs Konkova testified that she was able to describe one of the men who threatened her to the police. The Board asked her to provide the description she gave. She said that the assailant was the same height as her and had black hair. The Board concludes that she did not provide the police with helpful leads and therefore did not rebut the presumption of state protection.

[15] Even though Mr Conka alleged that he received medical treatment on two separate occasions, he presented no medical reports to the Board – despite testifying that he went to the police station with a medical report after the Bratislava attack. He said that he did not know he had to bring the report with him to Canada. He added that, when he realized he needed it, he called his mother to ask for it. She could not find it and asked the hospital for a new copy but she was told that the claimant had to retrieve it in person. Mr Conka presented a letter from his mother. The Board gives it very little weight because it is not dated.

[16] The Board concludes that there is no persuasive evidence that Mr Conka was ever physically attacked, injured, provided with medical treatment or complained to the police or mayor. He provided no corroborative documents such as police or medical reports.

[17] Furthermore, the Board reproaches Mr Conka for his failure to complain to the agencies which investigate police misconduct in Slovakia. The Board recalls that state protection cannot be rebutted by speculating about its effectiveness and asserting a subjective reluctance to engage the state. In the absence of a compelling explanation, a failure to seek state protection is fatal to a claim.

[18] The Board insists that the preponderance of the objective evidence shows that there is adequate state protection in Slovakia because that state is “making serious efforts” to address problems and that “the police are both willing and able to protect victims”. Police corruption and deficiencies exist but are not systemic.

[19] In the result, the Board rejects all five claims under sections 96 and 97 of the *IRPA*.

II. Issues

[20] This application for judicial review raises four issues:

1. Did the Board err in assessing credibility?
2. Did the Board choose the correct test for state protection?
3. Did the Board err in assessing state protection?
4. Did the Board err in failing to consider the minor applicants’ claims separately?

III. Standard of Review

[21] Credibility findings are questions of fact. They are reviewable on reasonableness: *Triana Aguirre v Canada (Citizenship and Immigration)*, 2008 FC 571 at paras 13-14; *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1078 at para 51.

[22] The standard of review for the Board's understanding of the test for state protection is correctness. Yet the standard of review for the Board's application of that test to the facts before it is reasonableness: *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 22.

[23] The fourth question does not call for a standard of review analysis.

IV. Analysis

A. *Did the Board err in assessing credibility?*

[24] The law is settled that the allegations of a refugee claimant must be presumed to be true unless there are reasons to doubt their truthfulness: *Maldonado*. Having reviewed the Board's reasons, the principal claimant's PIF narrative and the transcript of the hearing, the Court has concluded that the Board expressed reasonable concerns with the credibility of the sworn testimony. Consequently, the presumption of truthfulness was displaced. It was open to the Board to insist on corroborating evidence and to reject the applicants' explanations for not providing any.

[25] The Board was under no obligation to take the principal claimant's word at face value, as he failed to provide a clear and consistent story. Nor could he remedy the omissions and inconsistencies in his testimony with any objective evidence. The Board's conclusion that he had never been assaulted or injured falls within the range of acceptable outcomes on the standard of reasonableness.

B. *Did the Board choose the correct test for state protection?*

[26] According to the applicants, the Board erred by focusing on the efforts undertaken by Slovakia to rectify corruption and impunity, instead of the operational adequacy of those efforts.

[27] The applicants are correct that the state protection test focuses on adequacy: *Cervenakova v Canada (Citizenship and Immigration)*, 2012 FC 525 at para 74; *Ruszo*, above, at para 27; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 at paras 35-36. Yet there is no merit to their argument that the Board erred.

[28] In their submissions, the applicants selected passages from the Board's reasons to support their argument that the incorrect test was applied. The Court must consider the reasons as a whole. Although the Board did mention the efforts made by the authorities in Slovakia, it also referred to the correct test and stated unequivocally that "the police are both willing and able to protect victims" [emphasis added]. The Board clearly applied the operational adequacy test. The applicants' disagreement with the Board's conclusion does not mean that it erred in this respect.

C. *Did the Board err in assessing state protection?*

[29] It is settled law that courts in Canada must presume that state protection is available in the country of origin. The onus always lies on the applicant to rebut the presumption with “clear and convincing proof of a state’s inability to protect”: *Ward*, above, at 725-726.

[30] In the case at bar, the Board found that the principal claimant’s specific allegations lacked credibility. It evaluated the documentary evidence and found that it did not rebut the presumption of state protection. This was a reasonable conclusion open to the Board on the evidence. On judicial review, the Court does not have the function of re-weighting the evidence and substituting its own view for that of the decision-maker.

[31] There is no merit to the applicants’ arguments that the Board ignored the particular situation of the Roma in Slovakia or that its evaluation of corruption in the security forces was irrelevant to their claims. To the contrary, the honesty and efficacy of the police forces is central to the state protection analysis.

D. *Did the Board err in failing to consider the minor applicants’ claims separately?*

[32] The Board was silent on the alleged discrimination faced by the minor applicants in Slovakia. Counsel for the applicants submits that a failure to separately decide claims which raise distinct issues constitutes a reviewable error, relying on *Ramnauth v Canada (Minister of Citizenship and Immigration)*, 2004 FC 233 and *Babos v Canada (Citizenship and Immigration)*, 2014 FC 346.

[33] The respondent counters that the applicants made a conscious choice to designate Peter as their representative in their immigration matters. He was the only one among them to submit a PIF narrative.

[34] In the Court's view, it would have been preferable for the Board to specifically mention the allegations that the children face persecution in Slovakia due to bullying and segregation at school. Before infirming an administrative decision, however, the Court must look at the evidence and determine whether it is capable of supporting the outcome: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[35] The allegations which the Board did not explicitly address are the weakest. Even if they are accepted as true, it cannot be reasonably concluded that the discrimination faced by the children amounts to persecution warranting asylum. In these circumstances, the Board's failure to discuss the matter did not taint the reasonableness of its decision.

[36] This application is dismissed. The parties did not propose questions for certification and none are certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3259-14

STYLE OF CAUSE: PETER CONKA, DOROTA CONKOVA, SOFIA
CONKOVA, TINA CONKOVA, MAGGIE CONKOVA v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: MOSLEY J.

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