

Federal Court



Cour fédérale

**Date: 20190318**

**Docket: IMM-4059-17**

**Citation: 2019 FC 332**

**Ottawa, Ontario, March 18, 2019**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**ION ZATREANU  
CRISTINA STAVARACHE  
MARIA DIANA ZATREANU**

**Applicants**

**And**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicants, a husband, wife and their minor daughter, are Roma. Formerly from Romania, they became citizens of Ireland in 2010 having made successful refugee claims there in December 2002. The husband and wife were born in Romania. Their minor daughter was born

in Ireland. The parents also have three sons who are not part of this application but who lived with them in Ireland and received Irish Citizenship.

[2] On November 3, 2016, the Applicants made a refugee claim in Canada. The Applicants say they are unable to receive state protection in Ireland.

[3] The basis for their refugee claim was that they fled Ireland as a result of years of harassment, abuse, threats, beatings and discrimination suffered in Ireland mainly at the hands of the Irish Travellers. Although the Applicants regularly complained to the local police, nothing was done and they received no protection.

[4] This is an application for judicial review by the Applicants pursuant to s 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*, of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada on September 13, 2017 [the Decision].

[5] In the Decision, the RAD dismissed the Applicants' appeal and confirmed, pursuant to paragraph 111(1)(a) of the *IRPA*, the Refugee Protection Division's [RPD] determination that the Applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *IRPA*.

[6] For the reasons that follow, this application is allowed.

II. **The RPD Decision**

[7] The hearing before the RPD occurred on February 2, 2017. The decision was rendered on March 2, 2017.

[8] The RPD found that the determinative issue was the failure of the Applicants to rebut the presumption of state protection in Ireland. The RPD also found that the discrimination and harassment alleged by the Applicants did not amount to persecution (*IRPA* s 96), that there was no evidence of danger of torture, and the finding on adequate state protection equally applies to risk considerations under section 97 of the *IRPA*.

[9] In assessing state protection, the RPD noted the Applicants had reported several incidents to the police on many occasions and the police always responded and investigated. The principal Applicant, Mr. Zatreanu, testified that he had tried to speak to the superintendent of the local police station but had not been able to speak to him in person. It was noted that there was evidence of 11 letters from the police station between 2011 and 2013 indicating that the crimes which had been reported were under investigation.

[10] The RPD also noted that a crime had been reported to the police by one of the sons who said he felt the family had been racially targeted. At that time, the police provided a letter, addressed “To Whom It May Concern” confirming that the son had reported that the family was having problems with neighbours. The letter, a copy of which is in the record, says:

Passing attention is being paid to this home and every unit has been made aware of the situation.

[11] The RPD accepted that the Applicants were subjected to racism, bullying at school and harassment by the Travellers. It found that those incidents were random and not serious enough to be considered as persecution.

[12] The RPD noted that the Applicants had been able to appeal to the High Court with respect to their housing, had been able to make complaints to the police and had been able to seek the assistance of lawyers to advocate on their behalf. The RPD expressed the view that those were “examples of exactly how a democratic state functions, whereby the claimants were able to access the resources of the state, and they were not denied fundamental rights.”

[13] The RPD found that the determinative issue was whether the government of Ireland had failed to provide adequate protection to the Applicants.

[14] In considering the question of state protection, the RPD said that being unable to provide perfect protection was not in itself a basis to determine the state was unwilling or unable to offer reasonable protection. It also observed that international refugee protection is not meant to permit one to seek better protection abroad than at home.

[15] The RPD specifically found that the Applicants had been subjected to racial harassment and attacks and had been frustrated in their attempts to move out of the area in which they lived. But the evidence indicated that the authorities, including the courts and the police, had addressed their concerns. The RPD said it was a case where the Applicants were not satisfied with the response of the police and expected better protection. Although the protection was not perfect the RPD found it had been adequate protection.

[16] The RPD concluded that the Applicants had not demonstrated through clear and convincing evidence that Ireland could not provide adequate protection to them. The documentary evidence showed Ireland was a multiparty democracy and civilian authorities maintained effective control over the security forces. There were no reports of impunity involving security forces. It noted that the police always responded and investigated the Applicants' reported instances of harassment and attacks.

### III. **The RAD Decision**

[17] The Applicants appealed the RPD decision to the RAD on March 2, 2017. They did not submit new evidence and did not request an oral hearing.

[18] The RAD stated that it would conduct its own analysis of the record to determine if the RPD had erred. It also acknowledged that the standard of correctness would apply to questions of fact, mixed fact and law and law as established in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 78 [*Huruglica*].

[19] In assessing issues involving credibility of oral testimony before the RPD, the RAD said that it may apply the modified standard of reasonableness where the RPD enjoys a meaningful advantage as set out in *X (Re)*, 2017 CanLII 33034 (CA IRB).

[20] The RAD outlined the background of the Applicants including their move to Coolock in 2008, the attacks and harassments by the Travellers, the number of attempts they made to seek assistance from the authorities and their application to the local council to be provided with

housing in a different area. The RAD found that each time the authorities were approached the police investigated but were not able to stop the harassment and attacks.

[21] The RAD identified that a state protection analysis is not to be carried out in a factual vacuum. It must be analysed in relation to the particular facts and situation of the Applicants.

The RAD then set out a number of principles from the jurisprudence on state protection such as:

- the onus is on applicants to rebut the assumption of state protection;
- an applicant must present clear and convincing confirmation of the state’s inability to protect by, for example testimony of similarly situated individuals let down by state protection or, their own testimony as to past personal incidents in which state protection did not materialize;
- absent a complete breakdown of state apparatus it should be assumed that the state is capable of protecting an applicant;
- the evidence that state protection is inadequate must not only be reliable and probative, it must also satisfy the RAD, on a balance of probabilities, that state protection is inadequate;
- where a state is in effective control of its territory, has military, police and civil authority in place and make serious efforts to protect its citizens, the mere fact that the state’s efforts are not always successful will not rebut the presumption of state protection;
- the more democratic the state’s institutions, the more an applicant must have done to exhaust all courses of action open to them; in a functioning democracy, that is a heavy burden;
- local failures by authorities to provide protection did not mean that the state as a whole fails to protect its citizens, unless the failures form part of a broader pattern of the state’s inability or refusal to provide protection;
- no government is expected to guarantee perfect protection to all of its citizens at all times, and the fact that the state is not always successful in protecting its citizens is not enough to justify a claim;

[Citations were provided in the Decision but have been omitted.]

[22] The RAD separately set out what it referred to as “other legal standards” to guide it in applying the legal principle of clear and convincing evidence:

- protection provided by the state is not perfect;
- the police are primarily responsible for state protection against violent attacks;
- the failure of one police officer or one police department to investigate a crime does not, by itself, determine that there is no state protection;
- just because the police did not apprehend the assailants in a particular incident, or that the applicants’ complaint was not pursued with the diligence that the applicants would have preferred, does not mean that state protection in their home country is not adequate; there may be many factors that could contribute to this;
- it is open to the panel to determine if the state was unable to protect them, not in the absolute sense, but rather to a degree that was reasonable having regard for the circumstances of the applicants.

[23] After setting out these principles, the RAD considered the specific allegations made by the Applicants.

[24] The RAD found that the evidence indicates the Applicants received protection from the Irish authorities. The Applicants reported incidents to the police and the police did provide assistance to them. The RAD acknowledged that the police were not able to resolve the problems reported by the Applicants but found that the authorities provided protection by investigating the incidents. It then reiterated that lack of success in protecting citizens is not enough to justify a refugee claim where a state is in effective control of its territory and is making serious efforts to protect its citizens.

[25] The RAD found that “[t]here is no evidence which would indicate that the [Applicants] were denied protection on account of their Roma ethnicity”.

[26] The RAD concluded by stating it had reviewed the oral and documentary evidence on which the RPD findings were based, and found that the RPD decision indicates that the RPD had

conducted a lengthy and fair analysis of the documentary evidence. The RAD then agreed with the RPD's finding that the presumption of state protection was not rebutted.

#### IV. Issues and Standard of Review

[27] Although the parties have raised several issues, the determinative issue is whether the RAD erred in its state protection analysis.

[28] The Federal Court of Appeal has established that reasonableness is the standard of review to be applied by this Court to a decision of the RAD: *Huruglica* at paras 30, 35.

[29] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[30] If the reasons, when read as a whole, “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

#### V. Analysis

##### A. *Credibility*

[31] Neither the RPD nor the RAD questioned the credibility of the Applicants.

[32] The RPD specifically accepted that the Applicants had been subjected to racial harassment and attacks. The RPD also noted that the police investigated each time they were approached by the Applicants, but were not able to stop the harassments and attacks.

[33] The RAD made no direct finding of credibility. It indicated, without criticism, that “[i]n both their written and oral testimony the [Applicants] outlined a series of attacks and harassments by individuals who belonged to the Travellers, an Irish Roma Group”.

[34] The RAD also noted that evidence was provided as to the number of attempts made by the Applicants to seek assistance from the authorities.

B. *Serious Efforts*

[35] The Applicants submit that the RAD used the wrong test to assess the adequacy of state protection as it referred several times to a state “making serious efforts to protect its citizens” whereas the proper test of state protection is “operational adequacy”.

[36] The Respondent argues that the RAD applied the correct test in that it found that the Applicants had not provided clear and convincing, relevant and reliable evidence that Ireland was unable or unwilling to provide protection to rebut the presumption of state protection.

[37] A review of the Decision shows that it is not clear whether the RAD was alert to the distinction that has arisen in the jurisprudence between “operational adequacy” and “serious efforts”.

[38] The RAD mentions three times the test set out by the Federal Court of Appeal in *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 18 Imm LR (2d) 130 which says that where a state is in effective control of its territory and makes serious efforts to protect its citizens, the mere fact that the state's efforts are not always successful will not rebut the presumption of state protection.

[39] On the other hand, the RAD twice correctly identified the test as being whether an applicant has raised clear and convincing evidence on a balance of probabilities that state protection is inadequate.

[40] The RAD also set out also the following case extract in a footnote re-affirming that the Applicants bore the legal burden of rebutting the presumption of state protection.

The Court stated: "The issue is not whether there is clear and convincing evidence that the police would not be reasonably forthcoming with a guarantee of effective protection but whether there is clear and convincing evidence that the police would not be reasonably forthcoming with serious efforts at protection." The onus is on the claimant to produce clear and convincing evidence that the police would not provide protection, not on the Board to provide proof that there will be state protection.

Decision, footnote 29 citing *Nadeem, Choudhry Muhammad v Canada (Citizenship and Immigration)*, 2001 FCT 1263.

[41] Given this specific extract, coupled with the conflicting references to "serious efforts" and state protection that is "adequate" and, in light of the lack of comment or analysis of the Applicants' evidence, as discussed below, it is not clear that the RAD applied the correct test. While for that reason alone the reasons for the Decision are unintelligible, there is another serious problem with the Decision - the state protection analysis is deficient.

C. *State Protection*

[42] The fundamental problem with the state protection analysis by the RAD is that there was no real analysis. There was a long recital of many principles and a conclusion that the Applicants had failed to rebut the presumption of state protection.

[43] The RAD devoted only two paragraphs to the Applicants' receipt of state protection:

[20] In this particular appeal, the evidence indicates that the [Applicants] did receive protection from the Irish authorities. The [Applicants] did report the incidents to the police and the police did provide assistance to the [Applicants]. The RAD does acknowledge the fact that the police were not able to resolve the problems reported by the [Applicants]. Although the result may not have been to the liking of the [Applicants], the documentation indicates that the authorities did provide protection to the [Applicants] by investigating the incidents. As stated previously, the fact that a state is not always successful in protecting its citizens is not enough to justify a claim, especially where a state is in effective control of its territory, has military, police, and civil authorities in place, and is making serious efforts to protect its citizens.

[21] All of the documentary evidence submitted by the [Applicants] indicates that the authorities in Ireland provided protection to the [Applicants]. There is no evidence which would indicate that the [Applicants] were denied protection on account of their Roma ethnicity.

[Footnotes omitted.]

[44] What was the basis for the RAD's conclusion that there is no evidence that the Applicants were denied protection?

[45] There was extensive evidence from Mr. Zatreanu before the RPD. It included his sworn testimony, the Basis of Claim [BOC] and a long, detailed and documented affidavit.

[46] In the BOC, Mr. Zatreanu outlined many, many incidents which resulted in the complaints he made to the police over the years. Some of the complaints resulted in physical harm to him and his family; others resulted in extensive property damage to his house and belongings. Several times people entered the backyard where the Applicants were living and threatened them with physical violence. Mr. Zatreanu, his friends and his family, including his son's wife, were verbally and physically assaulted. They were often slapped, threatened and spat upon.

[47] Mr. Zatreanu stated that when he complained, the police would attend and take notice of the damage such as broken windows, vandalism of the house, including breaking the television, and theft of their car. But nothing would happen. When he would call to follow up with the police, Mr. Zatreanu was told they were still investigating.

[48] The transcript of the RPD hearing shows that Mr. Zatreanu did not just contact the police. He testified that in addition to going to the police many times, he hired a lawyer to help with his housing problem, he went to court, he contacted local councillors and he went to organizations that "help people who are humiliated, terrorized, abused." In addition to his testimony, there are documents in the record substantiating those activities.

[49] Mr. Zatreanu testified that he also tried to get an appointment with the superintendent of the police as well as with a Minister of the government. He received letters of acknowledgement but never an appointment.

[50] The evidence from Mr. Zatreanu was that other than attending at the scene, taking notes and subsequently sending a letter to say that they would investigate, the police did little or

nothing. When he would telephone the police periodically for an update, he would be told “just wait”.

[51] The RAD made no express negative credibility findings. In saying that there is “no evidence” that the Applicants were denied protection, the RAD ignored significant contrary evidence, which is unreasonable: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17.

[52] The RAD seems to equate an investigation to the provision of state protection. The RAD agreed with the RPD that the police investigated the matters each time the Applicants complained “but were not able to stop the harassments and attacks”. Yet other than the form letters acknowledging receipt of each complaint, there is no evidence in the record that any investigation occurred. The evidence of Mr. Zatreanu is that after the police showed up and took notes, nothing happened. The RAD does not appear to have turned its mind to whether or not the kind of investigation that was carried out by the police in response to the many complaints of the Applicants actually was protection, or whether the evidence of Mr. Zatreanu rebutted the presumption of state protection.

[53] As was recently stated by Mr. Justice Grammond, “[i]ndividual policing failures do not prove that state protection is inadequate, and neither does the fact that the police took some action in an individual case prove the adequacy of state protection.”: *A.B. v Canada (Citizenship and Immigration)*, 2018 FC 237 at para 19.

[54] Simply listing a series of principles and stating a conclusion without more does not meet the test for reasonableness. It is impossible for the Court to understand and assess the train of thought of the RAD: *Groohi v Canada (Citizenship and Immigration)*, 2009 FC 837 at para 14.

## VI. Conclusion

[55] In allowing this application, the Court is not making any finding with respect to whether or not the Applicants rebutted the presumption of state protection.

[56] One finding that has been made is that the RAD did not clearly apply the correct test for state protection.

[57] The other finding is that, in support of its decision, the RAD did not provide an analysis of the facts and situation of the Applicants. The reasons did not meet the requirements set out in *Dunsmuir*. They were not justifiable, transparent or intelligible. The reasons, when read as a whole, do not allow the Court to understand why the RAD came to the conclusion it did. This is necessary in order to permit the Court to determine whether the conclusion is within the range of possible, acceptable outcomes defensible on the facts and law.

[58] The RAD identified but failed to heed one of the first principles it enunciated, at paragraph 9 of the Decision:

A state protection analysis is not carried out in a factual vacuum. It must be analyzed in relation to the particular facts and situation of the [Applicants].

[59] For the reasons given, this application is allowed. The matter is sent back for redetermination by a differently constituted panel.

[60] There is no serious question of general importance for certification.

**JUDGMENT in IMM-4059-17**

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

1. The application is allowed.
2. The matter is sent back for redetermination by a differently constituted panel.
3. There is no serious question of general importance for certification.

**"E. Susan Elliott"**

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Judge

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

**DOCKET:** IMM-4059-17

**STYLE OF CAUSE:** ION ZATREANU, CRISTINA STAVARACHE, MARIA  
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