

Federal Court



Cour fédérale

**Date: 20100304**

**Docket: IMM-1306-09**

**Citation: 2010 FC 252**

**Ottawa, Ontario, March 4, 2010**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**MIROSLAV KALEJA  
GRETA KALEJOVA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**O'KEEFE J.**

[1] This is a judicial review of a Refugee Protection Division (the Board) decision dated February 9, 2009 refusing the applicants' refugee status claim pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). The applicants, Miroslav Kaleja (the principal applicant), and his daughter, Greta Kalejova (the minor applicant) are

Czech citizens of Roma ethnicity. The principal applicant's two sons did not appear at the Board hearing and are not parties to this judicial review application.

[2] The applicants request that the Board's decision be set aside and the matter be referred to a different officer for redetermination.

### **Background**

[3] As a child, the principal applicant was placed in a school for children with special needs, where Roma students were usually sent. Before entering the classroom, the teacher would always come outside and check his head and hands for dirt and lice before allowing him in the classroom. Allegedly, this was only done to the Roma children.

[4] When he finished his education, the principal applicant went into the army and he claims he did not have the same privileges there as the other soldiers. He was never allowed to rest between work assignments unlike the others.

[5] The principal applicant married his first wife at an early age and they had three children. Due to his unemployment and financial problems, they had to live with his wife's parents. He then started to work as a musician in a hotel in Prague. He claims the housing and financial problems were the main reason for his divorce in 1993.

[6] In 1994, the principal applicant alleges being attacked by skinheads when he was on his way home from work. He suffered stitches on his left leg from a baseball bat and injuries to his back and shoulders. He also had a broken finger and lost some teeth in the attack. Police officers driving by called an ambulance for him, but they advised him not to say that skinheads had attacked him. A police report was written to say that unknown perpetrators were responsible for the attack. The principal applicant also stated that he was subjected to racial insults over many years.

[7] The principal applicant arrived in Canada in January 16, 2008 and claimed refugee protection on February 5, 2008.

[8] Greta Kalejova, according to her father's allegations, has been bullied at school because of her ethnicity, but when the principal applicant and his wife complained, the principal told them to be glad their daughter was attending the school and nothing was done.

### **Applicants' Written Submissions**

[9] The applicants submit that they were deprived of legal aid under questionable circumstances and that this justifies a judicial review. Former counsel from the Legal Aid office provided an opinion to the effect that the applicants have an excellent chance of succeeding before the Board. However, they were thereafter refused further coverage. The applicants were not in a financial position to retain counsel privately. Proceeding without legal counsel was very detrimental to their

case. The Board misunderstood their situation, stating that “they confirmed that they previously had counsel and they had dismissed that person”.

[10] On the merits of their case, the applicants submit that the Board erred by finding the applicants were not at risk of persecution. The Board made a clear error by not considering that the attack the principal applicant experienced in 1994 did not constitute persecution. The Board also erred in blaming the principal applicant for not following up on the matter with the police. In fact, the police would not do anything because he was only able to give a generic description of the assailants. The Board further erred by entirely ignoring the evidence regarding the rise of neo-Nazis in the Czech Republic. Finally, in the daughter’s case, the Board did not apply the test for cumulative persecution reasonably where there was sustained and systemic violation of basic human rights.

[11] The applicants also submit that the Board erred in failing to comprehensively review country conditions. Once the Board is satisfied that the applicants belong to the claimed ethnic group, the Board, even if it disbelieves the alleged incidents of persecution, still has a duty to review the country conditions materials. Here, the Board only focused on the incidents of discrimination and found them not serious enough. However, the applicants could still have a well-founded fear of persecution simply because they are in an environment hostile to Roma persons.

**Respondent's Written Submissions**

[12] The respondent submits that the Legal Aid decision was not an error of the Board. The Board bears no responsibility for the reasonableness of any decision of Legal Aid. In immigration matters, the right to counsel is not absolute. As long as a refugee claimant is afforded a fair hearing, the Court should not intervene. In this case, the Board took more than adequate steps to ensure that the applicants received a fair hearing and was clearly aware and attentive to the fact that the applicants were unrepresented.

[13] The respondent submits that the finding that the alleged acts of discrimination did not amount to persecution was reasonable. The Board considered the 1994 attack and found that the seriousness of the incident was mitigated by the length of time that had passed since then, as well as the fact that the principal applicant did not follow up on his report to the police. These are reasonable findings. The Board reasonably considered the cumulative effect of the incidents. The Board did not err in finding that the basic human rights of the applicants had not been affected in a fundamental way.

[14] The respondent finally submits that the Board adequately assessed the country conditions. The Board properly reviewed the country conditions documents. The member acknowledged that the documents indicated that Roma in the Czech Republic face societal discrimination. However, the Board, after considering the documentary evidence and the testimony, concluded the various

acts of discrimination faced by the applicants did not amount to persecution. This conclusion is within a range of reasonable outcomes.

### **Issues**

[15] The issues are:

1. What is the applicable standard of review?
2. Is the Board's decision reviewable because the applicants were unrepresented by Legal Aid?
3. Was the Board's conclusion that the applicants did not have a well-founded fear of persecution reasonable?

### **Analysis and Decision**

[16] **Issue 1**

What is the applicable standard of review?

If the decision is reviewable because of the lack of representation, the only potential error imputable to the Board would be a breach of procedural fairness in proceeding with the hearing although the applicants were unrepresented. The standard would therefore be correctness (see *Austria v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 423, [2006] F.C.J. No. 597 at paragraph 3).

[17] The applicants' argument about the treatment of the evidence on country conditions can be viewed as a question of sufficiency of reasons and therefore a matter of procedural fairness (see *Junusmin v. Canada (Minister of Citizenship and Immigration)* 2009 FC 673, [2009] F.C.J. No. 844 at paragraph 23).

[18] However, the applicants did not address this issue from a sufficiency of reasons perspective, they alleged the Board disregarded the evidence on country conditions. If this issue is to be viewed in this perspective, it is a matter of the assessment of evidence by the Board and it is a question of fact. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, the Supreme Court held that questions of fact are usually reviewable under the reasonableness standard.

[19] As for the Board's ultimate finding on persecution, it is a mixed question of fact and law. It is about the application of sections 96 and 97 of the Act in the applicants' specific situation. The standard of review for this matter is reasonableness. As noted in *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (C.A.) at paragraph 3:

It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved. It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein, and the intervention of this Court is not warranted unless the conclusion reached appears to be capricious or unreasonable.

[20] I wish to deal first with Issue 3.

[21] **Issue 3**

Was the Board's conclusion that the applicants did not have a well-founded fear of persecution reasonable?

The Board focused in its decision on the objective fear of the applicants and the seriousness of the discriminatory acts they were subjected to. The Board wrote one paragraph on the country conditions in the Czech Republic for persons of Roma descent. This paragraph reads as follows:

I acknowledge the documentary evidence which states, "Random violence, rallies and vandalism by neo-Nazis and skinheads groups against Roma occurred throughout the year. Societal discrimination against minorities, especially in Roma, continued and a lack of an equitable education, housing and employment opportunities for Roma persisted." "the laws prohibit discrimination based on race, gender, disability, language or social status; however significant societal discrimination against Roma and women persisted." However, the examples of discrimination given by the claimants in this case do not indicate that they have been subjected to this level of persecution.

[22] This does not respect the requirement of an "existence of justification, transparency and intelligibility within the decision-making process" (see *Dunsmuir* above at paragraph 47).

[23] In fact, there is a link missing in the reasoning chain. The member stated he acknowledged the existence of serious societal discrimination of Roma in the Czech Republic and then jumped back to his conclusion on the applicants' objective fear, stating the alleged incidents are not serious enough to amount to persecution. Although the applicants' uncontradicted story contained examples of skinhead attacks, discrimination in the education system and a lack of employment opportunities, the member declared the case is different from the level of persecution generally experienced by



Roma. The decision does not sufficiently distinguish persecution from what the applicants experienced. In *Mahanandan v. Canada (Minister of Employment and Immigration)* (1994), 49 A.C.W.S. (3d) 1292, [1994] F.C.J. No. 1181 at paragraph 8, the Federal Court of Appeal wrote:

Where, as here, documentary evidence of the kind in issue here is received in evidence at a hearing which could conceivably affect the Board's appreciation of an Appellant's claim to be a Convention refugee, it seems to us that the Board is required to go beyond a bare acknowledgment of its having been received and to indicate, in its reasons, the impact, if any, that such evidence had upon the Applicant's claim. As I have already said, the Board failed to do so in this case. This, in our view was a fatal omission, as a result of which the decision cannot stand.

[24] The member did not really address the evidence regarding country conditions. He simply mentioned it. But since this evidence contradicted his determination, he should have explained more significantly why he distinguished the applicants' case. In *Junusmin* above, at paragraph 38:

The Board member is presumed to have considered all the evidence without the need to address every piece of evidence. Nevertheless, the Board member has a duty to address in his reasons any evidence directly contradicting conclusions on a key aspect of a determination.

[25] 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 they are members of a persecuted group. The case law cited by the applicants involves young male Tamil from Sri-Lanka, but the principle that documentary evidence on persecution of a particular social group should be seriously evaluated is applicable to Roma cases. In a case involving a Hungarian Roma, *Sinko v. Canada (Minister of Citizenship and Immigration)*, (2002) 116 A.C.W.S. (3d) 242, [2002] F.C.J. No.903 at paragraph 23, the Court wrote:

The Board denied the applicants' claims because it did not find them credible. However, I am of the view that, in the circumstances of this case, there was before the Board independent and credible documentary evidence that was not considered. The Board should have expressly assessed this evidence in its reasons and by failing to do so, I am left to conclude that it made its decision without regard to the material before it. I deem this evidence sufficiently important and material to the claim that, had it been considered, it could have been capable of supporting a positive determination of the refugee claim.

[26] As a result of my findings, I am of the view that the Board 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.

[27] Because of my finding on Issue 3, I need not deal with the other issue.

[28] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

[29] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions**

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

<p>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,</p> <p>(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</p> <p>(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.</p> <p>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</p> <p>(a) to a danger, believed on substantial grounds to exist, of</p>	<p>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 :</p> <p>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;</p> <p>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.</p> <p>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 :</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire,</p>
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torture within the meaning of Article 1 of the Convention Against Torture; or

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 risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

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

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

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

**DOCKET:** IMM-1306-09

**STYLE OF CAUSE:** MIROSLAV KALEJA  
GRETA KALEJOVA

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 14, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** March 4, 2010

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