Federal Court  Cour fédérale

Date: 20110531

Docket: IMM-3214-10

Citation: 2011 FC 634

Ottawa, Ontario, May 31, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

SPACIL JAROSLAV (a.k.a. JAROSLAV SPACIL), SPACILOVA RUZENA (a.k.a. RUZENA SPACILOVA), ALEX SPACIL ERIK (a.k.a. ERIK ALEX SPACIL), JAROSLAV SPACIL

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 May 14, 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 four citizens of the Czech Republic: Jaroslav Spacil (age 39), the principal applicant, Ruzena Spacilova (age 42), his wife, and their two children, Eric Alex Spacil (age 9) and Jaroslav Spacil (age 19). They arrived in Canada on May 14, 2008, and claimed refugee status.

[3] The applicants claim that they have been persecuted in the Czech Republic because of their Roma ethnicity. The principal applicant described the bases for their claim in the narrative accompanying his Personal Information Form (PIF) and in his testimony before the Board.

[4] First, the evidence describes general mistreatment suffered by the applicants in the Czech Republic:

a. The applicants were constantly threatened, including with death, by their neighbours;

b. At least twice every month the applicants' family's home would be attacked by skinheads who would kick at their doors, threaten to throw burning bottles into their apartment, and shout threats, such as "we will burn you out, you black gypsy pigs", and "gypsies you should die in gas chambers." The applicant stated that their family could identify most of the skinheads by name or sight;

c. The applicants were terrified to go out in the evenings, because they would be vulnerable to attack; and

d. The applicants believe that the police and courts sympathize with those who attack Roma. The principal applicant stated that Czech television reports that such sympathizers exist. Moreover, he stated that it is well-known that those who are known to have attacked Roma in the Czech Republic receive light sentences when they are brought before the judicial system.

[5] In addition to the general allegations, the principal applicant also provided the following specific examples of treatment that the applicants say drove them from the Czech Republic to Canada:

a. In 1996, although the principal applicant's narrative differs from his testimony, it seems that the principal applicant, his mother-in-law, and his brother-in-law were attacked by skinheads. The majority of the beating occurred in his mother-in-law's apartment. One of their attackers used a baseball bat in the attack. All of the victims reported the attack to the police. The police found the skinhead who had used the baseball bat, and the principal applicant testified that the attacker received two years in jail for the crime. None of the other attackers was charged. Moreover, the principal claimant stated that his mother-in-law was at first refused medical treatment, but ultimately did receive attention once the police intervened. She suffered broken ribs and severe bruising, including a black eye, as a result of the attack.

b. In his narrative, the principal applicant stated that on October 30, 2002, Ruzena Spacilova's nephew, Jan Dunka (who has made a separate refugee claim), was sitting at a bar with some other Roma friends. They were forced from the bar by threats from a large group of skinheads who came to sit down. As they were leaving, Mr. Dunka was stabbed in the back. The police and an ambulance were called, and the police apprehended the man who stabbed him but the rest of the gang was allowed to flee. As a result of his injuries, Mr. Dunka could not return to work for two months, and he was fired as a result. Mr. Dunka made a police report after the incident, but when he went to follow up, about two months later, he was told that there was no report, that the police had lost the file and that they would not further pursue the matter.

c. On April 20, 2007, the principal applicant was told by his son's friend that his son Miroslav, who remains in the Czech Republic, was being beaten by skinheads on the street beside their home. His wife called the police, who told her that they could not assist them because it was simply a fight between boys. The narrative states that Mrs. Spacilova called the police about five times asking for help, but each time was told that they were too busy to help. The narrative states that the applicants were too scared to help their son because one of the skinheads was threatening them with a gun. The principal applicant did, however, gather with a group of about 15 other Roma men from the building in order to prevent the skinheads from coming and

attacking any of the younger children in the building. They, too, were threatened with a gun. Ultimately an ambulance and the police did arrive, which led the attackers to flee. Although he was badly beaten, Miroslav did not go to the hospital or make a police report because he had been told that if he made a report he and the other gypsies in his building would be killed. The narrative states that the applicants could identify the skinheads and know where they live. Many of them, however, are related to the policemen.

As a result of that incident, Miroslav was sentenced to 150 hours of community service. The narrative states that in phone conversations the applicants have confirmed with Miroslav that the attacks continue. He is unable to sleep due to constant kicking at his doors and late night telephone calls or text messages, threatening him with further attacks. Another relative who had been living in the apartment fled to join her relatives in another city because she feared for the lives of herself and her two young children.

d. The narrative states that in May of 2007 the applicants contacted six to seven attorneys in their area, seeking representation regardiong the attack on Miroslav. The attorneys refused to take their case.

e. On February 5, 2008, Mrs. Spacilova's father was found drowned in the fish pond in a park. The police contacted the applicants, and informed them that there would be an autopsy to determine how he had drowned. Two weeks later, the police informed them that their theory was that he had killed himself by overdosing on medication that had been found in his body. The applicants stated that he never took—indeed, refused to take—any medication. After contacting the police and insisting that she receive a copy of the autopsy report, Mrs. Spacilova received what the applicants suspect is an incomplete copy of the report soon before coming to Canada. The applicants suspect that Mrs. Spacilova's father was beaten and thrown into the pond. In his narrative, the principal applicant states that the funeral employee who was involved in removing the body from the water told his wife that there was a conspiracy to hide the truth about the death and that she should abandon her search for the true cause of death. He also states that when they saw his body for the first time, which was at his funeral, they saw bruises all over his body.

Decision under review

[6] The Board decided that the applicants are neither Convention refugees nor persons in need of protection.

[7] Before deciding the merits of the claim, the Board decided the applicants' motion that the Board could not decide the claim because there was a reasonable apprehension of bias by the Board against Czech refugee claimants as a result of comments made by the Minister of Citizenship and Immigration that Czech refugee claimants are "fraudulent".

[8] The Board stated that the definition of bias is "would a reasonable person reviewing the facts before them be left with the reasonable apprehension of bias?" The Board stated that it is an independent quasi-judicial tribunal. The Board found that Board members are independent decision-makers whose decisions are based on the evidence presented at each hearing and made in accordance with the Act. Although the members of the Board are appointed by the Governor in Council, the Minister of Immigration, they hold office during good behaviour subject to removal by the Governor-in-Council at any time for cause. The members of the Board are bound by a Code of Conduct.

[9] The Board concluded that there is no reasonable apprehension of bias:

> ¶3. … The Minister is not the individual making the decisions in these matters and decisions are made on the basis of the criteria set out in the *IRPA*. Therefore, I find there would be no reasonable apprehension of bias on the part of a reasonable person reviewing the facts.

[10] The Board then considered the factual basis for the applicants' claim. The Board reviewed the incidents of discrimination referred to above. The Board stated that the determinative issue in the case was the question of state protection:

> ¶14. The determinative issue in this case is whether there is a serious possibility that the claimants would be persecuted, if they

> returned to the Czech Republic, or on a balance of probabilities, they would be subjected personally to a risk to their lives or at the risk of cruel and unusual treatment, if they returned to the Czech Republic.
>
> ¶15. I find that there is adequate state protection in the Czech Republic, and the claimants have failed to rebut the presumption of state protection with clear and convincing evidence.

[11] With regard to state protection, the Board stated the legal principles and much jurisprudence relevant to an assessment of the question of state protection. The Board noted that there is a presumption of state protection and the burden is upon the applicants to rebut that presumption with clear and convincing evidence of the state's inability to protect. The Board recognized that evidence of the state's failure to protect other similarly situated individuals could rebut the presumption. The Board confirmed that the test is "whether the protection is adequate" and not whether the protection is "effective," although effectiveness is relevant to the determination. Protection need not be perfect. Moreover, the Board recognized that the burden to prove the absence of state protection increases with the level of democracy in the home state.

[12] The Board found that because the Czech Republic is a democracy with free and fair elections, the presumption of state protection is a strong one. The applicants therefore had the onus of demonstrating that they had exhausted their recourses to protection in the Czech Republic, including by seeking protection beyond their local area. The Board found that if the applicants believed some members of the security forces or authorities to be corrupt, they should have approached other members of the security forces or authorities.

[13] The Board found that there is considerable legal protection for the rights of Roma in the Czech Republic, especially with anti-discrimination and hate legislation. The Board found that the

following legislation and actions by the Czech government demonstrated the respect and protection afforded by the Czech state to Roma within the Czech Republic:

a. Legislative prohibitions against discrimination and hate crimes in the Czech Constitution, legislation governing employment and education, and the *Charter of Rights and Freedoms*;

b. Membership in the European Union, which gives its citizens recourse to the European Court of Human Rights, and "multilateral programs such as The Decade of Roma Inclusion";

c. The hiring of "Roma Police Assistants" – individuals hired to assist police in investigating, and Romani victims in reporting, crime;

d. Close monitoring by the police of extremist movements;

e. Efforts to increase recruitment of Roma police officers, including by providing financial assistance to complete formal education requirements. The Board stated that there were an estimated 61 Romani police officers in the Czech Republic in 2006;

f. Police training on how to deal with minorities, and efforts to engage with Roma communities;

g. Prosecutions of hate crimes committed against Roma by the judiciary;

h. Investigations by the Czech Ombudsman into allegations of public-sector mistreatment of Roma; and

i. Non-governmental organizations, including 400 that the Board identifies as Romani, dedicated to investigating police misconduct involving Roma and the "social integration of Roma into Czech society, including housing, healthcare, employment, social services and cohesion."

[14] In this case, the Board found that the judicial system adequately protected the applicants. The Board noted that the attacker in the 1996 incident (the Board's reasons actually say "the attacks in 1992") was convicted and sentenced to two years in jail. The Court found that this indicated that there had been an investigation as well.

[15] With regard to the incident involving Miroslav, the Board found that there must also have been an investigation, which culminated in Miroslav's community service sentence. The Board recognized the applicants' concerns that they had not been fairly treated, that they could not find a lawyer to represent them, and that the police failed to respond to their calls for help. The Board concluded that the police and the judicial system appeared to have carried out their proper duties. In particular, the Board considered the following facts relevant to that conclusion:

a. There appears to have been an investigation and the judicial system dealt with the matter; and

b. Miroslav came to Canada and made an application for refugee protection before returning to the Czech Republic. The applicants testified at their hearing that Miroslav has mental problems and that they could not explain or control his actions, but the Board found that

> Nevertheless, Mirsolav was the target of this assault according to the claimants and he was sentenced as a result. He subsequently returned to the Czech Republic. It appears that the police and the judicial system carried out their duties in this matter.

[16] With regard to the death of the principal applicant's father-in-law, the Board concluded that despite the applicants' doubts regarding the adequacy of the police investigation, an autopsy was performed. Although the applicants stated that the funeral home employee had told them that the autopsy was corrupted, the Board found at paragraph 24 that "I cannot conclude on a balance of probabilities that the investigation and autopsy were incorrect. The Czech system dealt with the matter."

[17] The Board found that it could give little weight to the incident regarding Mr. Dunka. The Board stated that the testimony regarding that incident was hearsay and the story was implausible.

[18] With regard to the applicants' testimony that their children were forced to be educated in special schools for Roma, at paragraph 26 of its decision, the Board reviewed the documentary evidence regarding treatment of Roma children in special schools. The Board recognized that these schools cater to students with developmental disabilities. The Board recognized that the level of education in these schools has been reported to be "substandard and is falling short of providing students with the knowledge necessary for them to enter regular schools" but found that reports are also that opportunities for Roma education are improving. The Board stated that reports are that more attention is being paid to providing resources to improve education for Roma, including preparatory classes and teachers' assistants, free pre-school education, and secondary school scholarships for Roma.

[19] At paragraph 27 of its decision, the Board considered efforts by non-governmental organizations to assist Roma students. The Board found that Roma children are "still systematically turned away from regular schools and sent to schools where the curriculum is not as challenging and does not meet the minimum requirements for dignity." At paragraph 28 the Board considered efforts by the Czech government to ensure that Roma pupils are not wrongfully placed in special schools. The Board stated that in 2007 the European Court of Human Rights had ruled in favour of eighteen Roma Czech students who had been sent to the special schools, finding that it amounted to "indirect discrimination" and violated the European Convention on Human Rights. The Board found that as a result of that decision, the Czech government must enact legislation prohibiting discrimination against Roma children in the education system. The Board concluded that the applicants could

therefore have ensured that their children were placed in the regular school system had they so desired:

> ¶28. … I, therefore, find that the claimants could demand that the children attend a school in the regular education system if they returned to the Czech Republic.

[20] Finally, the Board considered the applicants' testimony regarding difficulties in attaining housing the Czech Republic. The Board found, however, that the evidence was not persuasive that they had faced any discrimination in obtaining housing:

> ¶29. …However, evidence was given that the employer of the PC had guaranteed the purchase of the home in which they lived along with another family of relatives on another floor of the house. There was no persuasive evidence that hey were discriminated against in obtaining housing.

[21] The Board also considered the applicants' submission that the applicants' evidence ought to be considered in light of the fact that some relatives of the applicants had obtained refugee protection in Canada based on similar evidence, including a portrayal of the 1996 attack. The Personal Information Form narrative used in that case was submitted as an exhibit to the Board. The Board found, however, that the facts as conveyed in the PIF and the applicants' testimony differed from that submitted by their relatives. The Board concluded that "There are no written reasons for the relatives' decision and I can only deal with the facts in this particular case."

[22] The Board drew a similar conclusion with respect to other cases presented by the applicants' counsel to the Board in which the same member of the Board gave a positive finding in a Czech Roma matter, and another in which this Court granted a Roma judicial review application:

> Each case is decided on its individual facts and although I have taken these other cases into consideration, I find that there is no clear and convincing evidence that the claimants would be unable to obtain state protection, if they returned to the Czech Republic.

LEGISLATION

[23] 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, religion, nationality, membership in a particular social group or political opinion,	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) 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.

[24] 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	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

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	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 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.	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, (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

[25] The applicants raise four issues:

1. Does the dramatic difference in the Board's acceptance rate for Czech refugees before and after comments from the Minister of Citizenship and Immigration in

April 2009 raise a reasonable apprehension of bias on the part of members of the Board with regard to their determinations of refugee claims from the Czech Republic?

2. Did the Board err in finding that the police in the Czech Republic had provided adequate protection to the applicants in answer to their complaints?

3. Did the Board err in concluding that violence against Roma had declined, by failing to refer to, or consider, the most recent evidence suggesting the opposite conclusion?

4. Did the Board err in law in relying upon the wrong test for state protection?

STANDARD OF REVIEW

[26] 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.

[27] 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.

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

[29] The Board's consideration of the evidence regarding the status of violence against Roma is also a determination of fact to be reviewed on a standard of reasonableness.

[30] 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.

[31] The issue of whether the facts of the case give rise to a reasonable apprehension of bias is 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: Does the difference in the Board's acceptance rate for Czech refugees before and after comments from the Minister and Citizenship of Immigration in April 2009 raise a reasonable apprehension of bias on the part of members of the Board with regard to their determinations of refugee claims from the Czech Republic?

[32] The applicants submit that, as a result of the comments made by the Canadian Minister of Citizenship and 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 from the Czech Republic. The Minister's comments are in paragraphs 43, 44 and 50.

[33] The Court notes at the outset that it heard two applications, one after the other, which raise this same issue. To be consistent, the Court will set out in full its reasons for concluding that a

reasonable person, being practical and having thought the matter through, would not think it more likely than not that the Board would, consciously or unconsciously, decide a refugee claim of a Czech Roma unfairly, because of the Minister's comments and the difference in acceptance rates for Czech claimants. The Court reserved its decision on this application together with its decision in IMM-1773-10, and rendered both decisions at the same time. To be consistent, these reasons on the issue of the reasonable apprehension of bias are the same as in the other case (IMM-1773-10).

Judicial comity applies

[34] This allegation has been raised in numerous recent cases before this Court. In *Zupko v. Canada (Citizenship and Immigration)*, 2010 FC 1319, Justice Snider was faced with precisely this issue. Justice Snider summarized the results of the other decided cases:

> ¶11. As the parties before me were aware, this very issue of reasonable apprehension of bias has been considered and dealt with in three separate decisions:
> - *Dunova v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 438, 367 F.T.R. 89 (Eng.) (F.C.) (*Dunova*) (Justice Crampton);
> - *Gabor v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1162 (F.C.) (*Gabor*) (Justice Zinn); and
> - *Cervenakova v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1281 (F.C.) (*Cervenakova*) (Justice Crampton).
>
> ¶12. In each of these cases, the Court rejected the arguments of the applicants. In the words of Justice Zinn, in *Gabor*, above, at paragraph 35:
>
> > An informed person, viewing the matter realistically and practically and having thought the matter through, would not think it more likely than not that the Board would consciously or unconsciously decide a refugee claim of a Czech Roma unfairly.

Since *Zupko*, Justice Mosley has decided and rejected this allegation of bias. See *Ferencova v. Canada (Minister of Citizenship and Immigration)* 2011 FC 443 per Mosley J.

[35] As Justice Snider recognized in *Zupko*, the case therefore raises the principle of judicial comity:

> ¶14. In light of the existing jurisprudence on this very issue, I am of the view that this case is one where the principle of judicial comity is directly applicable. As stated by Justice Lemieux in *Almrei v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1025, 316 F.T.R. 49 (Eng.) (F.C.) at paragraphs 61-62:
>
> > The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law.... [citations omitted.]
> >
> > There are a number of exceptions to the principle of judicial comity as expressed above they are:
> >
> > 1. The existence of a different factual matrix or evidentiary basis between the two cases;
> >
> > 2. Where the issue to be decided is different;
> >
> > 3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and
> >
> > 4. The decision it followed would create an injustice.

[36] In *Zupko*, Justice Snider concluded that none of the exceptions to the principle of judicial comity applied. Justice Snider nevertheless proceeded to consider the issue of bias, and concluded that aside from the earlier decisions of this Court, the evidence in her opinion does not raise a reasonable apprehension of bias.

[37] I am also of the view that the principle of judicial comity applies in this case. Accordingly, the Minister's comments do not raise a reasonable apprehension of bias. However, I will consider the issue in any event.

Law of bias

[38] In this case, the Court has additional evidence not previously available: the statistics regarding the Board's treatment of claims from the Czech Republic between January and September of 2010.

[39] 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. Such allegations must be proven to be probably true. This is a high threshold.

[40] The cases outlined above, as well as my decision in *Dunkova v. Canada (Minister of Citizenship & Immigration),* 2010 FC 1322, which mentioned but did not decide the same issue, have repeated the test for determining whether a decision gives rise to a reasonable apprehension of bias—a test which has been repeatedly affirmed by the Supreme Court of Canada. The classic articulation of the test is that provided by Justice de Grandpré at page 394 of *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369 [emphasis added]:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, 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. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly." [Emphasis added]

[41] Where the bias is alleged to be not of an individual decision-maker but at an institutional level, the test is similar. In considering the question of institutional bias and independence of tribunals in the context of section 11(d) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673, stated that the objective independence of the Tribunal must also be assessed:

> It is therefore important that a tribunal should be perceived as independent as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

[42] Apprehension of bias must be established on the balance of probabilities. The applicant alleging apprehension of bias must demonstrate that an informed person, viewing the matter realistically and practically, and having thought the matter through, would probably conclude that the Board was biased.

The Minister's comments

[43] The applicants submit that the following comments reported in two media articles biased the Board:

a. A National Post news article, dated April 15, 2009, "Canada Flooded with Czech Refugee Claims", by Peter O'Neil, in which the Minister is reported to have made

the negative comments about Czech Roma refugee claimants during an interview with Canwest News Service. The applicants state the following statements biased the Board:

i. Although, like every other democracy, it has its challenges and shortcomings, it's hard to believe that the Czech Republic is an island of persecution in Europe

ii. We would like to maintain our visa exemption with the Czech Republic. At the same time, we are obviously concerned about the numbers of false refugee claimants.

b. An Embassy Magazine article, dated July 22, 2009, "Political Interference Crippling Refugee Board: Former Chair", by Michelle Collins, in which the Minister is quoted as making the following comments regarding a report produced by researchers from the Board in an interview with the *Toronto Star* on June 24, 2009:

i. If someone comes in and says the police have been beating the crap out of them, the IRB panellists can then go to their report and say, 'Well, actually, there's been no evidence of police brutality".

[44] The *National Post* article has the headline: **Canada flooded with Czech refugee claims** (bold in the original headline). This article reports that Immigration Minister Jason Kenney called on the Czech Government "to crack down on unscrupulous operators behind the massive surge in the number of refugee claimants arriving at Canadian airports". The Minister was quoted as saying:

> If indeed there are commercial operations (arranging for the refugee claimants from the Czech Republic), I would hope the Czech authorities are able to identify those and crack down on them.

The article refers to the mid-1990s when Canada re-imposed a visa requirement on the Czech Republic after a "flood of more than 4000 Czechs, again mostly Roma, showed up during the visa-free period. At the time, a documentary appeared on Czech television, touting Canada as a promised land for Roma because of the alleged easy access into the country and generous social programs after arrival".

The allegation of bias or reasonable apprehension thereof

[45] The applicants submit that:

1. the comments create a reasonable apprehension of bias that the Board will be biased against Czech refugee claimants; and

2. the acceptance rates for Czech refugee claimants before and after those comments proves there was actual bias.

[46] Attached as Appendix 1 is a table prepared by the Board showing acceptance rates for Czech refugee claimants which include cases abandoned or withdrawn before proceeding to a full hearing. The respondent submits that the Court must take into account the number of refugee claims from the Czech Republic which are abandoned or withdrawn each year because these claims would presumably not have succeeded at a hearing or else they would not have been abandoned or withdrawn. Now that the Court understands these statistics, the Court agrees with this analysis. Using these rates of acceptance, the acceptance rates are as follows:

Percentage of refugee claims from the Czech Republic accepted by the Board

1.	2008	43% of the claims from the Czech Republic were accepted
2.	2009	10% of the claims from the Czech Republic were accepted
3.	2010	(January – September) 2% of the claims from the Czech Republic were accepted

[47] However, the same table has another important statistic. In 2008, 107 claims from the Czech Republic were withdrawn or abandoned. In 2009, 760 claims from the Czech Republic were withdrawn or abandoned. In 2010, 624 claims from the Czech Republic were withdrawn or abandoned. The respondent submits that when the Minister of Citizenship and Immigration stated that his department was concerned “about the number of false refugee claimants”, he could reasonably have been referring to the large number of refugee claimants who voluntarily withdrew or abandoned their claims presumably because they were false and could not succeed.

[48] The applicants submit that the dramatic decline in acceptance rates demonstrates a bias by the Board against Czech refugee claimants. The applicants point to comments made by members of the Canadian legal community in the *Embassy Magazine* article referred to above. These quotations are contained in a magazine article. While the Court has great respect for the persons quoted in the *Embassy Magazine* article, the Court cannot give weight to these opinions. First, the Court does not accept opinion evidence on conclusions of law. The Court will decide whether the statements made by the Minister of Citizenship and Immigration raise a reasonable apprehension of bias. Second, the expert opinion evidence on such key issues, even if it were admissible, cannot be admitted without providing the witness for cross-examination.

Context of the Minister's comments

[49] The Minister's comments about the surge in refugee claims from the Czech Republic must be taken in context. First, he was in Europe attending EU meetings which included the Czech Republic. Second, Canada had suddenly seen a surge in refugee claims from the Czech Republic after the visa requirement was lifted in late 2007. (The Board Table at Appendix 1 shows the surge in Czech refugee claims referred to the Board.) Third, the Minister obviously had heard reports of "unscrupulous operators" who promote and assist Czech refugee claimants to Canada in return for money. Fourth, Canada has a history of Czech Roma refugee claimants streaming into Canada in the mid-1990s after a Czech television program touted Canada as a "promised land for Roma" because of alleged easy access and generous social programs. After that, Canada had to impose a visa requirement on visitors from the Czech Republic. All of these factors constitute the context for the Minister to make the comments.

[50] The Court finds that the newspaper report demonstrates that the Minister was expressing a concern that there are alleged commercial operations in the Czech Republic bringing large numbers of Czech citizens to Canada via the refugee system. As a result, many of these claimants were not genuinely refugee claimants in need of protection. In particular, the Court finds the following section of the article helpful to establishing its context:

> Kenney said the Canadian government has no immediate plans to re-impose the visa requirement — a move almost certain to infuriate Czech authorities and citizens.
>
> "We would like to maintain our visa exemption with the Czech Republic. At the same time, we are obviously concerned about the numbers of false refugee claimants."
>
> He said he hopes Czech authorities, who are also anxious to retain visa-free status, do their part.
>
> "If indeed there are commercial operations, I would hope the Czech authorities are able to identify those and crack down on them."
>
> He also said Canada and the Czech Republic are looking at ways "to prevent people from abusing our very generous refugee determination system."
>
> He noted that seven other eastern European and Baltic countries had their visa requirements waived in the 2007-08 period, and in no other case was there a refugee spike.
>
> Several of those countries, including Slovakia and Hungary, have large Roma minorities.

[51] The Court also notes that the evidence demonstrates that the 2007/2008 surge of Czech claimants following the lifting of visa requirements echoes Canada's previous experience. In 1997, Canada re-imposed visa requirements for Czech visitors to Canada after having lifted them for one year. The following uncontested evidence is provided by the National Post article:

> Canada has shown in the past it's prepared to take firm action, lifting in the mid-1990s and then re-imposing the visa requirement a year later, after a flood of more than 4,000 Czechs, again mostly Roma,

> showed up during the visa-free period. At the time, a documentary appeared on Czech television, touting Canada as a promised land for Roma because of alleged easy access into the country and generous social programs after arrival.

[52] Within the above-described context, the Court understands why the Minister made his comments expressing a concern “about the numbers of false refugee claimants” from the Czech Republic. These comments were made in Paris by the Minister in the presence of officials from the Czech Republic.

[53] The other cases that have considered this bias question have all concluded that the statistical evidence is not sufficient to demonstrate bias on the part of the Board, and that no other evidence of bias exists to support the bias claim.

[54] In *Gabor*, Justice Zinn found that the statistics simply did not give rise to a reasonable apprehension of bias:

> ¶34. Allegations of the possibility or apprehension of bias by an independent decision-maker are serious allegations. I agree with the respondent that the allegations in this case "call into question the professionalism of the panel member, the functioning of the administrative tribunal and the impartiality of decision-making. They should be made in only the clearest of cases where the grounds for the apprehension are substantial." I find no substantial grounds here for the allegations raised by the applicant. His allegations are speculative and there is no evidence before the Court that the Board was or could be influenced by the Minister's statements.

[55] In *Cervanakova*, Justice Crampton had the opportunity to review the fact-finding reports to which he had merely referred in *Dunova*. He concluded that the reports could potentially have supported such a decline:

> ¶68. Now that I have had an opportunity to review the Board's two issue papers, I am satisfied that content of those papers provides an entirely plausible explanation for the decline in the level of acceptance of refugee claimants from the Czech Republic, from the last quarter of 2008 to the second quarter of 2010.

[56] Furthermore, Justice Crampton agreed with Justice Zinn that the statistics were simply insufficient to provide the necessary grounds for a reasonable apprehension of bias.

[57] Finally, in *Zupko*, Justice Snider explained why she did not find the statistics convincing:

> ¶22. The problem with this argument is that there are other factors that could have affected the decline in acceptance rates. I do not intend to embark on an extensive statistical analysis (in part, because no such analysis was presented by an expert in such analyses). However, I observe that the acceptance rate could well have been a result of updated documentary evidence or by a number of abandoned claims. Indeed, the rate of acceptance had begun (albeit not markedly so) to decline even before the Minister's comments. Without expert guidance, it would be difficult to draw conclusions from such evidence unless the statistics were overwhelming conclusive on their face or unless the statistics were clearly supported by other reliable evidence. Statistics alone cannot establish a reasonable apprehension of bias (see, *Geza v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 124, 52 Imm. L.R. (3d) 163 (F.C.A.) at para. 72; *Zrig c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2001 FCT 1043, [2002] 1 F.C. 559 (Fed. T.D.) at para. 130).

[58] Many factors can explain why the Board stopped accepting as many refugee claims from the Czech Republic in the latter part of 2009 and 2010. For example, there was the fact finding mission from the Board which issued its papers in the summer of 2009. Significantly, there was also the fact that the Board had much more experience in dealing with Czech claims after the surge in 2007 and 2008.

The Board's actual analysis in the case at bar

[59] In the case at bar, for example, the Board member did a very thorough analysis of all aspects of the refugee claim and disposed of it in a fair and reasonable manner. For the reasons which follow, the Court cannot fault the Board member's analysis in this case.

The Board is independent of Minister

[60] Moreover, the Court affirms earlier jurisprudence holding that the Board is independent: see *Bader v. Canada (Citizenship and Immigration)*, 2004 FC 214, at paragraph 16. An informed person, reviewing the Board decision in the application at bar, would not apprehend that the Board was influenced by the Minister's statements in April 2009. Rather, an informed person would conclude that the Board carefully and independently assessed the merits of the applicants' claim on a reasonable basis: i.e. (1) the applicants experienced discrimination, but not persecution; (2) the Czech Republic provides adequate state protection; and (3) assault(s) on the applicants were isolated incidents which, when reported to the police, were investigated. The state is taking action against attacks by skinheads and by other extremist groups.

[61] In *Zupko* Justice Snider ably considered this issue at paragraph 20. She found that under the Act the Board is independent from Citizenship and Immigration Canada and from the Minister of that department. Every member of the Board is statutorily required to swear an oath of office requiring the Board member to impartially carry out the duties of a Board member. Board members cannot be removed from office on the basis of how they decide cases. Then Justice Snider held that it is sheer speculation, without any evidence, to think that Board members are reappointed on the basis of their particular refugee claim acceptance rates with respect to Czech Roma.

[62] I agree with Justice Snider. An informed person, viewing the matter realistically and practically, and having thought the matter through, would not apprehend that the Board member was biased in this case because of the public remarks made by the Minister of Citizenship and Immigration on April 15, 2009. This submission is premised on unrealistic speculation. It speculates that the current Minister is re-elected and reappointed as Minister of Citizenship and Immigration, it speculates that the Minister renews appointments on the basis of the Board member's rejection of Czech refugee claims, it speculates that the Board member will seek reappointment, and it speculates that such a Board position even exists under Bill C-11. Accordingly, the Court is not satisfied on the balance of probabilities that an informed person, viewing the matter realistically and practically, would have a reasonable apprehension of bias on this basis.

Issue No. 2: Did the Board err in finding that the police in the Czech Republic had provided adequate protection to the applicants in answer to their complaints?

[63] The applicants submit that the Board provided only a "flimsy and superficial" analysis of the specific incidents detailed by the applicants with regard to their treatment by the police in the Czech Republic. In particular, the applicant submits that the following findings by the Board are not reasonable based on the evidence:

a. The Board found that the police and judicial system "carried out their duties" with respect to the attack on the applicants' son Miroslav. The applicants submit that the Board failed to consider how Miroslav could have properly been convicted of a crime and sentenced to 150 hours of community service when he had been the victim of an attack by 15 skinheads;

b. The Board found that the Czech system dealt with the drowning of Mrs. Spacilova's father. The applicants submit that the Board failed to address their evidence regarding foul play, and the alleged cover up by the authorities; and

c. The Board put little weight on the incident involving Jan Dunka, Mrs. Spacilova's nephew, because it was "implausible." The applicants submit that in the context of general treatment of Roma, the incident was entirely plausible. Moreover, the applicant submits that the Board failed to refer to the applicants' evidence that they

> had sought to obtain the police report of the incident and was told that the entire file had been lost and that the matter would not be pursued.

[64] The Court finds that the Board's findings of fact resulted from a thorough consideration of the evidence before the Board. The Board specifically addressed most of the issues raised by the applicants.

[65] With respect to the finding against Miroslav, the Board stated that the fact that Miroslav had been sentenced demonstrated that an investigation had, indeed, been carried out. The applicants suggest that the police corrupted their investigation, but the Board was entitled to find that suspicion was not supported by the evidence.

[66] Similarly, the Board found that the applicants' suspicions regarding foul play in the drowning of Mrs. Spacilova's father were not convincing enough to conclude that Czech authorities had failed to carry out their legal duties with respect to investigating the death. This, too, was within the range of reasonable conclusions that the Board could draw based on the evidence. This Court cannot adjudicate upon whether the autopsy was fraudulent to cover up a crime.

[67] Finally, the Board found that the incident involving Mr. Dunka was told second-hand—the applicants had not witnessed it—and that there was likely more to the story. The Board was entitled to decide not to rely on Mr. Dunka's re-telling of his story, not least because Mr. Dunka was not before the Board. In its description of the facts, the Board did, indeed, also mention the absence of the police report and the fact that the police told Mr. Dunka that no investigation had been made.

Although the applicants now submit that it was they who went to the police station to ask for the report, the PIF narrative states that it was Mr. Dunka who went.

[68] The Board's reasons demonstrate a careful consideration of all of the evidence, and a fair reading of the facts. The Board's conclusions with respect to the police were reasonable and explained in the reasons.

Issue No. 3: Did the Board err in law in concluding that violence against Roma had declined by failing to refer to, or consider, the most recent evidence suggesting the opposite conclusion?

[69] The applicants submit that the document relied upon by the Board for the majority of its conclusions regarding violence against Roma in the Czech Republic—namely, the June 2009 Issue Paper report by the fact-finding mission from the Board, *Czech Republic: Fact-Finding Mission Report on State Protection*, June 2009—does not, in fact, support the conclusions for which the Board cites it. The applicants submit that the Issue Paper in fact states that violent attacks on Roma in the Czech Republic are increasing.

[70] The Court finds that the Board's reasons demonstrate that the Board considered the entire June 2009 Issue Paper and the other evidence that was before it. The Board need not refer to each section of the report. Although the applicants has stressed parts of the report that detail the ongoing problems faced by the Czech state in combating discrimination against Roma, the Board was entitled to quote instead from other parts of the report. The Board nevertheless repeatedly recognized that there exists ongoing discrimination against Roma in the Czech Republic. For example, at paragraph 21 the Board concludes an assessment of Czech measures to combat exclusion of Roma as follows:

> The preponderance of the documentary evidence indicates that the Czech Republic government is making very serious efforts to provide protection to the Roma whether as victims of hate crime, assist in obtaining health care or education or inclusion into Czech society. As noted above, there is discrimination against the Roma in various aspects of their lives. However the Czech government is making very serious efforts to overcome this discrimination.

[71] Other paragraphs of the Board's reasons cited above also demonstrate how the Board considered ongoing problems faced by Czech authorities in integrating Roma. In particular, the Board closely considered the issue of Roma education, and concluded that despite the numerous difficulties that it detailed, the applicants could have accessed better education had they sought it.

[72] The European Court of Human Rights has shown a willingness to deal with discrimination against Roma children in the Czech education system. The Court finds that the Board did not misrepresent the report cited by the applicants. The Board was reasonable in finding that the report found ongoing violence and discrimination but also demonstrated serious efforts by the Czech authorities to combat that acknowledged problem.

Issue No. 4: Did the Board err in law in relying upon the wrong test for state protection?

[73] The applicants submit that although the Board correctly stated that the test for state protection is whether the protection is "adequate," it nevertheless in fact found that the applicants had sufficient state protection because the Czech authorities were making "serious efforts" to provide that protection. The applicants submit that the correct test for whether state protection is "adequate" is not "serious efforts", but is rather that the state provides "effective protection".

[74] The test for state protection has been well established in the recent jurisprudence of this Court and was correctly stated by the Board. As I stated in *Hippolyte v. Canada (Citizenship and Immigration)*, 2011 FC 82, quoting previous jurisprudence, the test is adequate protection and not effectiveness *per se*: see *Hippolyte* at paragraph 27, and cases cited therein. In *Flores Carillo v. Canada (Citizenship and Immigration)*, 2008 FCA 94, at paragraph 18, the Court of Appeal explained as follows:

> ¶18. Indeed, in order to rebut the presumption of state protection, she must first introduce evidence of inadequate state protection (for the sake of convenience, I will use "inadequate state protection" as including lack of such protection). This is the evidentiary burden.
>
> ¶19. In addition, she must convince the trier of fact that the evidence adduced establishes that the state protection is inadequate. This is the legal burden of persuasion.

[75] Serious efforts by the state to provide protection are relevant to, but not determinative of, the question of whether protection is adequate. No standard of perfection is required. In *Beharry v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 111 Madam Justice Mactavish held at paragraph 9 with respect to state protection that the proper focus is not on the efforts made by the government to combat crime, but the efforts which have “actually translated into adequate state protection”. Similarly, Mr. Justice O’Keefe held in *Toriz Gilvaja v. Canada (Minister of Citizenship and Immigration)* 2009 FC 598 at paragraph 39 that the Board ought not to look at whether serious efforts have been made to protect the citizens, but whether at the operational level the protection has been applied.

[76] The Board not only correctly stated this test, but also applied it to the evidence. In paragraph 20 of the Board’s decision, the Board writes:

> … The police have arrested Neo-Nazis and they have been prosecuted, including a case where a Romani had been murdered. The police successfully prevented a clash of Neo-Nazis in Bruno and expelled them from the city.

The Board found that the burden was on the applicants to displace the presumption of state protection, and that the evidentiary burden would be higher because of the relatively high level of democracy in the Czech Republic. The Board considered whether the applicants' evidence demonstrated a failure of the state to provide protection to them. The Board concluded that the applicants had been adequately protected by the Czech state. The Court finds that this conclusion was within the range of reasonable conclusions open to the Board. The Court has no basis to intervene in the Board's findings with respect to state protection.

CONCLUSION

[77] The Court finds that the Board reasonably concluded that the applicants were not Convention refugees or persons in need of protection. As a result, this application is dismissed.

CERTIFIED QUESTION

[78] The applicants propose questions for certification. These questions are similar to proposed questions for certification raised in the following recent cases involving exactly the same issue: *Ferencova v. Canada (Minister of Citizenship and Immigration)* 2011 FC 443 per Mosley J. at paragraphs 27 to 31; *Cervenakova v. Canada (Minister of Citizenship and Immigration)* 2010 FC 1281 per Crampton J. at paragraphs 97 to 102; *Dunova v. Canada (Minister of Citizenship and Immigration)* 2010 FC 438 per Crampton J. at paragraphs 75 to 77; *Zupko v. Canada (Minister of Citizenship and Immigration)* 2010 FC 1319 per Snider J. at paragraphs 44 to 48. In all of these

cases, the Court declined to certify similar questions. I am of the view that this issue is one where the principle of judicial comity is directly applicable and that none of the exceptions to the principle of judicial comity applies. Accordingly, there is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

APPENDIX 1

Immigration and Refugee Board of Canada
Refugee Protection Division

Commission de l'immigration et du statut de réfugié du Canada
Section de la protection des réfugiés

Claims Referred and Finalized: Czech Republic
Demandes d'asile déférées et réglées : Rép. Tchèque

	Referred/ Déférées	Finalized[1] / Réglées[1]	Accepted/ Acceptées	Rejected/ Rejetées	Abandoned/ Désistements	Withdrawn/ Retraits	%Accepted[2] %Acceptées[2]
2005	11	19	2	7	6	4	11%
2006		10	2	6	2	-	20%
2007	86	1	-	-	-	1	0%
2008	860	196	84	5	11	96	43%
2009	2,206	929	93	76	32	728	10%
2010 (Jan-Sept)	49	864	16	224	8	616	2%

(1): Claims finalized in a given year may have been referred in a previous year.
(1): Les demandes finalisées durant une année peuvent avoir été déférées lors d'une année précédente.

(2): The acceptance rate is calculated by dividing the number of accepted claims by the number of all claims finalized (accepted, rejected, abandoned, withdrawn).
(2): Le taux d'acceptation représente la somme des demandes d'asile qui sont acceptées, divisée par le nombre total de demandes d'asile réglées (acceptées, rejetées, désistements, retraits).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3214-10
STYLE OF CAUSE:	*Spacil Jaroslav (a.k.a. Jaroslav Spacil) et al. v. The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 27, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
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