Federal Court  Cour fédérale

Date: 20111202

Docket: IMM-2577-11

Citation: 2011 FC 1407

Ottawa, Ontario, December 2, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MILAN KOKY; ALENA KOKYOVA; MILAN KOKY; TOMAS KOKY; NATALIE KOKYOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 25 March 2011 (Decision), which

refused the Applicants' claim for protection as Convention refugees or persons in need of protection under sections 96 and 97 of the Act

BACKGROUND

[2] The Principal Applicant, Milan Koky, his common-law wife, Alena Kokyova (Alena) and their children, Tomas Koky (Tomas), Milan Koky (Milan), and Natalie Kokyova (Natalie) are all citizens of the Czech Republic. They are all Roma. The Applicants arrived in Canada together on 16 April 2009 and made their claim for protection on 17 April 2009.

[3] When he was a child, the Principal Applicant says he experienced discrimination because he is Roma. When he was attacked at school, he would defend himself and was labelled a problem child by his teachers for fighting. Once, after he started trade school in 1991, he was attacked in a washroom at school by a group of skinheads. He went to the Principal of the school, but nothing was done. When Alena was in elementary school, she too experienced discrimination because she is Roma; she was often called names and laughed at by the other children.

[4] In 1996, the Principal Applicant was riding a train from work to his home when he was attacked by a group of skinheads. He reported this attack to the police, but they did not do anything, saying that there was nothing they could do because there were no witnesses. To date, the Principal Applicant has not heard if the police ever investigated his complaint. Alena says when she went to the doctor she was often verbally harassed in the waiting room. Other women waiting to see the doctor said things such as "gypsies go last" and "gypsies go to the gas chamber."

[5] In 1999, the Principal Applicant went with Alena to a club with their friends. A number of other Roma people were there with them. While they were at the club, a group of fifteen skinheads entered, yelled racist comments, and "heiled" the Roma in the club. The Principal Applicant was attacked with baseball bats. The police were called but, by the time they arrived, the skinheads had left. The people in the club told the police what had happened, but no arrests were made and no charges were filed.

[6] In 2003, shortly after Natalie was born, a group of skinheads threw rocks and Molotov cocktails through the windows of the Applicants' house. The skinheads yelled that they would "destroy the gypsies." On another occasion, skinheads threw a brick into the room shared by Milan and Tomas; they refused to sleep in that room afterward.

[7] When they came to Canada, the Applicants claimed protection based on the discrimination they suffered in the Czech Republic. Their claims were joined under subsection 49(1) of the *Refugee Protection Division Rules* SOR/2002-228 and were heard together on 18 March 2011. At the hearing, Alena and the children adopted the Principal Applicant's PIF narrative as their own, so the RPD determined all the claims based on that narrative. At the hearing, the RPD examined only the Principal Applicant. After the hearing, the RPD made its decision on 25 March 2011 and notified the Applicants on 29 March 2011.

DECISION UNDER REVIEW

[8] The RPD found that the Applicants had established their identities by the official documents they submitted. The RPD determined that the Applicants are neither Convention refugees nor persons in need of protection. The Applicants were not Convention refugees because there was no

serious possibility of persecution if they were returned to the Czech Republic. They were not persons in need of protection because they had not rebutted the presumption of state protection.

Discrimination versus Persecution

[9] The RPD found that the Principal Applicant had been discriminated against while he was in elementary and trade school. It noted that, when asked at the hearing if he had reported the 1991 attack to the police, he said that he had not. The Principal Applicant said that, after reporting the 1996 attack, the police had joked and said he was at fault because he had dark skin. He said at the hearing that it would not make sense to go to another authority because the response would be the same unless something serious happened. The Principal Applicant had testified that, after the attack at the club in 1999, the police were more interested in the physical damage to the club than the harm to the people there.

[10] The RPD found that the Applicants had suffered discrimination in the Czech Republic because they are Roma. However, the RPD found that this discrimination did not amount to persecution because it was not a sustained or systemic violation of their basic human rights that demonstrated a failure of state protection. In evaluating whether the Applicants had suffered persecution, the RPD noted Professor Hathaway's definition of persecution in *The Law of Refugee Status* (Toronto:Butterworths, 1991) and Justice LaForest's dissent in *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593. The RPD found that there was no persuasive evidence that the Applicants were persecuted in education, employment, housing, or medical care (paragraph 20 of the Decision).

State Protection

[11] The RPD considered whether state protection was available to the Applicants in the Czech Republic. The Federal Court of Appeal held in *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94 that claimants alleging a lack of state protection must persuade the RPD that, on a balance of probabilities, the evidence establishes that state protection is inadequate. The RPD also noted that the presumption of state protection can only be rebutted with clear and convincing evidence of the state's inability to protect. Further, the onus is on a claimant to approach the state for protection and, while effectiveness of state protection is relevant, the RPD said that the proper test is the adequacy of protection and that the adequacy of protection can be measured by the serious efforts that a state is making to protect its citizens.

[12] The RPD found that the Czech Republic is a democracy with free and fair elections, so the presumption of state protection is strong, following *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (FCA). The RPD said that there was nothing before it to suggest that the Czech Republic is in a state of complete breakdown. The RPD also noted that the Government of the Czech Republic has taken steps to protect Roma people from discrimination, including passing an anti-discrimination bill, introducing Roma Police Assistants (RPAs) to liaise with the Roma community, the arrest and prosecution of neo-Nazis, actively recruiting Roma to be police officers, training police in dealing with minorities, and hiring Minority Liaison Officers (MLOs). Though there was discrimination against Roma people, the Czech government was making serious efforts to overcome that discrimination and to protect Roma people from hate crimes.

[13] The RPD noted that the Principal Applicant went to the police after he was attacked in 1996. It found, however, that he did not go to a higher authority when the officers to whom he reported the attack did not take action. The RPD found that the Principal Applicant did not take all reasonable steps to obtain state protection in any of the attacks he suffered.

[14] The RPD took note that, on 12 March 2011, the Czech police intervened in a peaceful protest by Roma people against a march by neo-Nazis. At that protest, the police charged Roma demonstrators with horses and beat them with batons. The Roma were attempting to block the route of the neo-Nazis; the police intervened because the neo-Nazis had given prior notice of their march and the route they would be following. The RPD found that a report, prepared by Amnesty International and submitted at the hearing by the Applicants (AI Report), contained a one-sided account. Accordingly, the RPD placed little weight on this report, saying that though the police had used excessive force, they were enforcing the law.

[15] The RPD concluded that there was no persuasive evidence that the police failed to act appropriately with respect to the Applicants or similarly situated individuals. The RPD also found that there was no persuasive evidence of a sustained or systemic violation of the Applicants' basic human rights which demonstrated a failure of state protection. Because they failed to rebut the presumption of state protection, the Applicants were not Convention refugees. The RPD also found that the Applicants were not persons in need of protection.

STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**

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;

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;

[…]

[…]

Person in Need of Protection

Personne à protéger

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

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) 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

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

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

to avail themself of the protection of that country,	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.
[…]	[…]

ISSUES

[17] The Applicants raise the following issues:

1) Whether the RPD applied the proper test for state protection; and

2) Whether the RPD's finding that there was adequate state protection was reasonable.

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the

reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] In *Saeed v Canada (Minister of Citizenship and Immigration)* 2006 FC 1016, Justice Yves de Montigny held at paragraph 35 that, when examining the RPD's application of the test for state protection, the appropriate standard of review is correctness. Justice Paul Crampton made a similar finding in *Cosgun v Canada (Minister of Citizenship and Immigration)* 2010 FC 400 at paragraph 30. The standard of review on the first issue is correctness.

[20] As the Supreme Court held in *Dunsmuir* (above, at paragraph 50).

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[21] With respect to the second issue, this Court has consistently held that the analysis of state protection is to be evaluated on the standard of reasonableness. See *Cosgun*, above at paragraph 28, *Saeed,* above, at paragraph 35, and *B.R. v Canada (Minister of Citizenship and Immigration)* 2006 FC 269 at paragraph 17.

[22] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at paragraph 59.

Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

PRELIMINARY ISSUE

No Personal Affidavit Filed

[23] The Respondent notes that the Applicants have not filed an affidavit on personal knowledge alleging the errors they raise in the Decision. The Applicants have instead filed an affidavit from Kathy VanderVennen, a legal assistant to their counsel, which only introduces an excerpt from the IRB's National Documentation Package for the Czech Republic and a copy of the AI Report. The Respondent says that there is no evidence on the record that Ms. VanderVennen attended the Applicants' hearing before the RPD. The lack of a personal affidavit is a fatal flaw in the application for judicial review so the application should be dismissed.

[24] The Applicants say that the lack of a personal affidavit is not necessarily fatal to their application for judicial review. Ms. VanderVennen's affidavit contains only information which was in her personal knowledge. Further, *Turcinovica v Canada (Minister of Citizenship and Immigration)* 2002 FCT 164 allows a third party affidavit to support an application for judicial review, so long as the errors alleged in the application appear on the face of the record. The Applicants say that the errors they allege – that the RPD applied the wrong test for state protection and made an unreasonable finding on state protection – are apparent on the face of the record. This application should not be dismissed even though there is no personal affidavit alleging the errors they rely on.

ARGUMENTS

The Applicants

[25] The Applicants say that the RPD erred in its examination of state protection when it focussed on the efforts the Czech government is taking to combat discrimination without assessing whether those efforts have translated into actual protection for minorities on the ground. The Applicants also say that the RPD unreasonably dismissed the AI Report, which was relevant to the state protection analysis. They say that the RPD unreasonably dismissed the AI Report because it did not contain comments from neo-Nazis involved in the demonstration incident, or comments from the police. This unreasonable dismissal of the AI Report renders the state protection conclusion unreasonable.

[26] The Applicants note that the RPD found that they had experienced discrimination while they were in school. While the RPD found that their past experiences did not amount to persecution, this finding was irrelevant as it did not go to the forward-looking analysis of the possibility of future persecution.

The RPD Applied the Wrong Test for State Protection

[27] The Applicants say that the RPD committed an error when it analyzed only the efforts the Czech government is making to combat discrimination without analyzing the practical effectiveness

of those efforts in protecting Roma people. They say that, when analyzing state protection, the RPD must examine both whether a state is willing to provide protection against persecution and whether the state's efforts have actually materialized into adequate protection for citizens. Since the RPD did not analyze the effectiveness of the Czech government's protection of Roma people in this case, the Decision should be returned for redetermination.

[28] For this argument, the Applicants rely on *Carillo,* above, where the Federal Court of Appeal held at paragraph 30 that

> In my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value. The evidence must not only be reliable and probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[29] The Applicants say that *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 holds that a state must be both willing and able to provide protection to its citizens.

[30] The Applicants draw a distinction between a state's efforts to protect its citizens and the practical effectiveness of those efforts. They note that in *Garcia v Canada (Minister of Citizenship and Immigration)* 2007 FC 79, Justice Douglas Campbell held that

> [There] is a sharp difference between due diligence in developing policy and giving education on a certain issue, and putting the policy or education into actual operation. This point has particular importance to protection against violence against women if the sentence under consideration is extended to contexts other than terrorism.

[31] The Applicants also rely on *Erdogu v Canada (Minister of Citizenship and Immigration)* 2008 FC 407 where Justice Leonard Mandamin followed Justice Frederick Gibson's decison in *Elcock v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1438. Justice Gibson wrote at paragraph 15 that

> [The] ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[32] The Applicants say that the RPD in their case only looked at the Czech Government's efforts to combat discrimination but did not evaluate whether these efforts actually protected Roma people from violence. They assert that the number of neo-Nazi skinheads in the Czech Republic is increasing and that the government's actions must be examined to determine if they are actually protecting the Roma from these skinheads.

[33] The Applicants point to the RPD statement at paragraph 22 of the decision that

> [Recent] Federal Court decisions have held that the test for a finding of state protection is whether the protection is adequate, rather than the effectiveness *per se*. The protection need not be perfect. One accepted measure of assessment is whether the state is making "serious efforts" to protect its citizens. This standard continues to be applied in many Federal Court decisions. [footnotes omitted]

This statement shows that the RPD applied the wrong test for state protection. The serious efforts the RPD refers to only show that the Czech government is willing to protect the Roma. The RPD failed to examine whether the anti-discrimination legislation, creation of RPAs, and creation of MLOs actually provide protection. The Applicants say that the RPD did not meaningfully engage with the evidence going to the practical effectiveness of these measures.

[34] Contrary to the RPD's finding that the Applicants had not rebutted the presumption of state protection, the evidence before the RPD clearly shows that the mechanisms in place in the Czech Republic do not provide adequate protection for the Roma. They point to the June 2009 Issue Paper: Czech Republic – Fact Finding Mission Report on State Protection (2009 Issue Paper), which the RPD relied on and shows that the Czech government has created RPAs and MLOs. The 2009 Issue Paper also shows that these measures are ineffective at protecting the Roma and proves that the RPD did not analyze the effectiveness of the Czech Government's efforts to protect Roma people.

[35] The Applicants also argue that the RPD erroneously conflated "serious efforts" with "adequate protection." They point to the RPD's statement at paragraph 27 of the Decision that

> 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 [sic] in obtaining health care or education, or inclusion into Czech society

[36] The Applicants rely on *Aguirre v Canada (Minister of Citizenship and Immigration)* 2010 FC 916 and the following words of Justice de Montigny at paragraphs 19 and 20:

> […] I find two flaws in the Panel's reasoning. First, the Panel assumes that the state can provide protection because "huge resources" have been dedicated to address gang violence, without ever assessing whether these efforts have had any real impact on the ground. Second, the Panel did not take into account and discuss the reasons given by the Applicant for not approaching the police. I will deal with each of these issues in turn.
>
> The case law is replete with statements confirming that it is not sufficient for a state to make efforts to provide protection; an objective assessment must also establish that the state is able to do so in practice: see, *inter alia*, *Avila* v. *Canada (M.C.I.)*, 2006 FC 359; *Sanchez* v. *Canada (M.C.I.)*, 2009 FC 101; *Capitaine* v. *Canada (M.C.I.)*, 2008 FC 98. However, the Panel does not seem to be alert to this distinction, and does not refer to any documentary evidence showing that the resources devoted to combating crime have produced any tangible results. There is only

> one vague reference to the "National Documentation Package", which is most unhelpful considering the voluminous number of documents that it contains. Even this one reference only supports the assertion that huge resources are dedicated to dealing with gang violence. There is not a shred of analysis of the numerous documents indicating that gang members are increasingly powerful and roam freely throughout the country, that El Salvador is one of the most violent countries in the world, and that extortion rings plague businesses and more particularly transportation and trucking companies. The Panel clearly had an obligation to review, weigh and explain why it rejected this documentary evidence which was not only relevant but which also contradicted its own findings: *Cepeda Gutierrez* v. *Canada (M.C.I.)* (1998), 157 F.T.R. 35, at para. 17. It should not have simply glossed over this dire information and contented itself with saying that El Salvador is a functioning democracy that has put enormous resources towards its problems.

[37] The RPD discontinued its analysis after finding that the Czech Republic government has made serious efforts to combat discrimination without analysing those efforts for factual effectiveness. This error means the Applicants' case must be returned for reconsideration..

The RPD Unreasonably Dismissed the AI Report

[38] The Applicants note that they placed the AI Report before the RPD. That report details an incident in Novỳ Bydžov, a town in the Czech Republic. On 12 March 2011, approximately 500 far-right demonstrators were marching through Novỳ Bydžov, when approximately 200 counter-demonstrators, including some Roma people, attempted to block the far-right demonstrators' route. The Czech police intervened to remove the counter-demonstrators' blockade by charging them with horses and beating them with collapsible batons. An hour after the demonstration was over, twenty of the far-right demonstrators attacked three Roma people.

[39] The Applicants say that this report goes to the adequacy of state protection of Roma people in the Czech Republic and that the RPD unreasonably dismissed the report.

[40] The RPD found that the AI Report was one-sided because it only included comments from Amnesty International observers who were present at the event and from counter-demonstrators. Accordingly, the RPD accorded the report little weight in its analysis of state protection. The Applicants say that it was unreasonable for the RPD to reject the AI Report because it did not include comments from the far-right demonstrators.

[41] The Applicants note that a Czech police official was actually quoted in the AI Report, though the RPD said it did not contain comments from the police. They also say that it is unimaginable what balance the comments of a far-right demonstrator could have added to the report or the RPD's assessment of state protection. The Applicants say that the RPD's giving little weight to the report glosses over the fact that the Czech police used force to assist neo-Nazis.

[42] The Applicants equate the weight the RPD put on the AI Report with a finding that it is acceptable for police in a democracy to use excessive force against peaceful protestors to support a racist demonstration. The RPD found that the police in this incident were enforcing the law by removing the counter-demonstrators from the approved march route. The Applicants say that the police used excessive force in the incident and that this was against the law. They also say that the RPD rejected the report because it was based on accounts of Amnesty International observers. It was unreasonable for the RPD to reject the report for this reason; Amnesty International is a credible and reliable organization. Since the RPD unreasonably rejected this evidence going to state protection, the Decision must be returned for reconsideration.

The Respondent

[43] The Respondent argues that the RPD's Decision should not be interfered with by this Court. The RPD reasonably concluded that the Applicants had not suffered persecution in the past and did not face a serious risk of persecution on return to the Czech Republic. The Applicants also failed to adduce sufficient reliable and probative evidence to rebut the presumption of state protection. The RPD appropriately weighed the evidence before it and it is not for the Court to reweigh the evidence on judicial review.

Discrimination or Persecution

[44] The Respondent notes that the RPD found that the Applicants had been discriminated against, but did not find that they had been persecuted. He says this Court has held that persecution is more than harassment and involves the affliction of repeated acts of cruelty or a particular course or period of systemic infliction of punishment.

[45] The RPD considered all the evidence and made a reasonable conclusion that the Applicants did not face a serious possibility of persecution. The RPD found that there was no persuasive evidence that the Applicants were persecuted in the areas of education, housing, employment, or access to medical care. Relying on *Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796, the Respondent says that the distinction between discrimination and persecution is not always clear on the facts, but it is for the RPD to draw its own conclusions on

whether actions perpetrated against a claimant constitute persecution. This Court should not disturb the RPD's conclusions unless they are unreasonable.

The RPD Applied the Appropriate Test for State Protection

[46] The RPD did not apply an incorrect test for state protection; having articulated the appropriate test as one of adequacy, the RPD relied upon an acceptable measure of adequacy: whether the state is making serious efforts to protect its citizens. The Respondent says that this Court approved this measure of adequacy in *Flores v Canada (Minister of Citizenship and Immigration)* 2008 FC 723 at paragraph 11, where Justice Richard Mosley wrote that

> The serious efforts to provide protection noted by the panel member support the presumption set out in *Ward*. Requiring effectiveness of other countries' authorities would be to ask of them what our own country is not always able to provide.

The Applicants have not Rebutted State Protection

[47] The Respondent says that, following *Ward*, above, *Carillo,* above, and *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 (FCA), there is a presumption of state protection which can only be displaced by clear and convincing evidence that the state is unable to protect a claimant. Though a state may not be able to perfectly protect its citizens at all times, simply showing that this is the case is insufficient to displace the presumption

[48] In this case, the Applicants did not provide evidence that was probative of the Czech Republic's inability to protect them. The Applicants made lukewarm efforts to seek state protection: when the Principal Applicant went to the police after he was attacked in 1996, he did not take

further steps to prosecute his complaint. Further, the evidence before the RPD did not show a complete state breakdown or rebut the presumption of adequate state protection. The RPD considered documentary evidence of the Czech Republic's efforts to combat discrimination.

[49] The Respondent also says that the RPD did not dismiss the AI Report as the Applicants have asserted. Rather, the RPD examined this report and assigned what weight it thought was appropriate. The assigning of weight is the proper role of the RPD and it is entitled to choose which documentary evidence it prefers, so long as it explains its preference and addresses contradictory documents. It was open to the RPD to assign little weight to the AI Report and the Court should not interfere.

The Applicants' Reply

[50] The Applicants say that the RPD's finding that they did not have a well-founded fear of persecution was based on its finding that there is adequate state protection in the Czech Republic. If the Court concludes that the RPD was incorrect in its analysis of state protection, this means their fear of persecution under section 96 must be analyzed again. They also say that the RPD's erroneous analysis of state protection lead it to incompletely analyse section 97 in their case. This means that their case should be returned for reconsideration.

[51] The Applicants agree with the Respondent that the jurisprudence of this Court establishes the correct test for state protection. However, they say that the correct test includes an analysis of both the state's willingness and ability to protect. It is an error to consider only willingness without analyzing the effectiveness of that protection. Further, the Applicants say that serious efforts, which the RPD found here, are not the test for state protection. The application by the RPD of an incorrect

test is an error of law that must result in redetermination, regardless of whether or not they adduced sufficient evidence to rebut the presumption of state protection.

[52] The Applicants say that it is absurd to expect that the far-right demonstrators referred to in the AI Report could have in any way balanced that report by providing their comments. The far-right demonstrators were a "known hostile entity with views that are well-established as unacceptable." All the evidence on the record shows that the Czech police, during the incident the AI Report refers to, were supporting the far-right demonstrators with force. This makes the RPD's decision to assign little weight to the report unreasonable.

ANALYSIS

[53] There really is not a great deal to say about this application, other than that the Court accepts the grounds and reasons for reviewable error put forward by the Applicants.

[54] The lack of a personal affidavit from the Applicants is not fatal in this case because the application deals with errors that are apparent on the face of the record. See *Ge v Canada (Minister of Citizenship and Immigration)* 2007 FC 890.

[55] The RPD considers the physical attacks upon the Applicants in its discussion of state protection and concludes that "there was no persuasive evidence of a sustained or system violation of basic human rights of the claimant's demonstrative of a failure of state protection." In reaching this conclusion, the RPD reviews the documentary evidence on the Czech Republic, as well as the experiences of the Applicants and other similarly situated individuals.

[56] As regards the documentary evidence, the RPD looks at the various laws and programs that have been put in place to help Roma people and other ethnic minorities and concludes at paragraph 27 that

> The preponderance of the documentary evidence indicates that the Czech Republic government is making serious efforts to provide protection to Roma whether as victims of hate crime, assist (*sic*) in obtaining healthcare 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.

[57] The reasoning appears to be that the acknowledged discrimination against Roma people in the Czech Republic does not amount to persecution because the Czech government "is making very serious efforts to overcome this discrimination." The RPD, in fact, bases its analysis upon its understanding that, "[o]ne accepted measure of assessment [of state protection] is whether the state is making 'serious efforts' to protect its citizens. The standard continues to be applied in many Federal Court decisions."

[58] The rationale is that, provided the Czech Republic is making "serious efforts" to protect the Roma people, this in itself demonstrates adequate state protection for the Roma.

[59] This being the case, the RPD does not examine the issue of whether, in light of its serious efforts, the Czech government has in fact been able to provide a level of protection that is adequate to the threats faced by the Applicants. There was a significant amount of evidence before the RPD that the "serious efforts" of the Czech government has not resulted in adequate protection for the Roma. See, for example, the 2009 Issue Paper. The RPD was not obliged to accept the evidence that adequate protection does not exist, but it was obliged to consider it and weigh it as part of its assessment. The weighing process did not occur because the RPD in this case took the legal position

that “serious efforts” are sufficient to establish “adequate” state protection. There was no need to go further and examine evidence that went to the issue of whether the “serious efforts” actually are providing adequate protection in practice. The Czech authorities may be willing to provide adequate state protection, but this does not mean that they can or have provided adequate state protection.

[60] In my view, then, the RPD has committed an error of law in its conclusion that “serious efforts” equates to adequate state protection. This error renders its conclusions on adequate state protection for the Applicants unreasonable.

[61] It is trite law since the Federal Court of Appeal’s decision in *Carillo*, above, that the appropriate test for state protection is not effectiveness *per se*. Rather, the test is whether there exists adequate state protection from the alleged risks. State protection need not be perfect; it need only be adequate. As was stated plainly by the Federal Court of Appeal in *Carillo* at paragraph 30,

> […] a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[62] It is well established law that while state protection need not be perfect, states must be both willing and able to protect their citizens (see *Ward*, above, at paragraphs 55-57 and *Villafranca*, above, at paragraph 7).

[63] According to the jurisprudence of this Court, it is not enough that a government is willing to provide protection and is making efforts to do so. In order for state protection to be present, the efforts made must adequately protect citizens in practice. For example, in *Garcia v Canada (Minister of Citizenship and Immigration)* 2007 FC 79, Justice Campbell discusses the difference between legislation on the books and legislation that is enforced:

> […] However, there is a sharp difference between due diligence in developing policy and giving education on a certain issue, and putting the policy or education into actual operation.

[64] In *Alexander v Canada (Minister of Citizenship and Immigration)* 2009 FC 1305, Justice Sean Harrington said that a state's "good intentions are simply not enough."

[65] In *Erdogu*, above, Justice Mandamin considered the decision of the Federal Court of Appeal in *Carillo*, above, and came to the conclusion that Justice Gibson's statement in *Elcock*, above, remains good law:

> The ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[66] Likewise in *Razo v Canada (Minister of Citizenship and Immigration)* 2007 FC 1265, Justice Eleanor Dawson said that "it is insufficient for a state to possess institutions designed to provide protection if those institutions do not provide actual and adequate protection."

[67] Justice Hughes confirmed this position in *Wisdom- Hall v Canada (Minister of Citizenship and Immigration)* 2008 FC 685, at paragraph 8:

> The Board member erred in concluding that the test to be applied was one requiring only a view of the laws in place and the expectations that they might be adequate rather than addressing the realities as to what was happening here and now. In order for adequate state protection to exist, a government must have both the will and the capacity to implement effectively its legislation and programmes.

[68] More recently in *E.B. v Canada (Minister of Citizenship and Immigration)* 2011 FC 111, Justice Anne MacTavish wrote at paragraph 9 that

> It is apparent from the decision that the Officer focused on the efforts made by the government of Guyana to combat crime, and did not properly assess whether those efforts have actually translated into adequate state protection: see *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] FCAJ No. Q99.

[69] The Court has stated in several other cases that it is an error to find against a claimant on the basis of government efforts to provide protection without assessing whether these efforts will result in adequate protection.

[70] The error in the present case is pretty well the error identified by Justice André F.J. Scott in *J.B. v Canada (Minister of Citizenship and Immigration)* 2011 FC 210 and I can do no better than quote Justice Scott's assessment and conclusions on the problem at paragraphs 46-49:

> The Board focused the bulk of its state protection analysis on considering the country conditions evidence set out in the IRB issue paper entitled, "Czech Republic: Fact-finding Mission Report on State Protection" (June 2009). As outlined above, the Board pointed to legislative prohibitions on discrimination as well as measures implemented to reform the country's police force and increase access to protection for the Romani population. The Board concluded that the, "preponderance of the documentary evidence" indicated that the Czech government was making "very serious efforts" to protect the Roma.
>
> However, as this Court has pointed out on a number of occasions, the mere willingness of a state to ensure the protection of its citizens is not sufficient in itself to establish its ability. Protection must have a certain degree of effectiveness: see *Burgos v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537, 160 ACWS (3d) 696; *Soto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1183 at para 32. As such, an applicant can rebut the presumption of state protection by demonstrating either that a state is unwilling, or that a state is unable to provide adequate protection: see *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at para 52.
>
> Completely absent from the Board's discussion was any recognition of the objective evidence pointing towards a potential inadequacy in state protection. For instance, the 2009 Amnesty

International Report on Human Rights in the Czech Republic indicated:

> The government again failed to implement adequate anti-discrimination provisions. The Roma continued to experience discrimination, particularly in accessing education, housing and health, as well as threats of attacks by far-right groups.

The US DOS report on the human rights practices in the Czech Republic entitled, "Country Reports on Human Rights Practices for 2008" (February 25, 2009), indicated:

> The laws prohibit discrimination based on race, gender, disability, language, or social status; however, significant societal discrimination against Roma and women persisted.

The Board's own Response to Information Request, CZE102667.EX (December 12, 2007) stated:

> However, according to the ERRC, in 2006 there was "near total impunity for racial discrimination against Roma" in the Czech Republic (1 Mar. 2007). The International Helsinki Federation for Human Rights (IHF) states that in the majority of cases involving neo-Nazis targeting minorities, including Roma, "authorities, including the police, turned a blind eye" (IHF 2007). According to IPS, a survey conducted in 2006 found that "courts rarely investigate cases of racial discrimination" (6 Apr. 2007), although further details on this survey could not be found among the sources consulted by the Research Directorate.

An earlier Response to Information Request, CZE100727.E (January 26, 2006) provided:

> However, the International Helsinki Federation for Human Rights (IHF) remarked that police "often failed to act adequately" in cases of violent attacks against Roma in 2004 (IHF 27 June 2005) and, according to the United States (US) Department of State, there remained some "judicial inconsistency in dealing firmly with racially and ethnically motivated crimes" (Country Reports 2004 28 Feb. 2004, Sec. 5).

> Even the document relied on by the Board, the 2009 issue paper, indicated:
>
> > Other NGO interlocutors claimed that the police tended to address acts of extremism only when they were considered serious or too high-profile to ignore...
>
> In the present case, I find that it was unreasonable for the Board to have focused on the "very serious efforts" being employed by the Czech Republic to protect Romani citizens to the exclusion of the evidence showing that, in practice, those efforts may have been inadequate. The Board was not required to refer to every piece of evidence placed before it. However, in view of the fact that reliable and relevant country conditions evidence supporting the applicants' position had been presented, the Board had an obligation to acknowledge that evidence and explain why it was satisfied that, despite that evidence, the government's "very serious efforts" were sufficient: see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264 (TD).
>
> [Emphasis in original]

[71] In conclusion, I find that the RPD committed a serious legal error in equating "serious efforts" with "adequacy" and unreasonably failed to address the evidence before it on the issue of whether, in practice, those efforts have resulted in adequate protection for the Applicants.

[72] The RPD's rejection of the AI Report is bizarre. The RPD, in effect, holds that the report on the neo-Nazi demonstration is not "persuasive evidence that the police failed to act appropriately in matters involving the claimants or in matters involving similarly situated individuals." As the report makes clear, representatives of Amnesty International "were present at the scene of the intervention." Whether or not the neo-Nazi march was legal or proceeding along an approved route, the observers saw the police allow a violent demonstration take place, charge the counter-demonstrators with horses, and beat counter-demonstrators with truncheons.

[73] To the RPD, direct observation by Amnesty International was not persuasive because these observations were not tempered by the views of the Neo-Nazis or the authorities who permitted them to march through a Roma area. This was unreasonable. No matter what the neo-Nazis or authorities could have said, this would not change the fact that the observers saw what they saw. This bore directly on the adequacy of state protection and it was unreasonable for the RPD to reject it.

[74] Given my comments above, I think it is clear that the Decision as a whole cannot stand and must be returned for reconsideration.

[75] Counsel agree there is no question for certification and the court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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