

CANADA / JUDGMENT

TB9-35369

COURT

Refugee Appeal Division

DECIDED

30 November 2020

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Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXX XXXX
XXXX XXXX

Personnes en cause

Appeal considered / heard at

Toronto, ON

Appel instruit / entendu à

Date of decision

November 30, 2020

Date de la décision

Panel

James Sloan

Tribunal

Counsel for the persons who are the subject of the appeal

Marjorie Hiley

Conseil des personnes en cause

Designated representative

XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

- [1] This is an appeal of a December 3, 2019 decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (Board) denying the Appellants' claim for refugee protection under sections 96 and 97(1) of the Immigration and Refugee Protection Act, SC 2001, c. 27 (IRPA).
- [2] XXXX XXXX (principal Appellant) and his wife XXXX XXXX XXXX XXXX (the co-Appellant) are Romanian nationals. He is Roma and she is not. The co-Appellant's XXXX XXXXyear-old son¹ from a previous relationship, XXXX XXXX XXXX XXXX XXXX XXXX XXXX and the minor daughter of the adult Appellants, XXXX XXXX XXXX XXXX XXXX XXXX XXXX are also part of this claim. They claim as follows: i) that the principal Appellant will be persecuted by the Social Democratic Party (PSD) because he stopped supporting them; ii) that the principal Appellant will be persecuted because he is Roma iii) that the co-Appellant will be persecuted because she is married to a Roma; and iv) that XXXX XXXX XXXX will be persecuted because their step-father and father, respectively, is Roma.
- [3] For the reasons that follow, I deny this appeal.

FACTS AND ALLEGATIONS

- [4] The principal Appellant was an active supporter of the PSD in the 2008 elections. However, he became disillusioned with the party. When the PSD candidate did not win in the 2009 election, the principal Appellant began to receive death threats by PSD officials because he (and the Roma community in his village over which he had influence) had withdrawn support. In XXXX 2010, he was beaten by a group of PSD supporters.
- [5] The co-Appellant claims that she was insulted and threatened on a daily basis because she married a Roma, and XXXX claims that he was treated badly at school because his stepfather was Roma.
- [6] In XXXX 2011, the adult Appellants and XXXX travelled to the US to seek asylum.
- [7] In the XXXX of 2015,² the Appellants (now including XXXX XXXX who had been born in the US in XXXX) travelled back to Romania so that the principal Appellant could reconcile with his brother who he feared was dying. The principal Appellant, travelling alone, tried to re-enter the US by travelling to Mexico on XXXX XXXX XXXX 2017 and retaining a smuggler. When he attempted to enter the US in early XXXX 2017, he was put in immigration detention. In or about XXXX 2017, he opted to be deported to Romania.

- [8] The Appellants moved to the UK in XXXX 2017. In XXXX 2018 they returned to Romania after the adult Appellants lost their jobs due to Brexit.
- [9] On XXXX XXXX XXXX 2019, the principal Appellant, the co-Appellant, and XXXX left Romania for Canada and claimed asylum at the airport after they were advised, that, owing to misrepresentations in their electronic travel authorizations (eTA), they would not otherwise have been admitted. XXXX joined the other Appellants in Canada, travelling on a US passport, on XXXX XXXX XXXX 2019.

NEW EVIDENCE

- [10] The Appellants included in their record 1) a XXXX XXXX XXXX 2020 affidavit from the principal Appellant "outlining his explanation on the credibility concerns" of the RPD and "identifying the extent to which the systemic incidents of discrimination based on Roma ethnicity [rose] to the level of persecution"³ and 2) an XXXX XXXX XXXX 2019 letter sent to the Registrar of the Board noting missing pages from the principal Appellant's and co-Appellant's Schedule 12 and Schedule A forms (documents completed at in support of their claims) and requesting the missing pages be provided to the Appellants.
- [11] Subsection 110(4) of the IRPA limits the admission of evidence in an appeal before the Refugee Appeal Division (RAD) to evidence that: 1) arose after the RPD's rejection of the claim; 2) was not reasonably available at the time of the RPD's rejection of the claim; or 3) an appellant could not reasonably have been expected in the circumstances to have presented at the time of the RPD's rejection of the claim. RAD Rule 3(3)(g)(iii)⁴ provides that an appellant seeking the admission of new evidence must provide full and detailed submissions regarding how the evidence meets the requirements of subsection 110(4) and how that evidence relates to the appellant.
- [12] The full and detailed submissions required by RAD Rule 3(3)(g)(iii) have not been made; indeed, there has been no argument whatsoever in this regard. Consequently, I find that the evidence does not meet the requirements of subsection 110(4) and is inadmissible.⁵
- [13] In the alternative, in case my call for adherence to the rules is viewed as overly exigent, I will consider the affidavit and XXXX XXXX XXXX 2019 letter with a view to determining if their content self-evidently meets the requirements of subsection 110(4).

XXXX XXXX XXXX 2020 Affidavit

- [14] In his affidavit the principal Appellant makes a number of statements and arguments, none of which meet the requirements of subsection 110(4). Indeed, the affidavit appears to indicate a misunderstanding of the nature of those requirements entirely.
- [15] First, the affidavit repeats explanations offered by the principal Appellant or his wife during the hearing in order to address the RPD's expressed misgivings about their credibility. The principal Appellant frequently quotes from his or his wife's testimony. These statements do

not contain information that arose after the rejection of the claim by the RPD, as per the first requirement of subsection 110(4). Nor may the statements be said to have been not reasonably available before the rejection of the claim—certainly no information is given as to why this might have been so—or why, in the circumstances, the Appellants could not have been expected to have provided them before the rejection of the claim. Indeed, as noted, for the most part, they did provide this information at their hearing when they were given an opportunity by the RPD to address its credibility concerns. In the Pajarillo case, where an appellant's affidavit submitted to the RAD consisted primarily "of an outline of the reasons the Applicant disagrees with the findings, analysis, and decision of the RPD," the Federal Court held that the RAD had "reasonably found that such statements constitute argument," rather than being of an evidentiary nature, such that they might meet the requirements of subsection 110(4).⁶

- [16] Second, the principal Appellant provides information to bolster some of the explanations the Appellants provided to the RPD in an effort to dissuade it from making negative credibility findings. For example, the principal Appellant claims that the Appellants did not provide evidence to prove the date of their US refugee hearing because there was insufficient time due to the Minister's submission on the issue not being received "in enough time for us to get anything in writing from the American Immigration authorities to prove that our refugee claim was concluded in XXXX 2018."⁷ This type of information does not meet the requirements of subsection 110(4), given that the information (i.e. that they could not get a document due to the Minister's lateness) did not arise after the rejection of the claim and there is no reason given as to why the principal Appellant could not reasonably have been expected to provide it before the rejection of the claim. Had the affidavit included as an exhibit the evidence that the principal Appellant states they did not have time to obtain due to the lateness of the Minister, this is the type of evidence that may very well have met the tests for subsection 110(4), i.e. if it was not reasonably available in the circumstances. However, no such document is attached.
- [17] Third, the principal Appellant's affidavit also includes arguments as to why the RPD's decision was in error. For example, he faults the RPD for not asking any detailed questions concerning the situation of the authors of the handwritten notes in support of his claim (discussed below).⁸ He suggests procedural unfairness when he states that his counsel requested the Board to provide her with missing pages from Canada Border Services Agency/ Immigration, Refugees, and Citizenship Canada documents a week before the hearing and there was no response to this request.⁹ In addition, his affidavit refers to the country condition evidence and argues that this substantiates their claim of discrimination in healthcare in Romania.¹⁰ Arguments about the weakness of the decision of an RPD panel are best made in an appeal memorandum and I will address them in my analysis of that document.¹¹
- [18] I find that there is no basis upon which the affidavit of the principal Appellant may be said to meet the requirements of subsection 110(4). It is inadmissible.

XXXX XXXX XXXX 2019 letter

[19] The letter, as noted, features a request for documents from the Board. I need not decide on the admissibility of the letter, because it is already part of the RPD file and, as such, available to me.

DETERMINATIVE ISSUE

[20] The determinative issue in this case is credibility.

STANDARD OF REVIEW

[21] In my review of the RPD's decision, I will apply a standard of correctness.¹² This is not a case where the RPD enjoyed a meaningful advantage in making its findings.¹³

ANALYSIS

[22] The RPD held that 1) XXXX XXXX as a US national who had not asserted a fear of harm upon return to the US, was not a Convention refugee or a person in need or protection and 2) owing to the problems the other Appellants had with their credibility and/or subjective fear they were unable to show that they faced a serious possibility of persecution or a likelihood of harm as per subsection 97(1).

[23] The Appellants argue that the RPD erred in finding 2). In addition, they argue that the RPD erred by not do not providing a separate analysis of their claim under subsection 97(1).

XXXX claim

[24] Because the Appellants do not contest the RPD's finding regarding XXXX XXXX I need not address the finding. I note, however, that I have reviewed the RPD's reasons and agree with its finding. I find that XXXX does not face a serious possibility of persecution or a likelihood of subsection 97(1) harm.

Credibility

[25] The RPD found that the Appellants' credibility and/or subjective fear was undermined on the following bases: a) they misrepresented their immigration history upon arrival in Canada; b) the Appellants, or some of them, reavailed in 2015, 2017, and 2018; c) they lacked persuasive documentary support for their claim that they feared the PSD; d) their evidence regarding their mistreatment in Romania due to their being Roma (or family members of a Roma) was embellished, vague, and lacking in documentary support.

a) Representations to Canadian border authorities

[26] The RPD found that the adult Appellants had misrepresented their immigration history upon arrival in Canada. They each answered "No" in reply to the following questions in their Schedule A forms, completed on XXXX XXXX XXXX 2019:

6. Have you, or if you are the principal applicant, any of your family members listed in your application for permanent residence in Canada ever:
- b) been convicted of, or are you currently charged with, on trial for, or party to a crime or offence, or subject to any proceedings in any country?
 - c) made previous claims for refugee protection in Canada or at a Canadian visa office abroad, in any other country or countries, or with the United Nations High Commissioner for Refugees (UNHCR)?
 - d) been refused refugee status, or an immigrant or permanent resident visa (including a Certificat de sélection du Québec (CSQ) or application to the Provincial Nominee Program) or visitor or temporary resident visa, to Canada or any other country?
 - e) Been refused admission to, or ordered to leave Canada or any other country?¹⁴

[27] In answering no, the principal Appellant omitted that he had been detained in the US for immigration violations and fined for a driving offence, that he and his family had sought refugee status in the US, or that he had been deported from the US. In addition, the co-Appellant failed to disclose that she had been charged with felony Grand Theft and Battery in 2011, while she was living in the US, or that she had sought refuge in the US. The RPD rejected their explanations, which they again raise at appeal, and found that the misrepresentations undermined their credibility.

[28] The Appellants make the following arguments or offer the following explanations:

- 1) they had lived in fear in Romania and had been told by others that if they told the truth to Canadian officials, they would either not get their eTA or would be returned to Romania;
- 2) the principal Appellant had no criminal charges or convictions; his driving infraction in the US led to a fine only;
- 3) the co-Appellant's criminal charge was dismissed without conviction; therefore, at the time she completed the Schedule A form there were no "current" charges;
- 4) the co-Appellant failed to acknowledge that she had been charged with a criminal offence in any country in when she filled out the eTA form because she understood the question to deal only with convictions;
- 5) the Minister's information regarding a US refugee hearing on XXXX XXXX XXXX 2019 was inaccurate; the true date was XXXX XXXX XXXX 2018 and at that point they were in the UK and so could not attend; and
- 6) the co-Appellant's "ETA misrepresentations" were peripheral to their refugee claim.

[29] I find as follows:

- 1) I accept that where someone fleeing persecution makes misrepresentations in order to enter a country that might provide protection, this ought not to undermine their credibility. However, their misrepresentations in their eTAs were not something that the RPD referred to in its credibility finding. Instead, it focused on the ostensible misrepresentations made after their arrival in Canada. This is a completely different matter. I do not accept that their fear of being sent back provides a justification for lying to Canadian immigration officials once they have arrived in Canada. If that were the case, the same logic could be relied upon to justify lying to this Board.
 - 2) I agree with the Appellants that paragraph b) above may reasonably be interpreted so as not to include a driving infraction. Similarly, while he had been charged with offences related to his attempt to enter the US in XXXX 2017, given he had been deported to Romania, I find that it is reasonable to believe that he would not consider these charges to be "current," as required by the form.
 - 3) I accept the co-Appellant's explanation that she answered truthfully to paragraph b) because her charges had been dismissed and, as such, she was not "currently charged."
 - 4) See 1) above.
 - 5) In the absence of evidence from the Minister's counsel regarding the XXXX 2019 date or how she discovered this, I accept the Appellants' testimony on this point.
 - 6) See 1) above.
- [30] While I have accepted some of the Appellants' arguments under this heading, I find that the Appellants made misrepresentations in relation to their having sought refuge in the US and, in the case of the principal Appellant, in relation to his having been deported from the US. I find that their misrepresentations in this regard undermine their credibility.
- b) Reavailments
- [31] The Appellants, or some of them, returned to Romania on three occasions i) they all returned from the US in 2015; ii) in or about XXXX 2017, the principal Appellant opted to return from the US; and iii) in XXXX 2018 they all returned from the UK.¹⁵ Noting that there was insufficient evidence to show that they were constantly in hiding while in Romania during the time they spent there (as the principal Appellant claimed they were), the RPD held that the Appellants' reavailments were incompatible with their holding a genuine fear in relation to the principal Appellant's political activities in 2008-2009.
- [32] The Appellants argue first, that the RPD's "erroneous credibility assessment tainted the analysis of" the reavailment issue.¹⁶ Second, they restate the explanations they gave to the RPD for the reavailments and argue that the RPD did not provide any analysis of them:

- i) in 2015, the Appellants returned due to the principal Appellant's sick brother (they note that a medical report was provided in that regard) and they stayed with friends and did not allow the children to go to school;
- ii) in 2017, the principal Appellant returned because he had tried and failed to enter the US and his lawyer told him that he would be kept in detention for some time; he was afraid to leave his wife and children in Romania without protection, particularly as he could not financially support them in detention; and
- iii) in 2018, the Appellants returned from the UK because the adult Appellants had lost their jobs due to Brexit and felt they had no choice but to return to Romania.

[33] First, while I have disagreed with some of the RPD's credibility findings, I see no linkage-and none is pointed to-between those erroneous findings and its analysis of the Appellants' reavailments to Romania that would amount to the one tainting the other.

[34] Second, as to the reasons given by the Appellants for the reavailments, I find as follows:

- i) First, according to the supporting evidence, the principal Appellant's XXXX-year-old brother was admitted to hospital on XXXX XXXX XXXX 2015 with "XXXX XXXX XXXX and XXXX XXXX" and discharged on XXXX XXXX XXXX 2015.¹⁷ While a number of maladies are listed on the document, there is nothing to indicate that he was at risk of dying; indeed, when he was released his condition was said to be "Improved." As such, while the document does show that the principal Appellant's brother had been hospitalized in XXXX 2015, it does not, otherwise, support the principal Appellant's claim that his brother was dying.

Even accepting that the principal Appellant's brother was ill, I am not persuaded that this provides a reasonable basis for the principal Appellant to leave the safety of the US and take the risk of moving back to Romania and, if his story is to be believed, facing persecution against him and his family. While risking one's life to return to Romania to be at a dying brother's bedside for a few days or weeks may be reasonable, to move back to Romania for some two years is not. Nor is it reasonable for the whole family to return to Romania, giving up a comfortable life, employment, and, most importantly, safety,¹⁸ in order that that the principal Appellant could reconcile with his brother.

I find that the fact that the Appellants moved back to Romania and lived there for some two years (the principal Appellant stayed in Romania from the XXXX of 2015 until XXXX 2017 and the co-Appellant and children stayed there from the XXXX of 2015 until XXXX 2017) undermines their subjective fear and their credibility. As noted below, I also agree with the RPD's uncontested finding that the Appellants' lack of documentation to support their claim to have lived in hiding during that time undermined this claim.

- ii) I accept that the principal Appellant would feel a strong desire to support and protect his family. Given this, and given the brevity of his reavailment to Romania before leaving for the UK (a few months in the XXXX of 2017), I accept his explanation for the second reavailment.

iii) I do not accept as reasonable the Appellants claim that they felt that they had no alternative but to return to Romania in 2018 when the adult Appellants lost their jobs. To return to Romania and risk the persecution of all four of them, including, at the time, two minor children, because they feared that, owing to Brexit, they would have difficulty finding more work in the UK is not believable. There is no evidence that they were compelled to leave the UK. I find that their reavailment to Romania in 2018 undermines their claim of subjective fear and their credibility.

c) Credibility of their evidence regarding the PSD threat

[35] The RPD found that the evidence the Appellants provided in support of their claim that the PSD attacked the principal Appellant in XXXX 2010 and continue to pursue the Appellants almost a decade later, was of very little probative value. It noted that: i) a XXXX XXXX XXXX 2010 medical report meant to support his claim to have been attacked in XXXX 2010 described treatment for a stroke rather than for the head injury he claimed to have suffered and was otherwise lacking;¹⁹ ii) it was unable to verify the identity of the authors of two supporting letters attesting to the principal Appellant's having been threatened and beaten by the PSD;²⁰ and iii) a XXXX report finding that the principal Appellant had symptoms of XXXX XXXX XXXX XXXX XXXX repeated uncritically the information of the principal Appellant and, as such, has no impact on whether or not the principal Appellant genuinely fears persecution in Romania.²¹ In addition, the RPD held that there was insufficient evidence to support the principal Appellant's claim that he the Appellants were constantly in hiding when they reavailed to Romania.

[36] The Appellants argue that:

- 1) the RPD's erroneous credibility analysis "factored into the dismissal of the RPD of the handwritten notes and the attribution of little probative value...to the medical report of XXXX 2010";²²
- 2) the RPD erred by not asking "probing questions" about the supporting letters and by not asking for further documentation as regards the identity of the authors of the letters;
- 3) the RPD failed to examine the medical report;
- 4) the RPD did not appreciate that the medical report provided objective evidence that he had been seriously injured in a way that was consistent with his Basis of Claim narrative; and
- 5) that "once the RPD made the negative credibility assessment any personal documentation was tainted by that assessment and dismissed as unreliable."²³

[37] With the exception of 4), the above arguments lack merit. I will consider them one-by-one:

- 1) While I have not agreed with all of the RPD's credibility findings, the Appellants have not provided support for their assertion that those credibility findings that I have found to be erroneous are in any way linked to its assessment of the two handwritten notes or the medical report. The documents were found to be wanting based on their own characteristics.
 - 2) It is the Appellants who are responsible for proving their claim and for asking relevant questions in order to do so.²⁴ In this case the Appellants' counsel was given the opportunity to ask questions and did so. Had she wished to elicit more evidence about the authors of the handwritten letters, she had every opportunity to do so.
 - 3) It is evident that the RPD did examine the medical report; otherwise, it would not have been in a position to highlight its shortcomings.²⁵
 - 4) I agree that the manner in which the RPD assessed the medical report and its mention only of treatment of a XXXX, creates the impression that it did not have regard to the litany of other factors mentioned in the report-i.e. XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXXandXXXX XXXX XXXX XXXX XXXX XXXX XXXXpossibleXXXX XXXXof XXXX XXXX XXXX, or the fact that the principal Appellant was aggravated, uncooperative, or agitated. As such, I will reconsider the document to ensure that all of his conditions are considered.
 - 5) As noted at 1) above, there is no support for the claim that the RPD's assessment of his credibility led to prejudice or "tainted" its consideration of the documents.
- [38] With two exceptions, I agree with the RPD's assessment of the documents for the reasons given by it. First, I note that the medical report warrants more weight than attributed to it by the RPD because the conditions noted-in particular the trauma to the head and back-could correspond with the attack that the principal Appellant claimed to have occurred in XXXX 2010. I will consider it in my assessment of the Appellants' credibility below.
- [39] Moreover, in addition to agreeing with the RPD that the two handwritten letters are less probative than they would otherwise be because there is no identity evidence provided that could verify the signature of their authors, I also find that the two handwritten letters are less probative than they would have been had they been dated and sworn. While there is, of course, no requirement that supporting letters be sworn, dated, or that the signatures of their authors be verifiable, where such elements are lacking, such letters are less probative than they otherwise would have been.
- [40] In addition, I agree with the RPD's uncontested finding that there was insufficient evidence to support the Appellants' claim that they, or some of them, had lived in hiding in Romania from XXXX 2015 (when they returned to Romania from the US) until XXXX 2017 (when they left Romania for the UK).

d) Did they face discrimination?

[41] The RPD made the following findings regarding the discrimination the Appellants claimed to have suffered:

* Medical care. It found that the Appellants' testimony that they had no access to medical care not to be credible, apparently due to their failure to provide reliable supporting evidence.

* Education. It found that they failed to provide sufficient reliable evidence regarding their alleged lack of access to education.

* Housing. It found that the Appellants' evidence about their substandard housing was not credible because it was vague, evasive, selective, and contrived to embellish.

Based on their evidence and the country condition evidence, it concluded that the Appellants had "failed to provide reliable and trustworthy evidence to establish discrimination as a result of the Roma or perceived Roma ethnicity."²⁶ In addition-and apparently in the alternative-it found that even if the events had occurred as described and amounted to discrimination, they did not amount to a "serious and systemic violation of their human rights, and do not cumulatively rise to the level of persecution."²⁷ This alternative finding will be considered below.

[42] As to the RPD's linkage between the lack of supporting evidence and findings of credibility, I disagree. It is true, of course, that Rule 11 of the RPD Rules²⁸ provides that a claimant must provide acceptable documents establishing their identity and other elements of the claim-or explain why they did not provide the documents and what steps they took to obtain them. Moreover, in view of the fact that I have agreed with some of the RPD's findings in relation to the Appellants' credibility and/or subjective fear, the Maldonado presumption of the truthfulness of sworn evidence does not apply.²⁹ However, in the circumstances of this case, I do not agree that the claimed discrimination in medical care, education, and housing are of a nature that supporting evidence would reasonably be available. For example, I can think of no documentation that would serve to support the claim of in-school bullying. I do not find the lack of supporting evidence warrants a negative credibility finding.

Overall credibility finding

[43] When I weigh the elements undermining the Appellants' credibility and subjective fear of returning to Romania-their misrepresentations about their past refugee claims in the US, the principal Appellant's misrepresentation about his having been required to leave the US in 2017, and their reavailments in 2015 and 2018-against the limited supporting evidence about their fear of the PSD, I find that they are, overall, lacking in credibility. I find that the principal Appellant was not attacked by the PSD because he failed to vote for them (or to encourage others to do so), that the Appellants were not under threat from the PSD and are not now under threat, and that they did not live in hiding during the prolonged period they lived in Romania after 2015. In addition, I do accept their evidence as it relates to the discrimination they suffered in Romania.

Did the discrimination they suffered in Romania amount to persecution?

[44] As noted, the RPD held that the Appellants had not proven that they had suffered discrimination as Roma in Romania, in part due to credibility findings and in part due to a lack of proof. While I did not adopt its credibility findings in this regard, because I have (even without those findings) found that they are, overall, lacking in credibility, I am effectively in the same place: I do not find their claims to have been discriminated against to be credible. Consequently, I find that, individually or cumulatively, the discrimination that claim to have faced could not have amounted to persecution.

RPD's alternative finding

[45] As noted, the RPD also made an alternative finding: if it was incorrect, and the Appellants had indeed faced discrimination as they claimed, that discrimination did not cumulatively amount to persecution.

[46] The Appellants make a number of arguments in relation to this RPD's finding. They argue: that, by virtue of the Cepeda-Gutierrez case,³⁰ the RPD's statement that it had engaged in a careful consideration of the country condition evidence was insufficiently detailed because the country condition evidence contradicted its analysis; that it was selective in its assessment of the evidence because it failed to have full regard to their testimony³¹ and the country condition evidence in making its finding; that it failed in its obligation to consider if the cumulative impact of the discriminatory events in deciding whether there was persecution; and that it failed to offer reasoning on its finding that the discrimination did not amount to persecution.

[47] In view of my overall credibility finding, discussed above, I find that it is not necessary for me to make an alternative finding in the way the RPD did. As such, I do not need to consider the Appellants' arguments on how the RPD allegedly erred in finding that the discrimination they claimed occurred in the past did not amount to persecution.

Do they face a future risk of harm?

[48] A finding of whether they face a serious possibility of persecution or a likelihood of other harm as per subsection 97(1) is, of course, forward-facing. In the absence of evidence of the Appellants' past mistreatment, I will address the question of whether, despite that lack of evidence, they face a serious possibility of persecution or a likelihood of other harm solely by virtue of their status as Roma.

[49] Relying on the country condition evidence, the Appellants argue that discrimination against Roma exists in Romania in the following areas:

* Health care. Country condition evidence shows Roma have inadequate healthcare and face a lower life expectancy than non-Roma.³²

* Education. Country condition evidence shows that Roma children have difficulties accessing education and many drop out early³³ and that Romania has not implemented general legislation to combat the bullying of Roma at schools.³⁴

* Housing. Country condition evidence shows that some 88% of Roma live in accommodation with limited amenities compared to 58% of non-Roma and that Roma continue to report ongoing discrimination in access to suitable social housing and forced eviction.³⁵

* Employment. Country condition evidence provides that Roma experience disproportionate unemployment.³⁶

* Generally. Country condition evidence shows that Roma face discrimination in access to employment, healthcare, services and goods, housing (including public housing), and education³⁷ and that, in the European Union "every second Roma was discriminated against due to their ethnic origins...".³⁸

I accept that discrimination against Roma is widespread in Romania; however, neither the evidence referred to by the Appellants nor the objective evidence more generally, shows that discrimination in the various areas discussed occurs to all Roma in all areas of Romania. Nor do the Appellants claim that this is the case.

[50] In addition, evidence of the treatment of people with similar profiles to those of the Appellants may be a factor in considering the possible future treatment of the Appellants. The Appellants included a XXXX 2019 medical report relating to the principal Appellant's son XXXX XXXX who was said to have been "the victim of physical aggression."³⁹ According to their counsel, this showed a "pattern of what we are seeing in regards to aggressive behaviour" in relation to Roma in Romania with similar profiles to those of the Appellants.⁴⁰ Not only was XXXX situation similar to the Appellants' because he was a family member, but also because the attack was said to have taken place XXXX XXXX,⁴¹ the Romania village where the Appellants had resided.

[51] The evidence relating to XXXX was accorded no weight by the RPD on the basis that it was not able to test its reliability and trustworthiness.

[52] While the Appellants did not contest this finding, I am inclined to disagree with the RPD. While it may well have been preferable if the RPD had greater scope to test it-presumably it was referring to the fact that neither XXXX nor his physician had been made available for examination at the hearing-this, alone, is not a basis to afford it no weight. The RPD had the opportunity to question the Appellants on the evidence if it had chosen to do so.

[53] When I consider the objective evidence about the possibility of discrimination against some Roma in Romania and have regard to the treatment of the principal Appellant's son in XXXX 2019, I conclude that they have not shown that they face a serious possibility of discrimination rising to persecution, i.e., a "serious and systemic violation of their human rights, and do not cumulatively rise to the level of persecution."

[54] I note that the Appellants have argued that they are owed an explanation of why the test for persecution is not met; why, in their case, discrimination was found not to amount to persecution. However, aside from the Board clearly setting out the test and its analysis of what parts of the Appellants' evidence it accepts and rejects (including how it regards the Appellants' evidence of similarly situated persons), I can see no way in which the process of applying a test to the facts in the case can be further articulated or explained by the Board.

Failure to assess their subsection 97(1) claim

[55] Finally, the Appellants argue that the RPD failed in its obligation to engage in a subsection 97(1) analysis, given that they are claiming that they face a risk of cruel and unusual punishment or treatment and because the principal Appellant "could claim personalized risk due to his political behaviour."⁴²

[56] In the Sellan case, the Federal Court of Appeal considered whether, where there is relevant objective evidence that may support a claim for protection but where the RPD does not find the claimant's subjective evidence credible except as to identity, the RPD is required to assess that objective evidence under subsection 97(1).⁴³ It held that:

...where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.⁴⁴

[57] It fell to the RPD to look to whether the Appellants have, to use the words of the Federal Court of Appeal, met their "onus of demonstrating" that there was "independent and credible" objective documentary evidence capable of supporting a positive disposition of the subsection 97(1) claim. It is clear that it did not and I can find no basis upon which the RPD could have found evidence capable of supporting a positive disposition of the claim under subsection 97(1). As such, I find that the RPD's disposition of the matter under section 96 was sufficient to dispose of the entire claim.

[58] Moreover, I am in as good a position as the RPD to make such a finding. Above I found, based on my review of the matter, that the Appellants are generally lacking in credibility; as such, they have not been and are not being pursued by the PSD and their claims to have discriminated against are not believable. At appeal, the Appellants have not pointed to any objective evidence capable of supporting a positive disposition of the claim under subsection 97(1). Based on my review of the record, I am unable to find any such evidence. Consequently, I need not enter into analysis under subsection 97(1); my disposition of the matter under section 96 is sufficient to dispose of the claim.

CONCLUSION

[59] I find that the Appellants are neither Convention refugees nor persons in need of protection. The appeal is dismissed.

(signed)

James Sloan

James Sloan

November 30, 2020

Date

1 He was XXXX years old at the time of the RPD hearing.

2 The principal Appellant first testified that they returned to Romania from the US in XXXX 2015 but later testified that it was "XXXX, XXXX, XXXX. It was after XXXX I think." (Transcript of RPD hearing, at p. 22.) I note this discrepancy for clarity only; I do not draw a negative credibility inference on this basis.

3 Exhibit P-2, Appellants' Record, at p. 31, para 1a.

4 Refugee Appeal Division Rules (SOR/2012-257).

5 In the Pajarillo case, the Federal Court held: "The burden of establishing the admissibility of new evidence lies on the appellant, necessitating full and detailed submissions on its admissibility and relevance. ...[T]he RAD cannot be faulted for failing to decide an issue that was not properly argued. (Pajarillo v. Canada (Citizenship and Immigration), 2019 FC 1654 at para. 18)

6 Ibid., at para 20.

7 Exhibit P-2, Appellants' Record, at p. 35, para 13.

8 Ibid., at p. 36, para 18.

9 Ibid., at p. 35, para 15. I note that an argument relating to procedural fairness and missing documents is not included in the Appellants' memorandum. If making mention of it in an affidavit is considered to warrant consideration, I find that there was no breach of procedural fairness. The Appellants' counsel was fully aware of the missing documents in advance of the hearing and, should she have feared prejudice, could have requested an adjournment. She did not. Instead, the Appellants' counsel advised the RPD member at the outset of the hearing about the missing documents and asked to see the member's copies of the documents. The member and Appellants' counsel discussed the documents and ultimately Appellants' counsel agreed that she had the same material as the RPD member (Transcript of the RPD hearing, at pp. 16-21).

10 Exhibit P-2, Appellant's Record, at p. 37, para 22.

11 See Pajarillo, *supra* endnote 5, at para 20. See also Harracksingh-Moore, where substantial portions of an appellant's affidavit "read as if they were a Memorandum of Fact and Law," with only some paragraphs containing evidence. The Federal Court struck the entire affidavit, with leave to file another that included only evidence. (Harracksingh-Moore, *Rema v. CIC* (F.C. no. IMM-4252-19), Simpson, October 19, 2020, 2020 FC 978, at para 11).

12 *Canada (Minister of Citizenship and Immigration) v. Huruglica, Bujar*, 2016 FCA 93, at para 103.

13 *Ibid.*, at paras 69-74. See also *Rozas del Solar v. Canada (Citizenship and Immigration)*, 2018 FC 1145, at paras 124-125, relying on *Guo v. Canada (Citizenship and Immigration)*, 2017 FC 317, at paras 15-19 and *Jeyaseelan v. Canada (Citizenship and Immigration)*, 2017 FC 278, at paras 19-21.

14 Exhibit RPD-2, Supplementary RPD Record, Exhibit 1, at pp. 76-77, para 4. In this paragraph of his Schedule A form, the Appellant answered "Yes" to a question asking if he had ever been "detained, incarcerated, or put in jail" and noted "I have been detained in USA for 2 hours due to my driver licence."

15 In his testimony, the principal Appellant was uncertain about dates. The dates used come from his Generic Application Form for Canada (*Ibid.*, at p. 81, para 12.)

16 Exhibit P-2, Appellants' Record, at p. 53, para 27.

17 Exhibit RPD-2, Supplementary RPD Record, Exhibit 6, at p. 329.

18 When asked about his circumstances in the US, the principal Appellant testified: "I had a job. There was a firm where I was working together with my wife. We were doing very well. We worked over there. We were treated very well." (Transcript of the RPD hearing, at p. 40).

19 Exhibit RPD-2, Supplementary RPD Record, Exhibit 6, at pp. 335-340.

20 *Ibid.*, at p. 343 (translation) and 345-346 (translation).

21 *Ibid.*, at pp. 363-366.

22 Exhibit P-2, Appellants' Record, at p. 54, para 31.

23 *Ibid.*

24 "It is not the RPD's responsibility to elicit the Applicants' case through careful questioning. The burden is squarely on the Applicants to adduce sufficient credible evidence to substantiate their claims." (*Ugbaja, Frances Enore v. M.C.I.*, (F.C., no. IMM-306-18), Fothergill, August 15, 2018; 2018 FC 835 at para 20.)

25 Exhibit RPD-2, Supplementary RPD Record, at p. 9, para 26.

26 *Ibid.*, at p. 14, para 50.

27 *Ibid.*

28 Refugee Protection Division Rules, SOR/2012-256.

29 *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.); 31 N.R. 34 (F.C.A.).

30 *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC).

31 They also argue that their evidence is supported by information in the principal Appellant's January 9, 2020 affidavit. Because I have found it to be inadmissible at appeal, I may not have regard to it.

32 National Documentation Package (NDP) for Romania, May 31, 2019 version, at item 13.4 and Exhibit RPD-2, Supplementary RPD Record, Exhibit 4, at p. 283. Because the May 31, 2019 version of the NDP was relied on in the Appellants' memorandum, my references are to this version of the NDP. I note, however, that I have also considered the current NDP in assessing forward-looking risk in accordance with the Board's Policy on National Documentation Packages in Refugee Determination Proceedings, June 5, 2019 (<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/national-documentation-packages.aspx>), at s. 5(II).

33 NDP for Romania, May 31, 2019 version, at item 13.1.

34 Exhibit RPD-2, Supplementary RPD Record, Exhibit 4, p. 77.

35 NDP for Romania, May 31, 2019 version, at items 13.1 and 13.4; Exhibit RPD-2, Supplementary RPD Record, at pp. 249-269 and pp. 270-273.

36 *Ibid.*, at item 13.4.

37 *Ibid.*, at items 13.7 and 2.7.

38 Exhibit RPD-2, Supplementary RPD Record, Exhibit 4, at p. 232.

39 *Ibid.*, Exhibit 7, at pp. 378-386.

40 Transcript of RPD hearing, at p. 2.

41 The medical form refers to "XXXX XXXX XXXX" (Exhibit RPD-2, Supplementary RPD Record, Exhibit 7, at p. 378).

42 Exhibit P-2, Appellants' Record, at p. 60, para 53.

43 The certified question in that case was "where there is relevant objective evidence that may support a claim for protection, but where the Refugee Protection Division does not find the claimant's subjective evidence credibly except as to identity, is the Refugee Protection Division required to assess that objective evidence under s. 97 of the Immigration and Refugee Protection Act?" (*Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 (CanLII), at para 2).

44 *Ibid.*, at para 3.

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

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