

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76264

REFUGEE APPEAL NO 76265

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AT AUCKLAND

<u>Before:</u>	M A Roche (Member)
<u>Counsel for the Appellant:</u>	I Uca
<u>Appearing for Department of Labour :</u>	No Appearance
<u>Date of Hearing:</u>	13 November 2008
<u>Date of Decision:</u>	16 December 2008

DECISION

[1] These are appeals against decisions of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the appellants' second refugee status claims.

[2] The appellants are Slovakian nationals and comprise a mother and two children. Since the determination of their first refugee claims, the mother's estranged partner, AA, (who is the father of the children) has been returned to Slovakia where he is currently in prison. The appellants fear that should they return to Slovakia, AA will harass and intimidate them once he is released from prison and may subject the mother to domestic violence.

[3] The principal issues to be considered in this appeal are whether the harm feared by the appellants is sufficiently serious to constitute persecution and whether state protection would be available to them in Slovakia.

[4] The appellants' second appeals were heard together as they are based on the same set of facts. Only the mother, who will henceforth be referred to as "the appellant" gave evidence. The children's interests were represented by her as responsible adult pursuant to s141B of the Immigration Act 1987 ("the Act").

JURISDICTION RELATING TO SECOND OR SUBSEQUENT APPEALS

[5] The Authority's jurisdiction in relation to second or subsequent claims is set out in s129O(1) of the Act:

"A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[6] Jurisdiction to hear and determine subsequent refugee claims under s129O(1) of the Act is determined by comparing the previous claim to refugee status against the subsequent one. This involves a comparison of claims as asserted by the refugee claimant. In the absence of significant difference in the grounds upon which the claims are based, there is no jurisdiction to consider the subsequent claim: *Refugee Appeal No 75139* (18 November 2004).

[7] Where jurisdiction is established, the merits of the subsequent claim will be heard by the Authority. This hearing may be restricted by the findings of credibility or fact made by the Authority in relation to the previous claim. Section 129P(9) of the Act prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim and the Authority has a discretion as to whether to rely on any such finding.

THE APPELLANTS' FIRST REFUGEE STATUS CLAIMS

[8] The appellants arrived in New Zealand with AA in September 2005 and applied for refugee status in November 2005. It is not proposed to set out in full the account presented by the appellants in support of their first claims for refugee status in New Zealand. A detailed summary of their account can be found in the decision of this Authority in *Refugee Appeal Nos 75883, 75884, 75885, 75886* (26 June 2007). Essentially, the appellants claimed that they were at risk of being

persecuted by the Slovakian police and other state officials because of their profile as former business owners who complained about their treatment at the hands of the police and other officials. They claimed that the reason for their mistreatment was the husband's Roma ethnicity.

[9] In its decision, the Authority found that the evidence given by the husband and wife was not credible and while it was accepted the wife had operated a transport business in Slovakia, the remainder of the appellants' claims were rejected.

THE APPELLANTS' SECOND CLAIMS FOR REFUGEE STATUS

[10] On 7 March 2008, the appellants filed their second claim for refugee status with the RSB. Because the grounds of the second claims are traversed in detail later, it is only necessary to give here a brief summary, sufficient to identify the claimed change in circumstances.

[11] The second refugee claims are based on the appellant's fear of AA from whom she is now separated. She conceded that false information had been provided in respect of the appellants' first claims. She had in fact met AA only in the year 2000 and knew very little about his background including whether he was Roma or not. He was not the father of the older child, as had previously been claimed to the New Zealand authorities, but his details were entered on her birth certificate as prior to that, she had no legal father. The appellant claimed that AA had been violent and abusive towards her during their relationship and that after she separated from him, he harassed and intimidated herself and the children. Although he is presently in prison, the appellants' claim to fear further harassment, intimidation and possibly violence from him in Slovakia once he is released.

[12] The appellant was interviewed by the RSB in respect of her second claim on 9 April and 15 May 2008. On 27 June 2008, the RSB published a decision dismissing the second claim. The RSB found that the appellant had not rebutted the assumption that state protection would be available to her and the children in Slovakia and that there was not therefore a real chance of them being persecuted if they returned to Slovakia. The appellants have appealed against this decision.

ASSESSMENT OF JURISDICTION AND CONSIDERATION OF S129P(9)

[13] The Authority has jurisdiction to consider a second appeal from the appellants. Their second claim is based on the appellant's separation from AA which occurred after the determination of the first appeal and his subsequent removal to Slovakia where they claim he poses a threat to them. The Authority is satisfied that, in terms of s129O(1) of the Act, there are changed circumstances and the second claims are therefore brought on significantly different grounds.

S129P(9) – Whether the Authority will rely on previous credibility findings

[14] At the commencement of the hearing, the Authority indicated its intention to rely on the findings of fact and credibility made by it in respect of the previous claim pursuant to s129P(9) of the Act and sought counsel's submissions as to whether there was any reason why it should not. Counsel advised that there was no objection to the Authority's reliance on its previous credibility findings as the appellant now conceded that false evidence was provided at the first appeal hearing.

THE APPELLANTS' CASE

[15] What follows is a summary of the evidence given by the appellant at the second appeal hearing. An assessment of her evidence follows later in this decision.

[16] The appellant is a single woman aged in her late thirties. Her children are aged ten and seven. She is from a relatively wealthy family in Slovakia. Her deceased father operated a successful transport business. Her brother currently operates a transport business and she operated a similar business in Slovakia.

[17] The appellant's daughter was born in 1988. No one was listed as the father in her birth certificate. There was considerable stigma attached to being a single mother in Slovakia and when the appellant met AA in 2000, she was very grateful that he was willing to have his details entered on the daughter's birth certificate and to assume responsibility for her as a father.

[18] At the time the appellant met AA, she was living with her daughter and parents. After she had been in a relationship with him for a few months, he moved

in with her. He had no possessions and arrived with a single bag, a matter which caused concern to her parents who found it odd that a man in his thirties would have no possessions. The appellant has subsequently learnt that AA had been released from prison shortly before their meeting which in part explained his lack of possessions.

[19] The early years of the appellant's relationship with AA were relatively normal although he was very reluctant to discuss his background with her and became angry should she ever suggest meeting his relatives or friends. From time to time they would argue about this and several times in the course of such an argument, AA slapped the appellant.

[20] In 2001, the appellant started her transport business. She employed a number of office workers, including AA and a number of drivers who drove leased trucks. The company was successful and, although she did have some problems, they were not of the severe nature that she claimed in her first refugee case.

[21] In June 2001 the appellant and AA had a son.

[22] In 2005, AA suggested that the family should move to New Zealand. He persuaded the appellant that they would have a better life in New Zealand. He was also concerned about something that was going to happen to him in Slovakia although the appellant did not know what it was. She now thinks that the appellant was facing the criminal charges which gave rise to his current imprisonment and left Slovakia to avoid these charges.

[23] The appellant and AA departed Slovakia suddenly without informing her family or closing her business. She had no further contact with her family until 2007 after she and AA had separated. She learnt from them that they had filed a missing persons report in respect of her and the children with the police and that the police had made enquiries about them in Slovakia and in a number of other countries. She also learnt that her accountant, who held a power of attorney from her, had closed the transport business in her absence.

[24] Since 2007, the appellant has remained in contact with her mother and brother and, through them, has learnt about AA's imprisonment. His lawyer is an acquaintance of her brother and through this contact understood that AA had been sentenced to a short prison sentence. Following the hearing, the appellant made further enquiries and was advised by members of her family that although he was

in custody, AA had not yet been sentenced but was due to be sentenced on 9 December 2008.

[25] The appellant and AA had a volatile and problematic relationship in New Zealand. He was unfaithful to her and they continued to have arguments during the course of which AA would sometimes slap her or grab her wrist. She however stayed in the relationship because she believed herself to be in love with him.

[26] In early 2007, the appellant and AA separated for approximately one month, however, he persuaded her to reconcile with him. When he moved back into her home he took money from her and sold her furniture. She has subsequently learnt that around this time he had also borrowed money from friends they had made in New Zealand.

[27] In September 2007, the appellant and AA separated again. Approximately two weeks later, AA sent the appellant a text message telling her to get out of the house as he was coming back. The appellant had the locks changed on the house but AA was let in by her flatmate. When the appellant tried to make him leave the house he became violent and grabbed and twisted her arm and pulled the telephone out of the wall as she tried to ring the police. He also put his hands around her throat. The daughter used a mobile telephone to ring the police but AA departed before they arrived. After this incident, AA sent the appellant constant text messages.

[28] In November, the appellant and children moved house. In December 2007, AA arrived at the house with a moving truck. He entered the house and began to remove furniture from it. However, he was interrupted when a friend of the appellant's came to visit. The friend intervened and AA left.

[29] Although the appellant did not see AA again after this he continued to send her threatening text messages. The children were very frightened and reluctant to be left alone and it remained so at the date of the hearing. The younger child still wants the appellant to stay in the bathroom with him when he showers and both children sleep in her bed as they are too frightened to sleep alone.

[30] In February 2008, AA was apprehended by the police robbing a store in Birkenhead. His arrest led to his removal from New Zealand. Prior to his arrest the appellant had learnt that he stole possessions from people he had lived with in Taupo and robbed the homes of a number of the appellant's friends in Auckland.

[31] The appellant fears that should she and the children return to Slovakia, AA will locate them and harass them because the appellant is from a wealthy family and he will be determined to extort money from her. Even though the appellant may be able to access a protection order to keep him away she does not believe that this would effectively protect her and the children because AA will stop at nothing to get money from her. Her mother and brother in Slovakia are similarly afraid that after he is released from prison, he will come after them seeking money.

[32] AA has physically disciplined the children but never assaulted them outside the context of parental discipline. He was not a good father to them however and the children do not miss him or wish to have anything to do with him. They are afraid of him.

Documents Received

[33] Items of country information were enclosed with both the written opening and closing submissions. The following documents were also filed:

- (a) Statement of BB. BB is a Slovak national. She was a victim of domestic violence and left Slovakia to escape her abusive ex-husband. In her statement she described a lack of assistance she received from the police and provided anecdotal information concerning a former sister-in-law in Slovakia who was also a victim of domestic violence. She also made comments about the attitude of the police in Slovakia to domestic violence.
- (b) A translated Slovak document dated 2 October 2000 relating to AA's release from prison on that date. This document had been found by the appellant's mother in the house where the appellant and AA lived in Slovakia.

THE ISSUES

[34] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and

being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[35] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (c) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (d) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[36] Prior to determining the framed issues it is necessary to make an assessment of the appellant's credibility. She has previously made a false refugee claim in New Zealand and gave false evidence under oath at her first refugee hearing. Appellants that have made false claims in the past face considerable hurdles in establishing their credibility in respect of subsequent claims. However, the Authority accepts that the appellant gave a truthful account in her evidence of her experiences in Slovakia and New Zealand and of her relationship with AA. Her evidence is accepted. In particular, it is accepted that she and the children are frightened of AA.

First issue - Do the appellants face a real chance of being persecuted?

[37] The appellant fears that should she and the children return to the Slovakia, AA will subject them to persistent harassment in an attempt to extort money from them. She does not consider that the legal remedies that might exist to protect her from AA will be sufficient to deter him, nor does she consider that the police will be able to protect her from him.

[38] AA has slapped the appellant during the course of arguments in the past. He has also grabbed her wrist. His most serious assault against her occurred in Auckland in October 2007 when he put his hands around her throat during the course of an argument. He made no further attempt to assault the appellant during the following months he remained in New Zealand, although he sent her many threatening text messages. On the occasion he attempted to remove

furniture from her home in December 2007, he did not attempt to assault her and was dissuaded from removing her furniture by a friend who arrived.

[39] The refugee enquiry is essentially forward looking although past events can provide an indication of what is likely to happen in the future. In the past, AA has assaulted and intimidated the appellant and subjected her to harassment in the form of telephone calls and text messages. He has also been psychologically abusive towards her and misled her considerably with respect to his past and his character.

[40] It is accepted that, should AA locate the appellant in Slovakia, he may attempt to harass or extort money from her. It seems unlikely that she would be subjected to further physical assaults by him. This is because the majority of the assaults occurred during the course of domestic arguments with the exception of the single occasion when he assaulted her while she was attempting to call the police in October 2007. On the appellant's evidence it does not appear that AA wishes to continue a relationship with her. Indeed one of the sources of conflict between them was his desire to be in different relationships. He has however in the past attempted to obtain money from her and may target her again in this regard in the future.

[41] Persecution has been defined in refugee law as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection (see Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at 15). There are thus two elements that the appellants need to establish. First, they must establish that they face a real chance of being subjected to a sustained or systemic violation of their core human rights in Slovakia. Secondly, they must establish that the Slovakian state is unable or unwilling to protect them from such a violation.

[42] Starting with the first element, it is the Authority's view that the treatment the appellants anticipate from AA does not amount to a sustained or systemic violation of their human rights. For reasons noted above, the appellants do not appear to be at risk of further physical assaults from him. It has been accepted that the appellant may be at risk of harassment in the form of persistent telephone calls and requests for money. Such harassment, while possibly extremely unpleasant, does not amount to a sustained or systemic violation of human rights.

[43] Turning to the second element, the appellants have not established that they would be unable to obtain protection from the Slovakian state against AA.

[44] It is a well established principle of refugee law that nations should be presumed capable of protecting their citizens. Clear and convincing evidence is required to demonstrate a state's inability to protect its citizens (see: *Refugee Status Appeal No 523/92* (17 March 1995)). This principle has particular application where a refugee claimant comes from an open democratic society such as Slovakia with a developed legal system which makes serious efforts to protect its citizens from harm.

[45] The appellant has made no attempt in the past to invoke the protection of the Slovakian state against AA. In her evidence, she expressed a lack of confidence in the Slovakian police and in the legal remedies that might be available to protect her. She also filed a witness statement from BB concerning the failure of the Slovakian police to protect her (BB) and her sister-in-law from domestic violence.

[46] Considerable country information concerning the response of the police in Slovakia to domestic violence appears on the file. Domestic violence in Slovakia is a widespread and serious problem. In the past, police attitudes towards domestic violence have been blamed for the under-reporting of domestic violence in Slovakia although it has been estimated that one woman in five has experienced domestic violence: Canadian Immigration and Refugee Board, Research Directorate *SVK100783.E Slovakia: State protection offered to victims of domestic violence (arrests and convictions, sentences, government funded agencies or NGOs, help available to victim and training programs for law enforcement agents)* (17 January 2006)

[47] In 2003 there were a series of changes to the Slovak Penal Code to provide better protection to victims of domestic violence whether currently or previously in a relationship with the perpetrator: Fenestra Women's Interest Association *Slovak Legislation* (2005) www.fenestra.sk/html/cw/eng7.htm. The Code of Civil Procedure has also been amended to allow speedy resolution in cases which concern a minor or a person threatened by violence. In addition, the Institute of Further Education of the Police Force Academy carries out educational and training activities concerning domestic violence for police officers. The Council of Europe Commissioner for Human Rights has noted that such measures saw an increase in successful prosecutions as a result of the reforms rise from 26 in 2002

to 166 in 2003: Council of Europe, *Follow-up Report on the Slovak Republic 2001-2005* Strasbourg, (29 March 2008).

[48] The most recent Department of State Report on the Slovak Republic notes that there were 246 convictions for domestic violence in 2007, that sentences of between 2 to 12 years imprisonment were available, and that police training on domestic violence continued. It also notes however that domestic violence continued to be a pervasive problem and that activists had criticised the government for not enforcing laws against it effectively. It also noted that the social stigma associated with being a victim contributed to the under reporting of domestic violence: United States Department of State, *Country Reports on Human Rights Practices 2007: Slovak Republic* (11 March 2008).

[49] In a similar vein recent draft concluding observations from the CEDAW committee noted with concern the high level of violence against girls and women while acknowledging legal and other measures undertaken by the state to address such violence: Committee on the Elimination of Discrimination against Women, *Draft concluding observations of the Committee on the Elimination of Discrimination against Women: Slovakia (CEDAW/C/SVK/CO/4)* (18 July 2008) at [20].

[50] Although the country information indicates that domestic violence continues to be a widespread problem in the Slovak Republic, the Authority does not accept that it is established that the Slovak state is unwilling or unable to protect victims of violence. Each case will depend on its own facts. In the present case, the appellant has on no occasion attempted to obtain police protection or other legal remedies against AA. It would appear that should the necessity arise, she would be able to do so especially given her relatively strong position as someone from a well off middle class family who is likely to be able to afford legal representation.

[51] As noted earlier in this decision, AA was in custody at the time of the appeal hearing and, according to advice received by the appellant, was due to be sentenced on 9 December 2008. On 28 November 2008, counsel requested leave to file further information concerning AA's sentence with the Authority until 11 December 2008. This request was duly granted but at the date of this decision no further information had been received nor had a further extension of time for filing information been sought.

[52] As no further information has been made available to the Authority concerning AA's sentence, it is unknown whether he has now in fact been sentenced, whether his sentence was custodial and whether, if so, it was lengthy or short. This decision is being issued in the absence of such information because the details of AA's sentence will not affect the outcome of these appeals. This is because of the conclusions made above, that the harm feared by the appellants does not amount to being persecuted and that, in any case, they have failed to rebut the presumption that state protection is available to them.

[53] The appellants do not face a real chance of being persecuted in the Slovak Republic. The first issue framed for consideration is answered in the negative. It is therefore unnecessary to consider the second issue of Convention ground.

CONCLUSION

[54] For the above reasons, the Authority finds the appellants are not refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. These appeals are dismissed.

"M A Roche"

M A Roche
Member