

**Date: 20090205**

**Docket: IMM-5512-07**

**Citation: 2009 FC 121**

**Montréal, Quebec, February 5, 2009**

**PRESENT: The Honourable Maurice E. Lagacé**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Applicant**

**and**

**MATTHEW HUND  
MICHELLE HUND  
MEGAN SANDERS  
GERARD HUND  
MARY HUND  
VIRGINIA HUND  
TELL SANDERS**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an application for judicial review by the Minister pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated December 13, 2007,

wherein the RPD determined that the respondents, all citizens of the United States of America were “Convention refugees” under section 96 of the *IRPA*.

## II. The Facts

[2] The respondents, four adults and three children, were born in the United States. The parents are: Matthew, father of three of the younger applicants, Gerard, Mary and Virginia Hund; and Michelle Hund, the biological mother of Tell and Megan Sanders born from a former marriage, and also biological mother of the three younger applicants. The parents married in 1994.

[3] The respondents claimed that they were conservative Mennonites before changing their religion to become members of the Old Order Benedictine Amish community in 2002, but although having lived close to the said community, they never lived within it.

[4] Before arriving in Canada, the respondents were living in Drake, North Dakota, United States, a non-Amish community. They lived in Kansas and Wisconsin before moving to North Dakota. In Paxico, Kansas, they owned and operated a farm for 7 years from 1995 to 2002. They subsequently moved to Cashton, Wisconsin, where they operated a farm for 2 years (from October 2002 to April 2004).

[5] From May 2004 to September 2004, prior to their first arrival in Canada, the respondents left the United States on a “spiritual journey” to find out how good or bad the rest of the world was. In that pursuit they travelled across Europe to Portugal, Spain, France, Switzerland, Austria, Poland,

the Czech Republic, Slovakia, Italy, Germany, Belgium, England, Ireland and finally Canada on their way back.

[6] From December 2004 to March 2005, the respondents owned and operated a small 5-acre farm in Mansfield, Missouri. In March 2005, they attempted to enter Canada at Sarnia, Ontario as immigrants but were refused entry due to lack of proper documentation. From April 2005 to January 2006, the respondents rented and then owned a farm near the city of Drake, North Dakota.

[7] In November 2005, they attempted to re-enter Canada as immigrants without the appropriate visa and were admitted as temporary residents until February 15, 2006. During that period, they lived in two farm houses in Desboro and Durham, Ontario. They did not seek an extension of their temporary resident visa.

[8] In January 2006, the respondents re-entered Canada at Sault Ste. Marie, Ontario, with authentic American passports which they subsequently burned after their entry. Upon their arrival, they falsely declared to an immigration officer that the purpose of the trip was to visit a friend in Canada. They have lived in Saint-Raphaël-de-Bellechasse, Quebec, near Québec City, until the end of 2006 when they moved to Hull-Gatineau, Quebec. They moved again to Chatham-Brownsburg, Quebec, in the fall of 2007.

[9] After this long pilgrimage, the respondents finally claimed Canadian refugee protection for the first time on August 17, 2006, when they declared that they were “conscientious objectors”. Their claims were heard before the RDP on October 2, 2007 in the absence of the Minister’s representative and the Refugee Protection officer.

[10] The crux of the respondents’ fear of persecution in the United States resides in their contention that too many people have guns. They also state that their country is ruled by a President who believes in war and who leads their country on a path of self-destruction and they do not share the political values of the present administration. One of their greatest fears remains the war that the United States government is waging in Iraq.

[11] The respondents allege that the various incidents of intimidation that they have endured in their home country have formed a “blanket of snow” that instilled fear into their lives and pushed them to seek to live in another country.

### III. The Impugned Decision

[12] Although the RPD acknowledged that the United States is a democratic country, it nevertheless determined that the respondents had established by clear and convincing evidence the inability or unwillingness of the United States to offer them adequate protection.

[13] Moreover, the RPD held that the exceptional circumstances and uniqueness of this case rest on the important fact that the respondents were persecuted by a sheriff’s officer in January 2006,

and this event combined to their belief system which prohibits them from initiating legal procedures against anyone, as well as their motto of turning the other cheek, of forgetting and forgiving and of moving on with their lives.

#### IV. Issues

[14] Did the RPD err in deciding that the United States was unable to offer the respondents adequate state protection, that they had established a serious possibility of persecution on a Convention ground due to their membership in a particular social group, and that they were Convention refugees entitled to obtain Canada's protection as "Convention refugees"?

#### V. Analysis

##### *Standard of Review*

[15] The Court owes deference to decisions of the RPD, an administrative decision maker with an expertise in the application of the *IRPA* (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[16] However, the present case involves questions of facts and weight of evidence intertwined with legal issues which attract a *standard of reasonableness*. And "[i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process". It is also concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47; *Hinzman v. Canada (Citizenship and Immigration)*, 2007 FCA 171).

[17] Was it reasonable for the RPD to decide that the United States was unable to offer the respondents adequate state protection, that they had established a serious possibility of persecution on a Convention ground due to their membership in a particular social group, and to conclude that they were Convention refugees entitled to obtain Canada's protection as "Convention refugees"?

*Objective Fear of Persecution*

[18] The respondents' claims had to be considered against the unequivocal and unchallenged documentary evidence that the United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. The RPD acknowledged this fact.

[19] The test to establish fear of persecution is bipartite. The respondents had to demonstrate that they had in their mind a subjective fear of persecution and that this fear was objectively well-founded in the sense that a valid basis existed for that fear (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689).

[20] Although subjective fear may very well be present, if it is not grounded in the definition of the Refugee Convention or if it is determined that there is no reasonable chance that the claimant will be persecuted on return because of the existence of adequate state protection, a claimant fails to meet the test to be recognized as a Convention refugee (*Ward*, above, at pages 712, 723, 726; *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, at para. 119).

[21] The applicant does not challenge, and neither does the RPD, the respondents' credibility in the description of their fear and apprehension. But while the respondents may have established the subjective component of their well-founded fear of persecution, they, on the other hand, have failed to demonstrate that their fear is objectively well-founded given the availability of state protection in the United States and the existence of other recourses against the incidents of harassment or discriminatory remarks that they experienced while living there.

[22] Taken independently or cumulatively, the alleged incidents reported by the respondents do not amount to persecution under the Refugee Convention. With respect to the incident of January 10, 2006, regarding a deputy sheriff, the respondents may have been subjected to targeting from this individual, but this does not dispute the fact that they had multiple ways of handling this situation within the United States without having to flee their homeland to claim refugee status abroad.

#### *State Protection*

[23] Claimants, such as the respondents, who claim against a democracy like the United States, bear a heavy burden when attempting to establish a claim for refugee status and protection. Not only must they establish an objective fear of persecution, but they support the burden to rebut the general presumptions in refugee law such as those of state protection (*Hinzman*, above).

[24] When the state in question is a democratic state, which is the undisputed situation here, the claimant must do more than what the respondents did. The fact that they denounced their fear and situation to their neighbouring or members of their religious community does not suffice to

demonstrate that they would not have obtained adequate recourse from other state's sources within their country of origin.

[25] One of the factors upon which the RPD based its finding of the non-availability of state protection, is that the respondents used horse buggies for transport which made it more difficult for them to travel to big cities where state central agencies are located. However, the respondents' membership in the Amish community does not relieve them from the obligation to avail themselves of the protection of their country of nationality, despite the fact that other state agencies might be situated at some distance from their place of residence.

[26] The RPD should have taken note that the lifestyle of the respondents as members of the Amish community did not preclude them to travel extensively through Europe and Canada by other means than their usual mode of transportation. The pilgrimage the respondents engaged into, before deciding finally to seek refugee protection from Canada against amongst others the harassment on the part of a local sheriff, has proved to be a much longer journey than traveling to a city in North Dakota in their home country or directly to Canada. Claiming refugee protection is not a question of choice; if the fear is real, the claim for protection must be made at the first opportunity, not when the claimant finds a better place to live as appears to be the case here.

[27] “[I]t is not sufficient that the evidence adduced be reliable. It must have probative value [...] 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.” (*Carillo v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 399 (F.C.A.) (QL), at para. 30).

[28] The “appellants have failed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the appellants in the United States. Because the appellants have not adequately attempted to access these protections [...] it is impossible for a Canadian court or tribunal to assess the availability of protections in the United States” (*Hinzman*, above, at para. 62).

[29] The RPD clearly failed to take into consideration that the respondents had not exhausted all of their recourses to obtain protection against the problems they were facing, and failed to properly analyze whether the respondents could find a safe place to live in the United States such as in one of the Amish farming communities which exist in many rural parts of the United States. This failure of the RPD constitutes another reviewable error.

#### *Exceptional and Unique Circumstances*

[30] The RPD also erred in holding that the respondents have shown “exceptional and unique” circumstances to rebut the presumption of a state protection in a democratic country like the United States, especially after having acknowledged that they could have reported the incident involving a deputy sheriff to higher authorities. The fact that the respondents chose not to do this, because of

their belief system which endorses not pursuing matters before a Court, to forgive and forget, and to move on, cannot be used as an excuse for not doing so.

[31] Sharing their community religious motto of “turning the other cheek, of forgetting and forgiving and of moving on with their lives” does not equate to exceptional circumstances that could justify the respondents’ claim of refugee protection. The negative approach they chose to face their problems remained their own choice; as a result they must now bear and live with the consequence of that choice since a refugee claim in Canada does not constitute a valid solution to their problems.

[32] Surprisingly, this traditional Amish attitude invoked by the respondents for failing to seek state protection, appears incompatible with prior actions they took to higher authorities and to the judiciary when they had to enforce their rights.

*Discrimination is Not Persecution*

[33] The RPD concluded in its decision that the respondents have been victims of acts of harassment and discrimination which cumulatively amount to persecution.

[34] The Court can accept that while various incidents of “lesser” Convention-related harms may not amount to persecution when taken individually; their “cumulative effect” might be sufficiently serious nevertheless to constitute persecution (*Madelat v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 49 (F.C.A.) (QL); *Sarmis v. Canada (Minister of Citizenship and*

*Immigration*) (2004), 245 F.T.R. 312; *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C.R. 771 (T.D.)).

[35] However, a “cumulative effect” analysis should only consider incidents related to a Convention reason since the ultimate goal is to determine if a claimant has a well-founded fear of persecution for a Convention reason.

[36] Here, the RPD refers in its decision to several incidents that the respondents allegedly endured and which were erroneously classified as cumulative acts of discrimination amounting to persecution such as: abandonment by the respondents’ own family; targets and attacks by a deputy sheriff; threats made at public meetings by members of their community; and several relocations over a span of four years.

[37] Most of the incidents enumerated by the RPD, in its reasons, do not fall within the definitions of discrimination and persecution. Abandonment by one’s own family, though an unpleasant occurrence, remains an unfortunate social and familial dynamic faced in the best families regardless of the religious beliefs and political opinions; as such it does not equate to discrimination. Uncorroborated allegation of threats made at public meetings of the respondents’ community, although unfortunate incidents, also cannot be equated to acts of discrimination towards these particular individuals.

[38] As to the incident allegedly involving a deputy sheriff, the respondents may have felt then that their “sensibilities of polite reserve” were offended by a police car patrolling the neighbourhood of their property; yet regardless of the nature of this incident, whether the respondents perceived such actions as harassment, or whether it was nothing more than an officer doing his duty, the fact remains that the respondents declared having moved to a neighbouring county following this episode without further incident on the part of the deputy sheriff in question. Let us not also forget that prior to the sheriff’s incident, unidentified gun shots had been heard in the neighbourhood; so that these unidentified gun shots could just as well explain the presence of the deputy sheriff’s patrol car. This random incident has not proved to be related to the respondent’s political beliefs, as they stated having kept them a secret. There is also no evidence that the deputy sheriff would have been targeting them for their religious beliefs. It is not because, as members of a minority community they felt targeted, that in fact they were.

[39] It cannot for these reasons be reasonably inferred, as the RPD did, that there is a link between those incidents and a Convention ground. It therefore follows that these incidents could not be considered as part of an analysis of the “cumulative effect” of past incidents of mistreatment.

[40] An analysis of the transcript of the hearing and of the decision has convinced the Court that the RPD, by its Member’s remarks, shared the respondents’ claim that they feared persecution because of the general political and cultural climate that prevails in United States, or at the very least demonstrated a receptive attitude with the respondents’ anti-Bush political stance.

[41] However, the respondents adduced no evidence that they would face personal risk in the United States because of their religious or political beliefs. Nothing in the evidence distinguishes them from other American citizens dissatisfied with the then Bush administration and with the evolution of the American social fabric.

[42] Indeed, the respondents have a right to their own political, religious beliefs and way of living; however, the fact that fellow citizens do not share their convictions and that the respondents feel threatened by these opposing views, does not constitute discriminatory or persecutory behaviour against them. When a citizen of a democratic country is not satisfied with the administration of his country, the solution is not to seek refuge elsewhere but to vote in favour of another administration.

[43] In any event, the definition of Convention refugee is forward looking, so that in light of recent political developments in the United States with the new Presidency, it remains to be seen if the Respondents' political fear will be objectively upheld.

[44] To support his finding regarding persecution, the RPD's Member referred to general newspaper articles regarding the political situation in the United States government. Although these articles may indeed support the respondents' political views, they fail on the other hand to demonstrate that the respondents would face a personal threat of persecution as a result thereof. The RPD Member's reliance upon these documentary sources to support his conclusions is therefore

unacceptable (*Sinora v. Minister of Employment and Immigration*, [1993] 66 F.T.R. 113 (F.C.A.); *Alexibich v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 57 (QL)).

[45] By erroneously construing the facts of this case to what constitutes persecution on cumulative grounds, and by erroneously equating to persecution the political and moral opposition with the politics of a country, the RPD acted manifestly in an unreasonable manner justifying the intervention of this Court.

#### *Internal Flight Alternative*

[46] Before deciding that the respondents were Convention refugees, the RPD had to consider whether they had an Internal Flight Alternative (IFA) in their country of origin and if they made serious efforts to look for one.

[47] The respondents had to meet here a very high threshold in order to establish that it would be unreasonable for them to seek refuge elsewhere in their country. It required nothing less than the existence of conditions which would have jeopardized their life and safety in traveling or temporarily relocating to a safe area. In addition, it required actual and concrete evidence of such conditions that the Court does not find in the evidence (*Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (F.C.A.)).

[48] The RPD committed a reviewable error here by failing to properly analyse whether the respondents could find or not or made any serious efforts to find a safe place for them to live in

United States, such as in one of the Amish farming communities which exists in many rural parts of the United States.

*Failure to Claim Protection Elsewhere*

[49] Finally, the RPD made another reviewable error when it decided that the respondent's failure to claim protection at the first opportunity while they travelled in Europe and in Canada, coupled with their return to the United States, did not negate their subjective fear of persecution.

[50] The respondents' itinerary during their pilgrimage in Europe and Canada before claiming refugee protection is incompatible with the behaviour of one who fears persecution or risk for his life or his security in his country of origin. This behaviour goes to the core of the respondents' claim and annihilates the existence of the subjective fear of persecution they may have had (*Caballero v. Canada (Minister of Employment and Immigration)* (1993), 154 N.R. 345 (F.C.A.); *Huerta v. Canada (Minister of Employment and Immigration)* (1994), 157 N.R. 225 (F.C.A.); *Pan v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1116 (F.C.A.) (QL); *Ilie v. Canada (Minister of Citizenship and Immigration)*, 88 F.T.R. 220 (F.C.T.D.)).

VI. Conclusion

[51] These cumulative errors of the RPD justify this Court to intervene. The impugned decision is way out of the range of possible and acceptable outcomes which are justified in respect of the facts and the law, and therefore does not deserve the deference of this Court since it is unreasonable.

[52] Therefore, the judicial review application will be granted and the impugned decision of December 13, 2007, set aside. The Court agrees with the parties that there is no serious question of general importance to certify.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES** that the application for judicial review is allowed, the decision of the Refugee Protection Division, dated December 13, 2007, is set aside, and the application for Convention refugee status is referred to a differently constituted panel of the Convention Refugee Determination Division for re-determination in accordance with the law.

“Maurice E. Lagacé”

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Deputy Judge

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

**DOCKET:** IMM-5512-07

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND IMMIGRATION  
v. MATTHEW HUND ET AL

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** January 13, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT:** LAGACÉ D.J.

**DATED:** February 5, 2009

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