Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-5879-11

Citation: 2012 FC 530

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

VIKTOR MOLNAR; JOLAN PITLIK; RAYMOND MOLNAR; ANDREA BIANKA MOLNAR; VIKTOR RICHARD MOLNAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 4 July 2011 (Decision), which refused the

Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are Roma citizens of Hungary. They seek protection in Canada from persecution on the basis of their ethnicity. The Adult Applicants are the Male Applicant, Viktor Molnar and the Female Applicant, his common-law wife, Jolan Pitlik. The Minor Applicants are their children, Viktor Richard Molnar (Richard), Raymond Molnar (Raymond), and Andrea Bianka Molnar (Andrea).

[3] The Applicants arrived in Canada on 16 July 2009. At that time, the Adult Applicants filed IMM 5611 forms to initiate their claims for protection. In the Male Applicant's form, he said he was afraid of the Hungarian Guard (Magyar Guarda) who were racist against Roma people. He also said that there was discrimination against Roma people in Hungary. The Female Applicant said she was afraid of Magyar Guarda and society in general. She also said she was afraid for her family's safety and noted that on one occasion she was attacked by Magyar Guarda members on her way home from work because she is Roma. The Adult Applicants declared that these forms were true, complete, and correct.

[4] Each of the Applicants filed a Personal Information Form (PIF) with the RPD on 14 August 2009. All of the Applicants submitted the same narrative (Original Narrative), which appeared in their forms under the heading "Viktor Molnar." This narrative spoke of discrimination in Hungary based on the Applicants' ethnicity. They included accounts of Roma people being killed and of their house being set on fire. The Original Narrative also related an event where Richard was attacked by

other students at school. This narrative said he was seriously injured and endured a long wait because ethnic Hungarian patients were treated before him at the hospital. According to the Original Narrative, the Male Applicant told the police about this attack but they did nothing. The Original Narrative also said that Magyar Guarda members came to the Applicants' home, broke in, and smashed their possessions after the Male Applicant complained to the police about an attack which left his nephew bleeding from the head.

[5] In the section titled "Your Counsel," all of the Applicants' PIFs are marked with a stamp from Veena Immigration Practice, indicating that they are represented by Sam Nagendra, a Certified Canadian Immigration Consultant (Nagendra). The Certified Tribunal Record (CTR) includes a faxed copy of a Counsel Contact Information Form which indicates that Nagendra is the Applicants' Counsel of Record. Nagendra faxed the RPD on 13 January 2011 and indicated that he was not Counsel of Record for the Applicants because he had not been retained.

[6] The RPD sent the Applicants a Notice to Appear for a Scheduling Conference on 9 March 2011. The Statement of Service attached to this notice indicates that the RPD believed the Applicants were not represented by counsel at that date. The RPD served this notice on the Applicants personally; "no counsel" is written on it under the heading "Counsel." Robert Blanshay – a Barrister and Solicitor practicing in Toronto – faxed the RPD on 23 March 2011 and indicated that he was representing the Applicants on a *pro bono* basis. Applicants' current counsel wrote to the RPD on 25 March 2011 to indicate that he would represent them if they were granted a certificate from Legal Aid. The Applicants submitted a Confirmation of Readiness form to the RPD on 27 April 2011, which shows their current counsel as Counsel of Record.

[7] The Applicants submitted a package of documents to the RPD on 6 June 2011, which included an amended PIF narrative written by the Female Applicant (Amended Narrative). This narrative differs significantly from the Original Narrative; it does not include any of the events recounted in the Original Narrative. In the Amended Narrative the Female Applicant said that teachers at the Minor Applicants' school called them "stinking damn gypsies." She also said that they received threatening letters between 2006 and 2009 when they lived in Budapest and that shopkeepers would not serve them because they are Roma.

[8] The Female Applicant also included in the Amended Narrative an account of an incident where, when she picked him up from school on 10 November 2007, she found Raymond bleeding from the head. Students at the school said a teacher slammed Raymond against a wall; when she asked the teacher what happened, he said he did not know. The teacher denied hurting Raymond and said "the stinking gypsy kids are lying." The Female Applicant told the teacher she was going to report him to the police. The Female Applicant took Raymond to the hospital in a taxi, and then went to a police station to file a complaint. She wrote in the Amended Narrative that the police took her complaint and said they would investigate the unknown perpetrator, but she knew this meant nothing would happen.

[9] The Female Applicant also wrote about an incident on 10 May 2009 when she was attacked on her way home from work. She complained to the police after this incident, but said she did not know if anything came of their investigation. She also wrote that, in June 2009, someone threw a Molotov cocktail at the Applicants' apartment.

[10] The RPD joined the Applicants' claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR/2002-228 and heard their claims together on 27 June 2011. In the early stages of the hearing, the following exchange occurred:

RPD:	Okay, now I have your [PIFs] and an amendment… an amended… an addendum to the principal female claimant's personal information form Now, they contain interpreter's declarations indicating that the completed [PIFs] were interpreted to you and they also contain your declarations indicating that the information you provided is complete, true, and correct. And would you each confirm that your completed personal information forms, including narratives and any changes, or additions made to the narratives were translated back to you in Hungarian?
Female Applicant:	Yes
Male Applicant:	Yes
Applicants' counsel:	Hold on, I just want to make sure they understand that they are saying that both narratives were... you were talking about both narratives, the first one as well.
Female Applicant:	The first narrative was completed before we hired [Applicants' counsel], so I do not know, it was not translated back and we made a complaint about it, about the way it was made and the second one, yes it was translated back and we know everything that contains.
RPD:	Okay and so why did you sign the first [PIF] if it was not translated back to you?
Female Applicant:	Unfortunately I was mislead and the people we knew two or three days after we arrived in Canada told us that that is the way we are supposed to (inaudible) and unfortunately (inaudible) and I thought it is the right thing to do at that time.
[…]	
RPD:	Okay, so it was translated to you, although it was after the fact?

Female Applicant: Yes, we obtained all these papers with difficulty after we complained… filed a complaint.

[11] The Female Applicant went on to say that the Applicants had complained to a Legal Aid centre and that they did not know Nagendra was an immigration consultant and not a lawyer. The RPD noted that their PIFs indicated Nagendra was a Certified Canadian Immigration Consultant and asked if the Applicants complained about him. The Female Applicant said the lawyer she talked to at Legal Aid said she took steps to file complaints everywhere; Applicants' counsel said that he had heard that Nagendra was under investigation from the authorities and also said that he wished he had confirmed this and brought something for the RPD in writing.

[12] The RPD asked the Applicants whether they had complained about Nagendra, noting that this was very important. The Female Applicant said that she had not been in this kind of situation before and that a Legal Aid lawyer named Georgina said she would file a complaint.

[13] The Female Applicant indicated that nothing in the Original Narrative was true except for statements about the general situation faced by Roma people in Hungary. She said five or six families had submitted the same story to the RPD, but the same events could not have happened to all of them. The Female Applicant also said she realized on 28 March 2011 that the Original Narrative was not correct after it was translated to her when the Applicants retained their current counsel. The Original Narrative was not true or correct and the events described in it had not happened to the Applicants.

[14] The Female Applicant also described the events surrounding the retention of Applicants' current counsel. She said that, on 10 March 2011, the Applicants received a notice to appear for a

hearing on 28 March 2011. The Female Applicant called Nagendra on 10 March 2011 to tell him about the hearing. Nagendra asked her if the Applicants had Legal Aid and told her that, if she did not have a lawyer, he would represent them for $1500. The Applicants then engaged their current counsel, having obtained a Legal Aid certificate.

[15] After hearing the Applicants' claims, the RPD made its Decision on 4 July 2011and notified the Applicants of the outcome on 11 August 2011.

DECISION UNDER REVIEW

[16] The RPD found that the Applicants are not Convention refugees or persons in need of protection because they were not credible and had failed to rebut the presumption of state protection in Hungary. The RPD also found that the Applicants had suffered discrimination, but this did not amount to persecution within the meaning of section 96 of the Act.

Credibility

Different PIF Narratives

[17] The RPD found that the Applicants were not credible because of differences between the Original Narrative and the Amended Narrative. It noted that the Adult Applicants had testified that the Original Narrative was not translated to them in Hungarian, although they signed the declaration saying it was. After their current counsel had the Original Narrative translated to them, they said they discovered several errors in it.

[18] The RPD found it was unreasonable for the Adult Applicants to sign the declaration on their PIFs if they did not understand the contents because they had not been translated to them. The PIFs also contain an interpreter's declaration which says the interpreter translated the PIFs to the Applicants. The RPD also found it was unreasonable for the Applicants not to have had their PIFs translated to them in the two years between when they filed the Original Narrative and when they retained new counsel. It noted the Applicants only sought new counsel when previous counsel demanded a higher fee. The RPD said the onus is on refugee claimants to ensure they are adequately represented. The RPD concluded that their substitution of the Amended Narrative for the Original Narrative undermined the Applicants' credibility.

Raymond and the Teacher

[19] After reviewing the portion of the Amended Narrative where the Female Applicant says Raymond was thrown into a wall by a teacher, the RPD was not persuaded that this incident actually occurred. It noted it had asked the Female Applicant three times what Raymond told her about this incident; she said a teacher assaulted him, he did not talk about it, and he did not say anything. The Female Applicant also testified that she did not know the teacher's name, but that she could have found this information because Raymond told her it was the Physical Education teacher. She also testified that she did not give the police the teacher's name and they did not ask for it, though she expected the police to hold him accountable. The RPD said it is expected that a parent would find out all the details of an incident like this and would report it to the authorities. Since the Female Applicant did not know all the details of this attack, the RPD concluded it had not occurred.

Whispering in the Hearing Room

[20] The RPD also found that, when the Female Applicant whispered to the Male Applicant while he was testifying, this undermined their credibility. During the hearing, the RPD saw the Female Applicant whispering to the Male Applicant and told her to stop. She did the same thing again while the RPD questioned the Male Applicant about his work history.

[21] The RPD noted that it told the Applicants at the beginning of the hearing that they were not to assist or correct one another during their testimony. It expected the Adult Applicants to be able to testify about what happened to them in Hungary without assistance from each other. The Male Applicant did not appear to need assistance in testifying, but the Female Applicant whispered to him anyway.

[22] The RPD also found that the neither of the Adult Applicants had any trouble obtaining employment in Hungary, even though the Male Applicant testified that Roma people in Hungary have trouble getting work because of discrimination. The Male Applicant was continuously employed between 1990 and 2009, as shown by his PIF and oral testimony, and the Female Applicant was employed as a chambermaid for the ten years before the Applicants came to Canada and in a glass factory before that. The RPD found that the Male Applicant's assertion that they faced discrimination in employment was not credible.

Discrimination vs. Persecution

[23] The RPD also found that the Applicants had not experienced persecution in Hungary. Their testimony about the incidents that occurred to them was vague and general and their complaints

about harassment in education and employment were based only on speculation. In light of its general negative credibility finding, and because neither the PIFs nor the IMM 5611 forms completed on arrival contained enough detail about what happened to them, the RPD found they were also not credible in this respect. It found that what they said had happened to them did not amount to persecution.

State Protection

[24] The RPD found that the Applicants had not rebutted the presumption of state protection established in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. It noted that Hungary is in effective control of its territory and has a functioning security force to uphold its laws and constitution. The RPD also found that Hungary is a functioning democracy with free and fair elections which, following *Hinzman v Canada (Minister of Citizenship and Immigration)* 2007 FCA 171, meant the burden on the Applicants to rebut the presumption of state protection was high. Further, the RPD noted that a subjective reluctance to engage the state will not rebut the presumption, nor will the fact that state efforts to protect are not always successful. In order to rebut the presumption, the Applicants had to show they had taken all reasonable steps to seek protection in the circumstances.

[25] Against the presumption of state protection, the RPD weighed what it found were insufficient efforts to seek state protection. Although the Female Applicant reported the teacher's assault on Raymond to the police, she did not give them the teachers name even though she could have found it out. It was unreasonable for the Female Applicant to expect the police to investigate this complaint when she did not give them important information. It also relied on its earlier finding that this event had not actually happened.

[26] The RPD also found that there was insufficient evidence that the police were not investigating the 10 May 2009 assault on the Female Applicant. The Amended Narrative said she was attacked by four or five people on that day. She testified that she reported this incident to the police and told them she believed she was attacked by the same people who had sent her threatening letters. She also said she went back to the police for a report about their investigation into this incident in June 2009, before the Applicants left for Canada, but could not get one. She also did not know if the police were investigating the incident. The RPD found that the documentary evidence before it showed that, if the Applicants were not satisfied with the police response to their complaints, other recourse was available to them. Rather than seeking state protection, the Applicants fled Hungary.

[27] On the evidence before it, the RPD was not satisfied that the police would not have investigated the Applicants' complaints or that they would not prosecute the perpetrators if the evidence warranted it. Although there was information before the RPD that Hungarian Roma face discrimination, there was also evidence before it that Hungary acknowledges this problem and is making serious efforts to address it.

[28] Against the Applicants' limited efforts to seek state protection, the RPD weighed evidence which showed the efforts Hungary was taking to protect Roma people. While a report from the Open Society Institute established that Hungary had one of the most advanced systems for minority protection in the region, other evidence showed government funding for programs to help Hungarian Roma often failed to reach the groups who needed it most. The RPD also found that Roma who experience discrimination can go to the Parliamentary Commissioner for the Rights of National and Ethnic Minorities (Minorities Commissioner). The Minorities Commissioner could

take action if he/she became aware of unjust procedures or discrimination. Further, an Independent Police Complaints Board had begun to operate in January 2008. This independent board could review complaints of rights violations by police.

[29] The RPD also weighed evidence the Applicants submitted, including a report from Human Rights First, which indicated an increase in racist attacks on Roma since 2008. This report noted that the government response had been mixed, with high-profile cases of violence attracting a response as well as shortcomings in the government's efforts. The RPD noted that reports the Applicants submitted showed problems faced by Hungarian Roma people, but these reports also contained accounts of successful efforts by Hungary to protect its citizens. For the RPD, this showed that Hungary was committed to addressing the problems faced by Roma people.

[30] The RPD said it considered the totality of the evidence before it and found the Applicants had failed to rebut the presumption of state protection. Since they had not rebutted the presumption, the RPD concluded that state protection was available to them. It found there was no persuasive evidence that the Applicants faced persecution, a risk to life or of cruel and unusual treatment or punishment, or a danger of torture in Hungary. It concluded the Applicants are not Convention refugees or persons in need of protection.

ISSUES

[31] The Applicants raise the following issues in this case:

1. Whether the RPD's negative credibility finding was reasonable;
2. Whether the RPD's state protection finding was reasonable;
3. Whether the RPD provided adequate reasons;

4. Whether the RPD breached their right to procedural fairness by failing to keep an open mind;
5. Whether their previous counsel's incompetence resulted in a breach of their right to procedural fairness;
6. Whether the Court should consider new evidence they have introduced on judicial review.

STANDARD OF REVIEW

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

[33] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held at paragraph 4 that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Wu v Canada (Minister of Citizenship and Immigration)* 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness. The standard of review on the first issue is reasonableness.

[34] Reasonableness is also the standard of review applicable to the RPD's state protection finding. In *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. Justice Leonard Mandamin followed this approach in *Lozada v Canada (Minister of Citizenship and Immigration)* 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)* 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness.

[35] The Supreme Court of Canada has recently given guidance to courts in assessing the adequacy of a decision-maker's reasons, the third issue in this case. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." The adequacy of reasons, therefore, is to be analysed along with the reasonableness of the Decision as a whole.

[36] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[37] The Applicants argue that their procedural rights were violated when the RPD did not listen to them with an open mind. As the Supreme Court of Canada said in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 22, procedural fairness includes the right to have submissions considered. Further, in *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29 (QL), the Supreme Court of Canada held at paragraph 100 that "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review on the fourth issues is correctness.

[38] The standard of review on the fifth issue is also correctness. In *Osagie v Canada (Minister of Citizenship and Immigration)* 2004 FC 1368, Justice Anne Mactavish held counsel's incompetence can result in a breach of procedural fairness (paragraphs 18 to 20). Justice Mactavish also held in *Lahocsinszky v Canada (Minister of Citizenship and Immigration)* 2004 FC 275 at paragraph 15 that those who allege a breach of fairness on this basis must demonstrate that "there is a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." This analysis calls for the reviewing court to make its own judgment on the question, which is the definition of the correctness standard (*Dunsmuir* at paragraph 50).

[39] On the sixth issue, the standard for the introduction of new evidence on judicial review is high. It is trite law that the reasonableness of a decision is only to be evaluated on the basis of the record which is before the decision maker. New evidence may be introduced on judicial review only

to demonstrate a breach of procedural fairness or jurisdiction and may not be used to show that a decision was correct on the merits (see *Canadian Federation of Students v National Sciences and Engineering Research Council of Canada* 2008 FC 493 at paragraph 40, *Vennat v Canada (Attorney General)* 2006 FC 1008 at paragraph 44, and *McFadyen v Canada (Attorney General)* 2005 FCA 360 at paragraph 15). The decision to admit new evidence is a question within the jurisdiction of the reviewing court.

STATUTORY PROVISIONS

[40] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries;	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
[…]	[…]
Person in Need of Protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son

nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENTS

The Applicants

Unreasonable State Protection Finding

[41] The Applicants argue the RPD's finding they had not rebutted the presumption of state protection is unreasonable because it was not based on the totality of the evidence. The RPD ignored documentary evidence which establishes that Roma people are at risk in Hungary. Although the RPD referred to country documents which showed that democratic institutions are present in Hungary, it ignored evidence which shows that state resources and police support are not available to Roma people. Contrary to the RPD's conclusion, there was evidence before it which established that Roma people in Hungary face discrimination and violence.

[42] The Applicants also say the RPD referred to country documents which are out of date. The evidence the RPD relied on to show Hungary's efforts to protect its citizens, including Roma people, dates from 2004 to 2008. However, there was also evidence before the RPD that violence and discrimination against Roma people in Hungary have increased since 2008. The Applicants point to evidence which shows that Jobbik – a fascist political party – holds opposition status in the Hungarian Parliament. This shows that racism against Roma people permeates Hungary's state institutions. Jobbik is linked to the Magyar Guarda – a group which violently targets minorities, including Roma people.

[43] Although the Applicants submitted evidence which showed law enforcement officials are linked to Jobbik and Magyar Guarda, the RPD did not refer to either of these groups. The evidence of Jobbik's rise to prominence was highly relevant and probative, but the RPD did not mention it in its reasons. The Court can infer that the RPD did not consider it (see *Cepeda-Gutierrez v Canada*

(Minister of Citizenship and Immigration), [1998] FCJ No 1425) and find the Decision is unreasonable (see *Zheng v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 140).

[44] The Applicants say the RPD's analysis of state protection was illogical. The RPD mentioned evidence showing that violence against Roma people in Hungary has increased and should have concluded that state protection is not available to them.

[45] The Applicants point to *Molnar v Canada (Minister of Citizenship and Immigration)* 2002 FCT 1081, at paragraphs 29 and 30, where Justice Danièle Tremblay-Lamer held at follows:

> In the case at bar, the acts committed against the applicants were not merely discriminatory, but also criminal. They were threatened, detained, and beaten. Most of these acts were committed by the police, the authority that is supposed to provide protection. The Board, by concentrating on the existence of human rights agencies and legal aid, failed to address the real issue of protection from criminal acts.
>
> In these circumstances, where protection from crime is at issue, it is questionable whether redress could have been obtained by seeking assistance from human rights organizations. The only authority that could have provided assistance is the police. In my view, once the applicants sought assistance from the police and they refused, there was no obligation on them to seek redress through other sources.

[46] The Applicants say *Molnar* stands for the proposition that Roma in Hungary are not obligated to seek state protection beyond going to the police. In their case, the Applicants went to the police, who did nothing; it was unreasonable for the RPD to require them to go to agencies other than the police for help.

[47] Further, the Applicants say *Molnar* shows that state protection is not available to Roma in Hungary, so it was unreasonable for the RPD to conclude otherwise. State efforts to protect

Hungarian Roma are superficial and ineffective. In the context of Jobbik's election to the Hungarian parliament and an increase in violence against Roma, the Applicants say it is clear there is no protection for Roma in Hungary.

Unreasonable Credibility Finding

[48] The Applicants also argue the RPD's finding the Male Applicant's testimony was not credible is unreasonable because it ignored their explanations for why they filed new PIFs. The RPD's credibility finding was also unreasonable because it drew an improper inference from the fact that the Female Applicant was whispering to the Male Applicant in the hearing room.

Previous Counsel and the Amended PIFs

[49] The Applicants say the RPD unreasonably found that filing the Amended Narrative undermined their credibility. The RPD did not take into account the reasons why they did not have the Original Narrative interpreted to them earlier: they trusted their original counsel and did not know about the procedure for refugee claims. The RPD did not account for the fact that the Applicants only learned their previous counsel had filed a template narrative after they hired new counsel and obtained a copy of their PIFs. The Applicants say that, because they are new to Canada, they cannot be expected to know Canadian legal procedure. They also note they do not speak English, were not aware of their rights, and are unaccustomed to asserting their rights. The RPD did not adequately consider their situation when it concluded they were not credible.

Whispering in the Hearing Room

[50] The RPD unreasonably found that the whispering in the hearing room between the Male Applicant and the Female Applicant undermined their credibility. They say the Female Applicant only whispered to the Male Applicant twice, during portions of his testimony which were not relevant to the persecution they suffered in Hungary on which they based their claim. The Female Applicant also interfered with the Male Applicant's testimony when he was slow in answering only because she thought the RPD would infer they were lying from his slowness. Further, the Applicants say the Female Applicant has a habit of interrupting her husband and this is common among spouses.

The Teacher's Name

[51] It was unreasonable for the RPD to infer that the Female Applicant was not credible because she could not remember the name of the teacher who assaulted Raymond. The RPD also unreasonably expected her to remember all of the circumstances of the assault on Raymond. The Female Applicant says that her testimony about what happened to Raymond was accurate. Given that the police in Hungary do not help Roma people, the Female Applicant's testimony that the police did not help her was believable. The RPD did not consider evidence that the police in Hungary do not help Roma people when it evaluated the Female Applicant's credibility.

Breach of Procedural Fairness

[52] The RPD breached their right to procedural fairness by failing to hear their case with an open mind. When the RPD asked the Female Applicant about her amended PIF narrative and

whether she had filed a complaint about previous counsel, the RPD was looking for a reason to refuse the claim. The Applicants note that this Court requires a refugee claimant who makes allegations against former counsel to notify that counsel. Because the RPD asked the Female Applicant if she had met this obligation, this shows that it was looking for a reason to deny the Applicants' claim and did not give them a fair hearing.

The Respondent

State Protection was Determinative

[53] Although the Applicants have impugned the conduct of their previous counsel, his conduct did not affect the outcome of their claim. The RPD analysed whether state protection was available to them in Hungary on the basis of the events in the Amended Narrative and oral testimony and still concluded that state protection was available to them. The question of whether state protection is available is within the expertise of the RPD. Further, in *Carrillo* above, the Federal Court of Appeal held at paragraph 30 that

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

[54] A subjective reluctance to approach the state for protection is not enough to rebut the presumption of state protection. When the RPD concluded that the Applicants had not rebutted the

presumption of state protection, it appropriately analysed their circumstances and all the relevant facts before it, so the Decision should not be returned on this basis.

The RPD Considered All the Evidence

[55] The Respondent also says that *Florea v Canada (Minister of Employment and Immigration),* [1993] FCJ No 598 (FCA) establishes a presumption the RPD has considered all the evidence before it. The RPD said that it had made its finding on state protection "having considered the totality of the evidence." The RPD's reasons show it conducted a detailed analysis of whether adequate state protection was available to the Applicants and drew a reasonable conclusion in this regard. It specifically addressed country condition evidence before it which spoke to the situation after 2008. The RPD also acknowledged evidence before it which showed an increase in racial violence since 2008, including attacks on Roma people.

[56] The RPD took this evidence into account but concluded that state protection was available to the Applicants. Some of the documents before the RPD which showed incidents of violence and discrimination directed at Roma people also indicated that the efforts of the authorities to protect had met with some success. In some cases, law enforcement officials had been held accountable for misconduct in hate crime investigations. The RPD weighed the evidence which showed Hungarian Roma face discrimination against what it found was persuasive evidence that state efforts were underway to protect Roma. The RPD concluded that Hungary could provide protection which was adequate, even if it is not perfect.

[57] The RPD also examined the Applicants personal circumstances and reasonably concluded they had not rebutted the presumption of state protection. It noted they had only approached the

police on two occasions. When the Female Applicant approached the police about Raymond's experience with the teacher, she did not give them the teacher's name, even though she could have found it out. The RPD reasonably concluded that the police could not have investigated this incident without knowing the teacher's name. With respect to the beating the Female Applicant said she suffered on 10 May 2009, the RPD found there was no evidence to show the police had not investigated this incident. Although the Applicants disagree with the weight the RPD put on the evidence before it, this is not enough to grant judicial review.

[58] The Applicants' reliance on *Molnar*, above, for the proposition that the Hungarian Roma do not have the obligation to rebut the presumption of state protection is misplaced. *Molnar* is distinguishable on its facts: Molnar feared persecution from neo-Nazis and the police arising out of incidents between 1999 and 2000, in which the police actually perpetrated violence against him. The Applicants do not fear the Hungarian police, nor were they ever harmed by the police. The Applicants have not demonstrated that the RPD's conclusion on state protection was unreasonable, so the Decision must stand.

Reasonable Credibility Finding

[59] The Respondent also argues that the RPD reasonably concluded that the Applicants were not credible because it reasonably relied on the Applicants' conduct at the hearing and rejected their explanation for not filing amended PIFs sooner. Nothing turns on the Applicants' complaint about their previous counsel, given the other concerns the RPD had about their credibility. The Respondent says counsel act as agents for clients and it makes no difference whether refugee claimants are represented by immigration consultants or lawyers.

[60] Although the Applicants take issue with the RPD's inquiry into whether they filed a complaint with the Law Society of Upper Canada (Law Society) about previous counsel, the Respondent points to this Court's jurisprudence which establishes that a refugee claimant must notify a former representative of any allegations of incompetence and give the former representative an opportunity to respond. Claimants are also obligated to make a complaint to the body which regulates the former representative (See *Nunez v Canada (Minister of Citizenship and Immigration),* [2000] FCJ No 555; *Shirvan v Canada (Minister of Citizenship and Immigration)* 2005 FC 1509; *Kizil v Canada (Minister of Citizenship and Immigration)* 2004 FC 137; *Mutinda v Canada (Minister of Citizenship and Immigration)* 2004 FC 365; *Gonzalez v Canada (Minister of Citizenship and Immigration)* 2006 FC 1274; and *Thamotharampillai v Canada (Minister of Citizenship and Immigration)* 2011 FC 438.

[61] The Applicants only notified their former representative of their concerns and filed a complaint with the Law Society two months after the RPD rejected their claim. Although they approached the Parkdale Intercultural Association and Legal Aid for help, these were not appropriate places for them to complain.

[62] Contrary to their assertions at the hearing, the Applicants were aware at the time they signed their original PIFs that they did not contain an accurate account. An affidavit (Bergman Affidavit) from Ori Bergman (Bergman) – a lawyer who shares office space with Applicants' counsel – says the Applicants told current counsel the Original Narrative was based on a template and the personal incidents described there did not happen to them, at the time they retained him. The Applicants also said previous counsel never asked them to tell their personal stories when they retained their current counsel.

[63] The RPD reasonably considered the Applicants' explanation of why the stories in their original and amended PIFs were different, but rejected it and found they were not credible. The RPD also found the Applicants were not credible because of inconsistencies in their testimony about important events and the Applicants' whispering in the hearing room. The Applicants do not dispute that they were whispering in the hearing room. This was a reasonable basis for the RPD to find them not credible because the conduct of witnesses at a hearing is relevant to their credibility. Even though the RPD advised the Female Applicant to stop helping the Male Applicant with his testimony, she persisted.

[64] The Applicants also do not challenge the RPD's understanding of the Male Applicant's testimony about his ability to obtain employment in Hungary. His testimony on this point was one of the occasions where the Female Applicant helped him, which the Applicants have admitted. Although they disagree with the weight the RPD put on their allegations and evidence, this does not mean its conclusion was unreasonable.

The Applicants' Reply

[65] The Applicants say *Carillo*, above, establishes that a subjective reluctance supported by objective evidence that state protection is inadequate is enough to rebut the presumption of state protection. In this case, the RPD ignored evidence showing that state protection is not available to Roma people and evidence that racism against Roma permeates state institutions in Hungary.

[66] Although the Respondent has said that the RPD assessed the Applicants personal circumstances, the Applicants say that he has not addressed the RPD's failure to consider the country condition evidence before it. Although the RPD mentioned country condition evidence

which showed mixed results from Hungary's efforts to protect Roma people and said it had considered all the evidence, the RPD did not actually analyse the evidence before it. Simply mentioning the evidence and drawing a conclusion is not enough; the RPD was required to show how it drew the conclusions it did. Since it did not do this, the Decision must be returned for reconsideration.

[67] Contrary to the Respondent's assertion that the Female Applicant withheld the name of the teacher who assaulted Raymond from the Hungarian police, the Applicants say she did not do this. They now say the Female Applicant knew the teacher's name, but she did not give it to the police because they did not take her seriously and ask for it. Rather, the police dismissed her and Raymond as liars. The Female Applicant simply could not remember the teacher's name at the hearing and the RPD assumed she does not know it. The police told her she did not have enough evidence that her son was assaulted.

[68] The Applicants also say that they notified their previous representative of their allegations against him. In an e-mail dated 1 April 2011 and introduced as an exhibit to the Bergman Affidavit, Applicants' current counsel had this to say to their previous counsel:

> Following our telephone conversation today, my contact information is below. I have been retained by [the Applicants] to provide an opinion to legal aid. I have acknowledged a legal aid certificate. The clients have informed me that they retained you to represent them and that you filed their PIF. However, they are concerned, because they never [*sic*] saw their PIF.
>
> Please locate the PIFs and fax a copy of them to me ASAP. Otherwise, we will contact the IRB and explain to them that it [*sic*] was lost.

[69] The Applicants say this email shows they clearly confronted previous counsel with their concerns and gave him a chance to respond. They also say he has not responded. Further, social workers filed a complaint with the Law Society, and the Applicants say they filed a formal complaint with the Law Society in September 2011.

Incompetence Breached Procedural Fairness

[70] The Applicants also argue that, because their previous counsel was incompetent in his handling of their claim, he compromised their right to procedural fairness. At paragraph 25 of *Rodrigues v Canada (Minister of Citizenship and Immigration)* 2008 FC 77, Justice François Lemieux applied the test for incompetence the Supreme Court of Canada articulated in *R v G.D.B.*, [2000] 1 SCR 520:

> The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[71] The Applicants' right to procedural fairness was breached by their previous counsel because the RPD relied on discrepancies between their original and amended PIFs to impugn their credibility. Had previous counsel not filed false narratives, the Applicants would not have had to

prove the Amended Narrative was true or that they had not had the Original Narrative interpreted to them before signing their PIFs. A miscarriage of justice has occurred in this case.

[72] The Applicants admit that this Court's jurisprudence requires that, in order to support an allegation of incompetence, claimants must advise a governing body in writing. However, they say they have met this obligation. They retained their current counsel because previous counsel asked them for additional funds to represent them at the hearing. Once they retained their current counsel, they discovered their Original Narrative was false and confronted previous counsel with this allegation. They assert they informed previous counsel of their concerns that he mislead and prejudiced them; he did not respond to these allegations. They also filed a complaint with the Law Society in September 2011.

[73] The Applicants point to *Shirwa v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1345 for the proposition that a breach of the right to procedural fairness occurs where counsel's misconduct results in the denial of a hearing, They also point to *Rodrigues*, above, and say that indications of incompetence include failure to make and reply to submissions, failure to prepare a case, and misrepresentation. In the instant case, previous counsel misrepresented himself as a lawyer when he was actually an immigration consultant. He also filed a template narrative, which the Applicants say amounts to a failure to prepare a case. Both of these actions resulted in a breach of their right to procedural fairness, so the Decision must be returned.

The Applicants' Further Memorandum

[74] The Applicants say the Court's jurisprudence establishes that there is inadequate state protection for Roma in Hungary. They point to *Molnar*, above, *Banya v Canada (Minister of*

Citizenship and Immigration) 2010 FC 686; *Bors v Canada (Minister of Citizenship and Immigration)* 2010 FC 1004; and *Kovacs v Canada (Minister of Citizenship and Immigration)* 2010 FC 1003. They also note that in *Elcock v Canada (Minister of Citizenship and Immigration),* [1999] FCJ No 1438 (QL), Justice Frank Gibson held at paragraph 15 that

> I am satisfied that the same result must follow here and that the CRDD committed a reviewable error in failing to effectively analyse, not merely whether a legislative and procedural framework for protection existed, but also whether the state, through the police, was willing to effectively implement any such framework. Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[75] In *Banya*, above, Justice Douglas Campbell held that it was an error for the RPD to disregard evidence that showed Hungarian Roma experienced attacks from extremists. In *Bors*, above, Justice Michel Shore held at paragraph 58 that, "It was unreasonable for the PRRA officer to find that the attacks against the Roma have stopped in Hungary without explaining how she reached that finding" [emphasis removed]. In *Kovacs*, above, Justice Shore made the same finding he had made in *Bors*, above. The Applicants say it was an error for the RPD to conclude that adequate state protection was available them because the cases they have cited show that this is not the case.

New Evidence

[76] The Applicants now say the Court should consider a supplementary affidavit from Bergman, which they filed with the Court on 3 January 2012 (Supplementary Affidavit). This affidavit introduces as evidence a second affidavit from Gwendolyn Albert (Albert Affidavit). The Albert Affidavit shows the submissions they made before the RPD are true, so the Court should consider this new evidence.

[77] The Applicants argue that, where there has been a breach of procedural fairness, new evidence can be considered by the reviewing court. In *Hutchinson v Canada (Minister of the Environment)* 2003 FCA 133, the Federal Court of Appeal had this to say at paragraph 44:

> This point can be disposed of summarily. The applications judge properly applied the authorities in refusing to allow the additional evidence to be introduced. It was not before the Commission and therefore, absent considerations such as denial of natural justice, there was no right to have it considered by the applications judge. See *Farhadi v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 315 cited by the applications judge.

[78] In *Farhadi v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 381, Justice Gibson held at paragraph 20 that

> It is trite law that a reviewing court is bound by the record filed before the federal board, commission or other tribunal the decision of which is under appeal. Reviewing [*sic*] court jurisprudence has followed this rule, noting that if evidence not before the initial tribunal is introduced on judicial review, the review application would effectively be transformed into an appeal or a trial de novo. While I am satisfied that a jurisdictional exception exists to the rule that new evidence is not admissible on judicial review, I am also satisfied that an issue as to jurisdictional error of the tribunals does not arise here. The issues before me pertain to the Charter and the adequacy of the procedural safeguards in any risk assessment process conducted in this case. [references omitted]

[79] The Albert Affidavit contains evidence which shows that the Decision was unreasonable, so the Court should consider it.

The Respondent's Further Memorandum

[80] The Respondent argues the Applicants seek to challenge the Decision on the basis of evidence which was not before the RPD. In their Application Record, the Applicants refer to evidence which does not appear in the documents the Applicants submitted to the RPD:

a. Nineteen pages from *Written Comments for Consideration by the United Nations Committee at its 98th Session*, authored by the European Roma Rights Center, Chance for Children Foundation and the Helsinki Committee Concerning Hungary; and

b. An article entitled "UN Bodies Urge Roma to Hungary to Act Against Roma Rights Abuses," from the website of the European Roma Rights Centre.

[81] The Respondent also says that the following articles were not before the RPD:

- *Hungary Post Election Watch: April 2010 Parliamentary Elections*, listed as item 4.2 of the RPD's National Documentation Package for Hungary from 29 October 2010 but not provided to the RPD
- Hungary's Opposition, A Nasty Party: The Centre-right Frets Over the Rise of the Far Right, *The Economist*, 18 June 2009

[82] These documents were not before the RPD, so it is inappropriate for the Court to consider them on judicial review.

Cases Are Distinguishable

[83] The Respondent also says the cases the Applicants rely on to show there is no state protection in Hungary for Roma people are distinguishable on their facts. Unlike in *Bors*, *Banya*, *Kovacs*, and *Molnar*, all above, the Applicants have not demonstrated that the RPD ignored evidence, which was the common error in these cases.

Albert Affidavit is Inappropriate

[84] The Respondent objects to the Albert Affidavit, saying that new evidence must not be considered on judicial review. The information in the Albert Affidavit was not before the RPD, so this Court should not consider it. A judicial review is not a *de novo* appeal of the RPD's decision. The Applicants are attempting to use the Albert Affidavit to challenge the RPD's conclusion, which is not appropriate.

[85] The Albert Affidavit has not been tested by the RPD and is introduced before this Court as hearsay. Although the Applicants say the affiant is an expert, her expertise was not established before the RPD. The Applicants' argument that this evidence should be considered because of a breach of procedural fairness is without merit. At no time were the Applicants denied an opportunity to address the state protection issue before the RPD, and they were represented by counsel at the hearing. They submitted country condition documents and made submissions on this point at the hearing, so the Court should not re-visit this issue.

Reasonable Credibility Assessment

[86] The Respondent also challenges the Applicants' argument that the RPD's credibility assessment was unreasonable. The RPD reasonably assessed the Female Applicant's testimony with respect to the incident where Raymond was assaulted by a teacher. She testified that Raymond told her a teacher pushed him against the wall. When the RPD asked her at the hearing if she knew the teacher's name, she said she did not. She also testified that she could have found out the teachers' name, but she could not prove he actually assaulted Raymond. When the RPD asked her what she expected the police to do, she said she expected them to ask her the teacher's name, believe her, and

to hold the teacher responsible. She also did not know if Raymond knew the teacher's name. Raymond only knew he was the physical education teacher.

No Breach of Procedural Fairness

[87] The Applicants have not satisfied the essential elements to establish that the conduct of their previous counsel amounted to a breach of procedural fairness. Claimants who make this kind of argument must demonstrate extraordinary incompetence to establish a breach of procedural fairness, which the Applicants have not done (see *Gogol v Canada*, [1999] FCJ No 2021 at paragraph 3). The RPD simply did not believe that the discrepancies between the Original Narrative and the Amended Narrative resulted from previous counsel's incompetence.

[88] The Applicants signed at the end of their PIFs and declared that the contents of the forms and all attached documents were interpreted to them. There was nothing before the RPD to indicate they had notified their previous counsel before the hearing of any complaint. The Applicants also relied on hearsay evidence about complaints against Nagendra. Applicants' counsel, at the hearing before the RPD, said that a lawyer from Legal Aid told him that she told the Applicants to take steps to file a complaint. Applicants counsel also said he heard their previous counsel was under investigation, but had not confirmed this or brought anything in writing to the hearing. Neither the Applicants nor their counsel confirmed with the RPD they had filed a complaint with the Law Society or any body overseeing immigration consultants. The hearing transcript also does not show where Applicants' counsel said he had informed previous counsel of concerns related to the Applicants' PIFs. The Applicants continue to rely on these hearsay allegations to support their complaints about their previous counsel, but have not shown his incompetence, if any, resulted in a breach of procedural fairness or that they adequately notified him of their allegations.

ANALYSIS

[89] Although the Applicants place significant emphasis on credibility issues and the negligence of their previous counsel, their application really stands or falls on the adequate state protection issue.

[90] In dealing with this issue the RPD examined the Applicants' own efforts to secure protection in the past, as well as the current situation in Hungary for Roma people. The analysis is detailed and thorough.

[91] Reading the Decision as a whole, it is my view that the adverse credibility findings do not materially impact the state protection analysis. The RPD examines what the Applicants themselves claim to have done in attempting to secure state protection.

[92] The Court has recognized that a subjective reluctance to seek state protection is generally insufficient to rebut the presumption of state protection. Justice Orville Frenette recently canvassed this principle in *Cueto v Canada (Minister of Citizenship and Immigration)* 2009 FC 805 at paragraphs 25 and 26:

> There is a presumption that state protection is the responsibility of the state of which the refugee is a citizen (*Sanchez v. Minister of Citizenship and Immigration*, 2008 FC 134). In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at page 709, the Supreme Court of Canada made it clear that claimants must first address themselves to their home state for protection or to demonstrate that it was objectively unreasonable to have done so, before the responsibility of other states becomes engaged. Therefore, refugee protection is not available when the claimant has not made an attempt or made an adequate attempt to first seek state protection in his home country (*Ward*, *supra*, at page 724; *Hinzman v. Minister of Citizenship and Immigration*, 2007 FCA 171, at paragraphs 52 and 56). When adequate protection exists, a claimant cannot claim an

> objective well-founded fear of persecution (*Sarker v. Minister of Citizenship and Immigration*, 2005 FC 353, at paragraph 7; *Dannett v. Minister of Citizenship and Immigration*, 2006 FC 1363, at paragraphs 34 and 43).
>
> To rebut the presumption of state protection, the claimant must establish relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate (*Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, [2008] 4 F.C.R. 636 (F.C.A.); *Granados v. Minister of Citizenship and Immigration*, 2009 FC 210; *Minister of Public Safety and Emergency Preparedness v. Gunasingam*, 2008 FC 181). A subjective reluctance to seek state protection is insufficient to rebut the above presumption.

[93] In addition, it is trite law that the assessment of state protection is largely a factual assessment made on a case-by-case basis. See *Farhadi*, above, at paragraph 20. As the trier of fact, the RPD is often required to assess what weight to give to competing evidence on country conditions. The Applicants have not rebutted the presumption that the RPD weighed and considered all the evidence. The Applicants do not indicate how the RPD disregarded or ignored evidence relevant to state protection as alleged at paragraphs 5 to 13 of their further memorandum.

[94] Moreover, it is also trite law that judicial review is based on the record before the administrative tribunal. However, the Applicants are attempting to challenge the RPD's assessment of state protection on the basis of information that was not before the member.

[95] There is no indication in the record that the Applicants were denied an opportunity to address the adequacy of state protection before the RPD. The Applicants were represented before the RPD by counsel who is a barrister and solicitor. Their legal counsel submitted documentary evidence on country conditions in advance of the refugee hearing and made submissions with respect to country conditions at the hearing.

[96] The Respondent submits that the Applicants' attempt to bolster their claim based on evidence that was not before the RPD is completely inappropriate in the circumstances of this case. I agree; the Court will not consider the contents of the supplementary affidavit of Ori Bergman or any of the material that was not before the RPD.

[97] As the Decision makes clear, the RPD questioned the Female Applicant about the efforts the Applicants had made to seek state protection before they fled Hungary. This involved the two main incidents of the teacher's assault on Raymond and the 10 May 2009 assault on the Female Applicant herself. These matters are dealt with as follows:

> [22] Jolan testified that she reported the physical assault Raymond suffered at the hands of a teacher to police but did not provide the teacher's name because police did not ask her. Jolan also testified that even if she gave police the name of the teacher, they would not have believed her and she would have been fined in the end.
>
> [23] I find that it was unreasonable to expect police to properly investigate Raymond's physical assault without knowing the name of the teacher who assaulted him, when the name of the teacher would have been easily obtainable. Jolan indicates in her narrative that police said they would start an investigation against unknown perpetrators. I also find this to be unreasonable as Raymond and Jolan knew who the perpetrator was and could have easily provided police with that information. Jolan's explanation that police would not have believed her if she provided the teacher's name is unreasonable unless it was determined by police that Jolan's allegations were false. Furthermore, my credibility findings above dispute that the incident occurred as described by Jolan.
>
> [24] Jolan maintains that she reported the May 10, 2009 incident involving her physical assault to police. When asked what she told police about the physical assault she endured, Jolan said that she told police she was attacked by four or five people and most likely they were the same ones who sent her threatening notes. When asked if police investigated her allegations, Jolan testified that she did not know. When asked if she followed up with police, Jolan indicated that she went back to police to ask for a report when she was about to leave Hungary at the end of June.

> [25] Insufficient credible evidence was presented to indicate that police were not investigating Jolan's allegations regarding the May 10, 2009 incident. Jolan went back to police in June 2009 before she left Hungary, to ask for a report. She testified that she does not know if police investigated her allegations. If Jolan or any of the claimants was dissatisfied with the response of police to their allegations, documentary evidence noted below indicates that they would have recourse available to them. Rather than pursuing state protection in Hungary, the claimants decided to leave the country.
>
> [26] I find that the claimants have failed to rebut the presumption of state protection with clear and convincing evidence, and they did not take all reasonable steps under the circumstances to seek state protection in Hungary prior to seeking international protection in Canada. Jolan reported the physical assault on Raymond to police but failed to provide police with the name of Raymond's attacker when it was readily available. Jolan reported the physical assaults she endured in May 2009 but failed to follow up with police and it is unknown to her if police investigated. The claimants did not seek recourse if they were dissatisfied with the response they received from police. Insufficient credible evidence was presented to indicate that any of the claimants ever sought the assistance of police in Hungary for any other matter.
>
> [27] I am not persuaded that police would not investigate all of the claimants' allegations if they were all reported to them with sufficient and readily available detail. I am also not persuaded that police would not prosecute any of these claimants' assailants if there was sufficient evidence. I found the claimants' responses regarding the effectiveness of state protection were not persuasive, since they were largely unsubstantiated and not consistent with the documentary evidence.

[98] I can find no reviewable error in this analysis. It is always possible to disagree, but disagreement is not sufficient. These findings, in my view, fall within the *Dunsmuir* range.

[99] The RPD then turned its attention to the documentary evidence. The Applicants say that the RPD's analysis failed to consider all of the evidence, disregarded facts, made erroneous assumptions and only addressed Hungary's efforts to protect without regard for the operational adequacy of state protection. None of these complaints is borne out by a reading of the Decision. It

contains a detailed and balanced approach to the documentation in which the continuing problems for Roma people, the widespread discrimination they face, and the violence to which some of them have been subjected, are all fully acknowledged and dealt with.

[100] This detailed analysis is framed by the following conclusions:

> [28] I acknowledge that there is information in the documentation to indicate that Romas [*sic*] face discrimination in Hungary. However, weighted [*sic*] against this is persuasive evidence that indicates Hungary candidly acknowledges this problem and is making serious efforts to rectify the discrimination and problems that exist.
>
> [29] The preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Hungary for victims of crime, including crimes committed against Romas [*sic*], that Hungary is making serious efforts to address the problems of criminality, and that the police are both willing and able to protect victims. Police corruption and deficiencies, although existing and noted, are not systemic. I am of the view in canvassing the documentary evidence, that, as a whole, the issue of corruption and deficiencies are being addressed by the state of Hungary.

[101] The RPD also acknowledges the recent surge in violence against Roma people and explains why this does not refute the adequacy of state protection:

> [35] I have considered the documentary evidence submitted by counsel. The Human Rights First report *Violent Hate Crimes in Hungary* indicates that, in Hungary, an alarming upsurge of racist violence has victimized many members of the country's Roma population, estimated between 400,000 and 600,000 people. There has been a particularly sharp rise in serious - sometimes deadly - attacks since 2008, inflaming social tensions and weakening the sense of physical protection of minorities across the country. The report also indicates that the government response to this serious problem has been mixed. The Hungarian authorities have demonstrated the resolve to respond to individual high-profile hate crime cases, although their overall response is still marred by significant shortcomings. Senior government officials publicly spoke out against some of the most serious recent cases of anti-Roma

> violence, although in most cases only after the violence had escalated considerable [*sic*]. Some progress has been made in investigating a number of serious violent attacks that occurred in 2008 and 2009. The Hungarian government at the time committed significant law enforcement resources to the investigations and sought international cooporation in those efforts. The authorities have also taken some steps to holding accountable law enforcement officials for misconduct in the course of hate crime investigations.
>
> [36] Although many of the reports and articles contained in counsel's documentary evidence described the problems of Romas [*sic*] in Hungary, accounts of Hungary's efforts and successes in providing better protection for the Romas [*sic*] are often contained in the same reports and articles. This reflects Hungary's commitment to address the problems encountered by Romas [*sic*] and eradicate violence and discrimination against this group.

[102] In a country such as Hungary where there are obvious and fully-acknowledged problems in human rights abuses that have to be confronted by Roma people, a state protection analysis is not easy and there will always be disagreement on this issue. In the present case, the evidence of personalized risk was not strong. As Justice Yves de Montigny held in *Jarada v Canada (Minister of Citizenship and Immigration)* 2005 FC 409 at paragraph 28:

> That said, the assessment of the applicant's potential risk of being persecuted if he were sent back to his country must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean there is a risk to a given individual (*Ahmad v. M.C.I.*, [2004] F.C.J. No. 995 (F.C.); *Gonulcan v. M.C.I.*, [2004] F.C.J. No. 486 (F.C.); *Rahim v. M.C.I.*, [2005] F.C.J. No. 18 (F.C.)).

[103] Justice Shore also addressed the need for personalized risk in *Jean v Canada (Minister of Citizenship and Immigration)* 2010 FC 674. He had this to say at paragraphs 32 and 33:

> The case law of this Court is clear and consistent that a generalized fear of crime caused by a situation prevailing throughout the country and affecting the entire population is not enough to justify granting the status of person in need of protection.

> An applicant must establish that there is a personalized risk based on his or her personal circumstances, which was not done in this case: the applicants did not show that their particular situation would cause a personalized risk, and the documentary evidence does not support their allegations.

[104] It may well have been possible to reach a conclusion in this case the Applicants were at risk, although, in my view, their evidence for personal risk was not strong. However, even if a different conclusion might have been possible, this does not mean that the RPD's analysis and conclusions were unreasonable. The Supreme Court of Canada pointed out in *Khosa*, above, at paragraph 59 that

> There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[105] The Hungarian situation is very difficult to gauge. Much will depend upon the facts and evidence adduced in each case, and on whether the RPD goes about the analysis in a reasonable way. Where it does, it is my view that it is not for this Court to interfere even if I might come to a different conclusion myself. It is my view that a reasonable analysis was conducted in this case that was alive to the governing principles and that applied them to the facts on the record in a responsive way. On this basis, I cannot interfere with the Decision.

[106] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	May 4, 2012

APPEARANCES:

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