Federal Court  Cour fédérale

Date: 20121126

Docket: IMM-581-12

Citation: 2012 FC 1361

Ottawa, Ontario, November 26, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROBERT TAMAS; DANIEL TAMAS;
LORETTA TAMAS; ROBERT TAMAS

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 21 December 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 citizens of Hungary and of Roma ethnicity. They seek protection in Canada from persecution on the basis of their ethnicity. The Primary Applicant is Robert Tamas (Robert) and the Secondary Applicants are his children Daniel Tamas, Loretta Tamas, and Robert Tamas.

[3] The Applicants, along with Robert's common-law spouse, Eva Molnar, arrived in Canada on 15 December 2009 and claimed refugee protection. In support of their application Robert submitted a narrative in his Personal Information Form (PIF), as well as materials about conditions for Roma in Hungary.

[4] Robert's PIF states that he has been treated as an outcast throughout his life because people in Hungary are very racist towards Roma people. When his son David was born, doctors at the hospital shouted at his wife to be quiet because she was making too much noise. Robert tried to talk to the doctors about it, but they called the police and they made him leave the hospital. Robert could not continue his education past elementary school because he could not afford it, and he was always humiliated at school. He could barely find any work because Roma are continually discriminated against. Roma are not even allowed to enter clubs and cafés. Robert felt so hopeless that he contemplated suicide at one point. He heard about other Roma families being killed, and his family lived in constant fear in Hungary. Robert had an opportunity to work in the countryside, but his family was too scared for him to leave them so that he could not take the job. When he went to the police about it, they laughed at him. Robert decided to come to Canada with his family to avoid the life of unemployment and starvation that existed for him in Hungary.

[5] In addition to the statements in his PIF, Robert submitted country condition materials from a variety of sources. No other evidence was submitted.

[6] After two previous adjournments, a hearing was scheduled for 20 December 2011. Robert submitted a medical note, stating that Eva Molnar has been suffering from health problems since September 2011, and would not be able to attend a hearing for approximately 3-6 months. The RPD decided to sever her application from the other Applicants, and proceeded with the hearing. At the hearing, a lawyer named Diane Younes was present. She stated that she was there for Victor Hohots, counsel for the Applicants.

[7] In the early stages of the hearing, the following exchange occurred:

> RPD: Now, I am in receipt of a letter that the principal claimant has given me which indicates that… that the principal claimant's wife has been under medical care since September 2011. The letter also says that it would be difficult for her to attend a hearing for three to six months.
>
> And while I am very sympathetic to your wife's heart condition, let me just point out that you have been in the country for two years, that the first communication with the board was January 2010; if your wife has been under medical care since September, the day of the hearing is not acceptable to let the board know that your wife cannot… cannot endure a hearing.
>
> We join family members, this is the practice of the board, but we also have the jurisdiction to disjoin if the circumstances are such that… that it will impede the proceedings if we adjourn instead of disjoining.
>
> Counsel, do you have any comments?
>
> Counsel: No, Madam Member, I just want to let the client know that… that if we are successful today he can sponsor his wife, this is one of the options.
>
> RPD: Well, I think you can do that, speak to him privately.
>
> Counsel: And I think that is why we are… in terms of her heart condition…

RPD: And he is… and he is the principal claimant?

Counsel: Yes. And you are the principal claimant and this is your story.

RPD: It is not your wife's story; her allegations are based on your allegations.

So, because as I stated earlier, because of the history of this claim already having been in the process for two years and having attended a show cause and sir I have to say that it… it is somewhat irresponsible when your wife has been under medical care since September to bring a note to the board on the day of the hearing.

Applicant: This is a mistake because I was actually at the lawyer's office for a month prior to this date; more than a month prior to this date.

RPD: Yeah but you just gave me this now. Your wife has been under medical care since September, today is December.

Applicant: Yes, I have sent a letter to the lawyer as well but the doctor just gave us this now because my wife needed further examination.

RPD: Okay, I understand but I am not accepting… I am not accepting to postpone this three to six months, I am disjoining your wife's claim…it will…it will be of no consequence to you in terms of…of…the outcome should not be…her allegations are based on yours and moreover there are other avenues as your counsel pointed out which she can deal with outside of the hearing room.

[…]

[8] After hearing the Applicants' claim, the RPD made its Decision on 21 December 2011, rejecting their claim for refugee protection.

DECISION UNDER REVIEW

[9] The RPD found the Applicants were not Convention refugees or persons in need of protection because Robert was not credible and had failed to rebut the presumption of state

protection in Hungary. The RPD also found that Robert had suffered discrimination, but this did not amount to persecution within the meaning of section 96 of the Act.

State Protection

[10] 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 military, police, and civil authorities in place to uphold its laws and constitution. The RPD also found that Hungary is a functioning democracy with free and fair elections. Because the burden on an applicant to prove an absence of state protection is directly proportional to the level of democracy of the home state, the burden on the Applicants to rebut the presumption of state protection was high. Further, the RPD noted that local failures by the authorities to provide protection did not mean that a state as a whole is unable to protect its citizens, unless it is part of a larger problem of inability or refusal to provide protection.

[11] The RPD pointed out that although the effectiveness of state protection is a relevant consideration, the case law has held that the test for a finding of state protection is whether the protection is adequate, rather than effective per se. The Applicants must demonstrate that they have taken all reasonable steps in the circumstances to seek protection, taking into account contextual factors such as their interactions with the authorities.

[12] The RPD considered what it found were insufficient efforts to seek state protection. According to Robert's testimony, the only time he went to the police was in 1995. Given that they laughed at him, he never returned. Robert's PIF spoke of repeated attacks by individuals and police, but when he was asked to provide details at the hearing he was unable to respond. When Robert was

asked if he knew of Romas who had contacted the police recently, he responded that "they were asked to bring substantial evidence of who attacked them – not all of them, but most of the police officers send you away."

[13] The RPD found Robert was not diligent in seeking state protection, and did not accept his explanations for not doing so. Robert was questioned about his statements where he indicated that he thought future attacks may occur. In response, he stated that he assumes that what has happened to other people will, in turn, happen to him. He failed to provide "clear and convincing" evidence of the state's inability to protect him, and thus did not rebut the presumption of state protection.

[14] The RPD also weighed the country condition evidence the Applicants submitted. It noted that the constitution and law of Hungary prohibit arbitrary arrest and detention, and the government generally observes these prohibitions. Reports indicate that corruption remains a problem, but the Independent Police Complaints Board (IPCB) has been established to investigate violations of fundamental rights by the police. Roma are able to go to IPCB with complaints, and have them investigated. The RPD noted there are also training programs in place for young Roma. The RPD stated that discrimination against Roma remains a serious problem in Hungary, but the documentary evidence shows that Hungary is committed to addressing the problems faced by Roma people.

Credibility

[15] The RPD found Robert's PIF contained very little detail or information related to Robert himself. Robert's oral testimony was similar; he essentially provided only opinions. The RPD concluded that Robert was concerned for his future based on things he heard or read, but could not

provide any evidence of personal attacks on him. This undermined his claim, as there was no evidence that he was subject to persecutory treatment.

Discrimination vs. Persecution

[16] The RPD also found that the Applicants had not experienced persecution in Hungary, and had not been denied any basic human right. Robert testified that he was forced to leave trade school because he could not afford it. While this is unfortunate, he was allowed to attend for a month. This is not tantamount to persecution. The RPD found the events Robert said happened to him did not amount to persecution. This, combined with its finding on state protection, led the RPD to conclude that the Applicants did not face a serious possibility of persecution in Hungary or a risk to his life, a risk of cruel and unusual punishment, or a danger of torture. As such, Robert's claim was rejected. As the Secondary Applicants' claims were based on Robert's, they too were rejected.

ISSUES

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

1. Whether the RPD breached their right to procedural fairness by refusing to grant an adjournment and severing his spouse's claim;
2. Whether the RPD's credibility finding was reasonable;
3. Whether the RPD misinterpreted the definition of "persecution";
4. Whether the RPD's state protection finding was reasonable.

STANDARD OF REVIEW

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

[19] The Applicants argue that their procedural rights were violated when the RPD refused the request for an adjournment. 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 first issue is correctness.

[20] 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 second issue is reasonableness.

[21] The issue of the RPD's interpretation of "persecution" is a question of mixed fact and law that involves a tribunal interpreting its enabling statute (see *Sow v Canada (Minister of Citizenship and Immigration*), 2011 FC 1313 at paragraphs 17-21). The Supreme Court of Canada stated in *Alliance Pipeline Ltd v Smith*, 2011 SCC 7 at paragraphs 26-34 that such a question is to be reviewed on a reasonableness standard. Further, the RPD's persecution analysis goes to the interpretation of evidence. The third issue is reviewable on a reasonableness standard (*Alhayek v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1126 at paragraph 49).

[22] 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.

[23] 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."

STATUTORY PROVISIONS

[24] 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 nationality or, if they do not have a country of nationality, their country of former habitual residence, would	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence

subject them personally	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

Request for an Adjournment

[25] Robert's spouse, Eva Molnar, was unable to attend the hearing due to a heart condition. The RPD refused an adjournment and severed her claim. The Applicants submit that the decision to postpone a hearing is a matter of procedural fairness where no deference is owed (*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41; *Madoui v Canada (Minister of Citizenship and Immigration)*, 2010 FC 106 [*Madoui*]).

[26] The Applicants submit that the RPD did not deal with the request for an adjournment in the Decision, and thus the reasons for the refusal are unknown. This means that it cannot be assessed whether the RPD complied with its own procedural rules. The RPD is supposed to take into account all relevant factors when determining whether to grant an adjournment (*Madoui*, above), and the Decision must demonstrate some indication that the RPD considered these factors (*Sandy v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468 at paragraph 54; *Modeste v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027 at paragraph 21; *Golbom v Canada (Minister of Citizenship and Immigration)*, 2010 FC 640 at paragraph 11; *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1275).

[27] The Applicants submit that illness, supported by a medical note, is a legitimate reason to postpone a hearing, and it is a factor that the RPD should have considered (*Khan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 22). Eva Molnar's testimony may have impacted the RPD's credibility findings, and thus might have influenced the outcome of the case.

The Applicants submit that this denied their right to procedural fairness, and the matter ought to be sent back to the RPD for redetermination.

Credibility

[28] The Applicants state that the RPD did not express any concerns with Robert's credibility until the end of the Decision, when it said that credibility concerns undermined the claim. The Applicants submit that in *Griffith v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1142 (TD), it was held that there was a breach of natural justice because the Board represented at the hearing that credibility was not an issue and then rejected the claim in part based on credibility. The Applicants submit the current situation is analogous.

[29] The Applicants also submit that there were no omissions, contradictions, or inconsistencies for which they did not provide a reasonable explanation. Thus, there is a presumption of truthfulness of the evidence provided by Robert, and any negative credibility findings must be made in clear and unmistakeable terms (*Pinzon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1138). As such, Robert submits his evidence should have been accepted as credible.

Persecution

[30] The Applicants submit that the RPD erred in finding that Robert's evidence was simply personal opinions. It was unreasonable for the RPD not to find evidence persuasive unless it involved "personal attacks." In doing so, the RPD misinterpreted the issue of persecution by finding

that unless Robert was personally attacked he was not persecuted. The RPD did not explain why the treatment suffered by Robert did not "threaten his or her basic human rights in a fundamental way," and it had an obligation to do so (*Tetik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1240 at paragraphs 27 and 29).

[31] The Applicants submit that the RPD also failed to consider whether the treatment suffered by Robert amounted to cumulative persecution. There is an onus on the RPD to consider this issue, especially when there is a long history of discrimination against a group of people, such as the Roma (*Hegedüs v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1366; *Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84; *J.B. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at paragraph 37; *Rahman v Canada (Minister of Citizenship and Immigration)*, 2009 FC 768 at paragraph 67; *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2010 FC 252 at paragraph 25; *Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840). Further, in *Bashta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 563 the Court found that the failure of the RPD to refer to relevant evidence demonstrating an objective fear of persecution was a reviewable error.

State Protection

[32] The Applicants submit that the RPD engaged in a microscopic analysis of the steps taken by Robert to secure state protection, and that the Federal Court has held that the RPD is not to focus in on a few points of error when analysing the evidence about whether state protection was sought (*Attakora v Canada (Minister of Employment and Immigration)*, (1989) 99 NR 168 (FCA); *Huang v*

Canada (Minister of Citizenship and Immigration), 2008 FC 346 at paragraph 10; *Chen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 270 at paragraph 16; *Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55).

[33] The RPD erred by equating the "considerable activism" and "serious measures" taken by the Hungarian government to combat discrimination with adequate state protection. The RPD cited enactments that happened in 1993, so one would expect their efficacy to have been demonstrated by 2012. The RPD referred to the "effectiveness" of these measures as a relevant consideration, but then proceeded to ignore the lack of effectiveness of the measures cited.

[34] In regards to the anti-discrimination measures adopted by Hungary, the RPD did not really engage in any analysis, but simply repeated the efforts being made by the government without any assessment as to their efficacy. Evidence that indicated there may be a lack of protection was given little attention, but the RPD concluded that the government is "taking measures" to combat the problem and this is tantamount to adequate state protection. This type of analysis was considered unreasonable in *Cervenakova v Canada (Minister of Citizenship and Immigration)*, 2012 FC 525 [*Cervenakova*].

[35] The meaning of "adequate" protection was considered in *Gomez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1041. Justice Marie-Josée Bédard found that the RPD must provide an "indication of the effectiveness of the tribunal," and stated at paragraph 28:

> I find that in this case, the documents on which the Board based its decision do not give any indication of the effectiveness of the protection mechanisms and were not sufficient to conclude that the applicant had not rebutted the presumption of State protection,

> considering the evidence to the contrary. In its decision, the Board did not mention, much less deal with, the evidence submitted by the applicant which tended to support his argument about the inability of the authorities to protect him from the Maras. The Board did not have to accept this evidence, but it was relevant and tended to contradict the finding that the State was able to protect its citizens from the violence of the Maras. A general statement by the Board about corruption in Guatemala was not, in this case, sufficient. The Board should have mentioned this evidence and explained why it could not give it any weight (see to the same effect: *Khakimov v. Canada (Minister of Citizenship and Immigration)* (2010), 2010 CF 909 (F.C.); *Sanchez v. Canada (Minister of Citizenship and Immigration)* (2008), 2008 CF 1336, [2008] F.C.J. No. 1673 (F.C.); *Aguirre v. Canada (Minister of Citizenship and Immigration)* (2010), 2010 CF 916 (F.C.)).

[36] The Applicants also point to the decision in *Banya v Canada (Minister of Citizenship and Immigration)*, 2010 FC 686, where Justice Douglas Campbell found at paragraphs 2-3:

> […]
>
> The critical factor in the Applicants' claim is that the immutable personal characteristic upon which their application is based is their ethnicity. There is absolutely no evidence on the Record upon which a doubt can be raised with respect to this fact. Nevertheless, as quoted above, the PRRA Officer held a belief that the very underpinning of their applications for risk relief, being their ethnicity, is in doubt. I find that this unsubstantiated and unwarranted suspicion which effectively constitutes an unsupported negative credibility finding explains how the negative PRRA decision could be rendered without a full contextual analysis of the evidence of the horrific suffering that the Applicants would probably experience should they be required to return to Hungary. The evidence is found in 24 articles in the Tribunal Record of in-country conditions in Hungary, a primary representative source of which is the U.S. Department of State Country Reports on Human Rights Practices — 2008, dated February 25, 2009, the introduction of which reads as follows:
>
> > The government generally respected the human rights of its citizens; however, problems remained and worsened, including in the following areas: reports that police used excessive force against suspects, particularly Roma; progovernment bias in state-owned media; extremist violence and propaganda against ethnic and religious minority groups; and

> government and societal corruption. Other human rights problems included societal violence against women and children, sexual harassment of women, and trafficking in persons. Extremists increasingly targeted Roma and other dark-skinned persons. A series of violent attacks against Roma led to four deaths and multiple injuries. Discrimination against Roma in education, housing, employment, and access to social services continued. Violence and abuse directed at gays continued to be a problem.

As a result, I find that the decision under review is unreasonable.

[37] Further, Justice Michel Shore stated in *Bors v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1004 at paragraphs 61-64:

> In a context similar to the situation facing the Roma in Hungary, Justice Yvon Pinard, in *Balogh v. Canada (Minister of Citizenship and Immigration)*, 2002 CFPI 809, 221 F.T.R. 203 (Fed. T.D.), pointed out that the evidence of improvement and progress made by the state is not proof that the current measures amount to effective protection:
>
> > [37] ... I am of the view the tribunal erred when it suggested a willingness to address the situation of the Roma minority in Hungary can be equated to adequate state protection....
>
> In *Avila v. Canada (Minister of Citenzenship andImmigration)* (2006), 2006 CF 359, 295 F.T.R. 35 (Eng.) (F.C.), Justice Luc Martineau also addressed the issue of state protection:
>
> > [27] In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that he is "unable or, because of that risk, unwilling to avail [himself] of the protection" of his country of nationality or habitual residence (paragraphs 96(a) and (b) and subparagraph 97(1)(b)(i) of the Act). The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may

> use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.).

> Thus, it cannot be sufficient to show the changes and improvements in the Hungarian state, including a number of options for recourse and the possibility to obtain state protection. It still remains to be proven that the changes have been effectively implemented in practice. Proof of the state's willingness to improve and its progress should not be, for the decision-maker, a decisive indication that the potential measures amount to effective protection in the country under consideration. As the case law above shows, willingness, as sincere as it may be, does not amount to action.

> In *Babai v. Canada (Minister of Citizenship & Immigration*) (2004), 2004 CF 1341, 2004 CarswellNat 3439 (F.C.), the decision-maker was required to assess the contradictory documentary evidence that indicated a risk for the applicant:

> > [22] The applicant submits that it is open to the PRRA Officer to make her own assessment of state protection. However, the PRRA Officer erred by ignoring voluminous documentary evidence that is highly corroborative of the applicant's claim that he will face persecution without hope of state protection should he be forced to return to Hungary....

[38] The Applicants submit that if an applicant had taken greater efforts to seek state protection, and adequate state protection would not have been forthcoming, then there is no obligation on an applicant to make such efforts (*Mora v Canada (Minister of Citizenship and Immigration)*, 2010 FC 235). The Court has held that the RPD is required to look at what was happening in the country at the time, rather than what the state was endeavouring to put into place; that is, the RPD must look for evidence of actual adequate state protection rather than merely looking for serious efforts by the state (*R.A.F.A. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 173 at paragraph 27).

[39] The Applicants submit that "adequate" state protection means effective protection. Measures taken by the government to improve state protection are not tantamount to adequate/effective state protection. The focus ought not to be on efforts to combat a problem, but on the efforts which "actually translated into adequate state protection" (*Jaroslav v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634 at paragraph 75; *Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 at paragraph 39; *E.Y.M.V. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at paragraphs 14-17; *Salamanca v Canada (Minister of Citizenship and Immigration)*, 2012 FC 780; *Olahova v Canada (Minister of Citizenship and Immigration)*, 2012 FC 806; *Lopez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1022; and *Cervenakova*, above). The Applicant submits he presented evidence of a lack of adequate state protection, which was ignored by the RPD, and so the Decision ought to be sent back for reconsideration.

The Respondents

Request for an Adjournment

[40] The Respondent points out that the transcript indicates that the doctor's note was discussed at the hearing, and the note was admitted into evidence. The RPD then reasonably refused the adjournment because Robert's wife had been under the doctor's care since September 2011, but the note was submitted on the day of the hearing in December 2011. Robert's wife's claim was severed. There was no breach of procedural fairness in the RPD's actions, nor is there a requirement for the RPD to provide written reasons for a refusal of an adjournment request.

Credibility

[41] The Respondent submits there is no breach of natural justice regarding the RPD's negative credibility finding, as it expressly stated that credibility was one of the determinative issues in the claim and provided an analysis of why it determined Robert was not credible.

[42] The Federal Court of Appeal has held that credibility findings are properly made as long as the RPD gives reasons for its findings in "clear and unmistakable terms" (*Hilo v Canada (Minister of Employment and Immigration)*, (1991) 130 NR 236 (FCA)). In other words, the findings should be supported by examples. Here, the RPD specifically expressed credibility concerns due to the complete lack of detail in Robert's narrative, and because Robert's testimony consisted primarily of personal opinions.

[43] In the Decision, the RPD provided specific examples for why it doubted the credibility of Robert's evidence. It specifically said the negative credibility findings were based on inconsistencies and omissions in the evidence. For example, Robert spoke in his PIF about repeated attacks by individuals and the police, but when asked to provide more details he was unable to respond. The RPD found that Robert's PIF and oral testimony were lacking in details, and that he only provided opinions about the future based on things he heard or read. Thus, contrary to what the Applicants assert, credibility was clearly a concern in the Decision. In fact, the RPD started the Decision by stating that "the determinative issues are credibility, discrimination vs. persecution, and state protection."

Persecution

[44] The Respondent submits that the identification of persecution behind incidents of discrimination is a mixed question of law and fact, and thus deference is owed to the RPD's conclusions (*Sagharichi v Canada (Minister of Employment and Immigration)*, 1993 FCJ No 796 at paragraph 3; *Al-Mahamud v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 521 at paragraph 8). The case law indicates that to be considered persecution, mistreatment suffered must be serious and the inflicting harm suffered must occur with repetition or persistence, or in a systemic way. A given episode of mistreatment may constitute discrimination, yet not be serious enough to be regarded as persecution (*Valdes v Canada (Minister of Citizenship and Immigration)*, (1998) 47 Imm LR (2d) 125 (FCTD); *Moudrak v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 419 (TD)).

[45] The Applicants had an onus to satisfy the RPD that they had a well founded fear of persecution in Hungary; they failed to satisfy this onus because Robert could not establish that he had a subjective fear of persecution (*Munderere v Canada (Minister of Citizenship and Immigration)*, above, at paragraph 42). Further, it was reasonable for the RPD to find that Robert had not been denied any basic human rights. Robert's inability to pay for trade school is not tantamount to persecution. The RPD stated that this was unfortunate, but he was permitted to attend for one month.

[46] The Respondent submits that the RPD did consider the evidence of similarly situated Roma. Robert was asked if he knew of other Roma who had contacted the police recently and to describe their experiences. He responded that "they were asked to bring substantial evidence of who attacked

them – not all of them, but most of the police officers send you away." The RPD reasonably noted that this response was general in nature and not specific, and so did not provide any useful information regarding similarly situated persons. The Respondent submits that the RPD's Decision was reasonable in this regard.

State Protection

[47] The Respondent submits that the RPD's state protection findings were reasonable because it correctly noted that, while the effectiveness of the protection is a relevant consideration, the preponderance of the jurisprudence has held that the applicable test is whether protection is adequate.

[48] The Respondent submits that the Applicants had done nothing more than simply allege that Robert went to see the police once and was unsuccessful (*Canada (Minister of Employment and Immigration) v Villafranca*, 99 DLR (4th) 334 at 337). In *Carillo*, above, the Federal Court of Appeal found that the claimant was not able to rebut the presumption of state protection based on one unsuccessful attempt to seek out protection from local police officers.

[49] Further, state protection may be available from state run or funded agencies, and not only from the police (*Nagy v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 281 at paragraphs 12 and 15; *Szucs v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1614 at paragraph 28). The RPD was alive to this consideration, and outlined a number of organizations that offered support and assistance to Roma in making and investigating complaints.

[50] The Respondent points out that the RPD considered things such as the penalties for police officers found guilty of wrongdoing, the mandate of the Roma Police Association to whom Roma can complain, and that there is training and education of young Roma for employment in the police force and military. Robert also specifically complained that he was discriminated against because he could not attend trade school because he could not pay for it, and so the RPD analyzed the effectiveness of the measures put into place by the Hungarian government to improve job prospects for Roma. The RPD specifically noted that one vocational program employed 14,700 people in 2009 alone, and that the government's labour programs have helped between 15,000 and 19,000 Roma find jobs every year from 2004-2006.

[51] The Respondent submits that the RPD properly considered and analyzed the evidence before it, and that the Decision was reasonable.

ANALYSIS

[52] The Applicants have raised a range of grounds for review and I will deal with each of them in turn.

Procedural Fairness

[53] The Applicants say the RPD does not deal with their request for an adjournment in its Decision, so that the reasons on this point are not known. In addition, they say that, because

negative credibility findings were made, it cannot be said that the refusal to postpone the hearing to allow Robert's wife to testify did not influence the outcome of the case.

[54] A review of the CTR reveals that the adjournment request was fully considered by the RPD that the material factors relevant to the request were assessed and weighed, and that, after a discussion between the RPD, Robert and counsel, full reasons were given to the Applicants for refusing the request. The Applicants were represented by counsel, who was invited to make comments. Counsel makes it clear to Robert that "you are the principal claimant and this is your story." In other words, as the application for refugee protection makes clear, the wife's claim is based upon Robert's claim, so that Robert is not prejudiced by his wife's absence. When the request for an adjournment is made, Robert and counsel do not say that she is required to give evidence. In addition, a full reading of the Decision reveals that insufficiency of evidence, rather than credibility was the decisive factor. There is also nothing before me from Robert's wife to indicate what she could have added anything by way of evidence that was not addressed by Robert himself.

[55] For the Applicants to now say that they were not given reasons for the refusal to adjourn, and that the testimony of Robert's wife may have influenced the outcome of the case, is unconvincing, given what the CTR reveals. The wife's illness and possible prejudice to the Applicants was taken into account by the RPD and the adjournment request was fully canvassed.

[56] My reading of the CTR also leads me to conclude that Robert's argument that he was somehow prevented by the RPD from providing the full details of persecution that the RPD required has no substance. Any details that Robert wanted to provide could have been provided through

questions from his own counsel if he felt that the RPD had not given him sufficient time or scope to make his case through its own questioning.

Credibility

[57] The Applicants say that "there were no omissions, contradictions or inconsistencies" and Robert "provided a reasonable explanation for everything."

[58] A reading the CTR and the Decision reveals this assertion to be inaccurate. The RPD's concern was that Robert was unable to provide any details concerning the repeated attacks by individuals and police that he said he had suffered. In addition, he only went to the police once, which was back in 1995. Robert simply could not provide cogent evidence to support his allegations of what had occurred in the past. This is why the RPD focused its attention on the future, and Robert's concerns that future attacks might occur, and that what had happened to other Roma might happen to him and his family if they returned to Hungary.

[59] The credibility issues in this case were Robert's failure to substantiate his allegations of past persecution. The fact that he could provide no details of alleged attacks, and admitted that he only went to the police once back in 1995, rendered his assertions of past persecution untenable. All of this is clearly explained in the Decision and was reasonable. No formal negative credibility or plausibility finding is made because the decisive issue for the RPD is that "the principal claimant failed to provide any persuasive evidence that would be tantamount to persecution." The RPD did not disbelieve that Robert went to the police in 1995, or that he had been unable to afford to go to

trade school in 1993. These matters are fully addressed in the Decision. The real problem was that he could not provide details of any alleged attacks by individuals and police.

Microscopic Analysis of Persecution

[60] The Applicants say in their written submissions that "the Board proceeded to conduct a microscopic analysis of the steps taken by the Applicant in trying to secure state protection."

[61] This issue was withdrawn at the hearing. This is understandable because it is difficult to know what the Applicants mean by this assertion. Robert provided very little in the way of evidence that could be examined, microscopically or otherwise. As the RPD points out

> a. The Board found the principal claimant's narrative submitted at the hearing to be lacking in any detail. It provided very little information related to the claimants themselves. What little information was provided, contained no details, i.e. dates, circumstances of incidents, involvement or lack of involvement by the police.
>
> b. The principal claimant's testimony was much the same. He provided opinions only. His one alleged approach to the police was 16 years ago. Therefore, he has not provided "clear and convincing" evidence of the state's inability to protect him and, therefore, he has not rebutted the presumption of state protection.
>
> c. The Board concludes that the principal claimant was not diligently pursuing state protection. Moreover, we do not accept his explanations for not doing so. His examples response to counsel were again general in nature and not specific, thereby not providing the Board with information regarding similarly situated persons.

[62] In my view, this has nothing to do with a microscopic analysis. In addition to a dearth of personal evidence, the Applicants provided no cogent evidence of similarly situated persons. The RPD's conclusion that "there was no evidence adduced to persuade the Board that the claimants had

been denied any basic human rights" was based upon Robert's failure to provide specifics to support his general allegations.

Discrimination/Persecution

[63] The Applicants also say that the RPD should have considered the "cumulative nature of the circumstances," when considering persecution, but this is precisely what the RPD did and concluded, reasonably, that the Applicants had provided insufficient evidence of what had happened to them over time to support their claims of persecution.

State Protection

[64] Essentially, the Applicants' complaint is that the RPD failed to address what Justice Mosley has called the "operational adequacy of state protection in Hungary." See *E.Y.M.V.*, above, at paragraph 16.

[65] They also cite and rely upon my decision in *Cervenakova*. However, the state protection analysis in that case was far removed from what the RPD provided in the present case. In the present case, the RPD acknowledges that the "general situation of discrimination, exclusion and anti-Roma prejudice remains cause for serious concern in Hungary." The RPD then looks at what has been implemented by the government to alleviate this situation. Details are provided and the success, or lack of success, of various initiatives is assessed and weighed. The RPD then concludes that the evidence shows "that the state's efforts are serious, that progress is slow, but there are positive signs and results."

[66] In addition, the Applicants had no evidence to demonstrate the state's unwillingness or inability to protect them. Going to the police in 1995 says nothing about current conditions in Hungary. The onus is on the Applicants to refute the presumption of adequate state protection; it is not for the RPD to prove that adequate state protection exists.

[67] It is possible to disagree with the RPD's analysis and conclusions but, in my view, I cannot say that the RPD was unreasonable or that the state protection findings fall outside of the *Dunsmuir* range.

Conclusions

[68] In the present case, the Applicants provided very little in the way of personal evidence to demonstrate that they had suffered persecution. They relied upon general conditions faced by Roma people in Hungary. As this Court has said on several occasions, it is not sufficient to point to general human rights problems in a country without providing evidence as to how those problems have impacted, or will impact, the claimants.

[69] In *Csonka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1056, Justice Shore said as follows at paragraph 3:

> Evidence of systemic or generalized human rights violations is insufficient to show "the specific and individualized fear of persecution of [a particular] applicant" (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at para 22).

[70] Justice Yves de Montigny in *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409 had the following to say 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.)).

[71] We find a similar point in *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 from Justice Paul Rouleau at paragraph 22:

> Thus the assessment of the applicant's fear must be made in concreto, and not from an abstract and general perspective. The fact that the documentary evidence illustrates unequivocally the systematic and generalized violation of human rights in Pakistan is simply not sufficient to establish the specific and individualized fear of persecution of the applicant in particular. Absent the least proof that might link the general documentary evidence to the applicant's specific circumstances, I conclude that the Board did not err in the way it analyzed the applicant's claim under section 97.

[72] There is also Justice Tremblay-Lamer in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 at paragraph 17:

> Accordingly, documentary evidence which illustrates the systematic and generalized violation of human rights in a given country will not be sufficient to ground a section 97 claim absent proof that might link this general documentary evidence to the applicant's specific circumstances (*Ould v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 83, [2007] F.C.J. No. 103 (QL), at para. 21; *Jarada v. Canada (Minster of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 (QL), at para. 28; *Ahmad*, supra, at para. 22).

[73] I can find no reviewable error in the Decision.

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

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application 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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