Federal Court  Cour fédérale

Date: 20140115

Docket: IMM-11092-12

Citation: 2014 FC 45

Ottawa, Ontario, January 15, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ATTILA BURI
EMIL BURI

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 of the Immigration and Refugee Board [RPD or the Board], dated 18 September 2012 [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, Attila Buri and Emil Buri, are brothers of Romani ethnicity and citizens of Hungary. They fled Hungary separately, in August and September 2011, as a result of multiple alleged incidents of abuse and violence at the hands of racist extremist groups and the Hungarian police, as well as discrimination against Roma and what they describe as deteriorating country conditions in Hungary. Upon arrival to Canada, they both made claims for refugee protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*.

[3] Attila Buri alleges that he was attacked by Hungarian Guards "many times". The latter are members of an extremist political movement who blame the Roma in Hungary for crime and other problems. The most serious attack was in 2004. It left him with a broken nose and ribs and an injured hip. His jacket was also stolen. The assailants were arrested and charged and his jacket was returned, but the attack apparently left him disabled for 10 years, although he did not give details of this attack in his original Personal Information Form [PIF] narrative. On another occasion, he was attacked by two Hungarian Guards who stabbed him in the neck with a piece of glass; he says he almost bled to death as a result. He reported the incident to the police but no one was arrested for the crime. In addition, he claims the police would provoke him so that they would have an excuse to beat him up. Despite this, he did not make a complaint against them. He also refers to the general discrimination he experienced as a "gypsy" in Hungary.

[4] Emil Buri refers to various examples of the discrimination he suffered as a Roma person in Hungary, as well as several attacks by both police officers and Hungarian Guards, some of which he says left him hospitalized. He recounts one instance in which he was arrested by the police and

taken into custody for 24 hours, during which he was beaten every two hours. He says he wanted to make a complaint against the police, but was reminded by them that no one would believe him because he is "only a stinky gypsy".

DECISION UNDER REVIEW

[5] The Applicants' refugee claims were heard together by the Board on 11 June 2012. In a decision dated 18 September 2012, the RPD rejected the applications. The Applicants received the negative Decision on 16 October 2012.

[6] The determinative issue in the Decision was state protection. The Board noted that it is not obliged to prove that Hungary can offer the Applicants effective state protection. Rather, the Applicants had to rebut the presumption that adequate state protection exists, particularly since Hungary is a functioning democracy. The Board found that the Applicants had not done so. In particular, they did not exhaust domestic avenues of protection described in the documentary evidence and reasonably available to them.

[7] The Board made several negative credibility findings based on discrepancies in the Applicants' respective testimonies. The Board also drew a negative inference from the lack of corroborative evidence provided by the Applicants in support of their allegations, and the lack of a reasonable explanation for its absence.

[8] The Board reviewed the documentary evidence concerning the situation of Roma in Hungary and the state response to it and found that, although Roma in Hungary face serious human

rights violations and discrimination, adequate, if not perfect, state protection exists for those who are victims of crime, police abuse, discrimination or persecution. The Board also found that Hungary is making serious efforts to address these problems, that police and government officials are both willing and able to protect victims, and that the state takes action when complaints are made.

[9] The panel also noted that Hungary has taken a number of measures to address discrimination against the Roma people, including the establishment of a Parliamentary Commissioner for National and Ethnic Minority Rights [Minority Ombudsman] and the Equal Treatment Authority. There is a Roma Police Officers' Association and various internal government bodies that protect minority interests. The government has also financed measures to improve Roma housing and healthcare. Although there have been criticisms regarding Hungary's implementation of its anti-discrimination laws, the Board pointed out that Hungary is responsible for upholding minimum standards in order to maintain its membership in the European Union.

[10] Overall, the Board concluded that the Applicants had failed to rebut the presumption of state protection and had failed to take all reasonable efforts to seek state protection in Hungary before making a claim for protection in Canada. The Board was not convinced that the state would not be reasonably forthcoming with state protection should the Applicants seek it.

[11] Given the availability of state protection, the Board found that the Applicants are not Convention refugees or persons in need of protection under sections 96 or 97 of the Act.

ISSUES

[12] The Applicants raise the following issues in this application:

a. Did the Board breach the duty of procedural fairness owed to the Applicants by relying on documentation that was not entered into evidence?

b. Did the Board apply the wrong test when assessing the availability of state protection?

c. Did the Board reach unreasonable conclusions in light of the evidence before it?

STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[14] The issue of whether the RPD relied on documentation that was not on the record and whether the Applicants were provided with an opportunity to respond to the information before the Board is one of procedural fairness. In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, the Supreme Court held at para 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 para 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." Thus, the first issue will be evaluated on a correctness standard.

[15] The Board's findings regarding state protection are findings of mixed fact and law that are reviewable on a standard of reasonableness: *Pacasum v Canada (Minister of Citizenship and Immigration)*, 2008 FC 822 at para 18; *Estrada v Canada (Minister of Citizenship and Immigration)*, 2012 FC 279; *Canada (Minister of Citizenship and Immigration) v Abboud*, 2012 FC 72; *Canada (Minister of Citizenship and Immigration) v Flores Carillo*, 2008 FCA 94; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171.

[16] Historically, this Court has reviewed the question of whether the RPD applied the proper test for state protection on a standard of correctness: see *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at para 30; *Koky v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1407 [*Koky*] at para 19; *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paras 24-29; *Molnar v Canada (Citizenship and Immigration)*, 2013 FC 126; *GM v Canada (Citizenship and Immigration)*, 2013 FC 710. Recently, however, it has been held that questions of whether the Board applied the proper test when applying certain provisions of the Act should be reviewed on a standard of reasonableness, since they relate to the interpretation of the Board's home statute and are not questions of general legal importance: see *B074 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1146; *Alberta (Information and Privacy*

Commissioner) v Alberta Teachers' Association, 2011 SCC 61, [2011] 3 SCR 654, at para 30; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 24. Thus, it seems necessary to consider whether the relevant precedents are consistent with new developments in the common law principles of judicial review.

[17] I agree with the recent analysis of Chief Justice Crampton in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 [*Ruszo*] that a standard of correctness should continue to apply when reviewing whether the Board applied the proper test in its state protection analysis. The Chief Justice looked first at the standard applicable to the meaning of "persecution" under section 96 of the Act, and then applied the same reasoning to the question of the test to be applied in a state protection analysis:

> 17 … The IRPA is the RPD's "home statute" or a statute "closely connected to its function, with which it will have particular familiarity." Accordingly, the interpretation of the IRPA by the RPD will generally be reviewed on a standard of reasonableness, unless the interpretation involves (i) a constitutional question, (ii) a question of law that is of central importance to the legal system as a whole and is outside of the RPD's expertise, (iii) a question regarding the jurisdictional lines between two or more competing specialized tribunals, (iv) a true question of jurisdiction or vires, or (v) is otherwise exceptional (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*], at paras 30, 34 and 46; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, at paras 26-28; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 54-61 [*Dunsmuir*]; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para 36).
>
> 18 In my view, the meaning of the term "persecution" in section 96 of the IRPA raises a question of law that is of central importance to the legal system. However, it would be difficult to maintain that this question is outside the RPD's area of expertise. Indeed, it is difficult to think of a subject matter that would be more squarely within the RPD's expertise.

19 The meaning of the term "persecution" also does not raise a constitutional question, a question regarding the jurisdictional lines between two or more competing tribunals or a true question of vires (*Alberta Teachers*, above, at paras 33-46).

20 Nevertheless, to the extent that the jurisprudence can be said to have established a clear test for what constitutes "persecution," within the meaning of section 96… this, in my view, would fall within the narrow category of "exceptional" situations identified in *Alberta Teachers*, above, at para 34. In the face of settled law on the meaning of the term "persecution," it is not open to the RPD to adopt a different interpretation of that term. Accordingly, the question of whether the RPD erred in interpreting the test for what constitutes "persecution" within the meaning of section 96 is reviewable on a standard of correctness.

21 The second question raised with respect to the RPD's conclusion on the issue of "persecution" is whether the RPD erred in determining that the discriminatory conduct that formed the basis of the Applicants' claims did not meet the test for what constitutes "persecution", within the meaning of section 96. This is a question of mixed fact and law that is reviewable on a standard of reasonableness…

22 The standard of review applicable to the RPD's assessment of the issue of state protection depends on whether the conclusion reached by Board turned on its understanding of the proper test for state protection or on its application of that test to the facts of this case. For essentially the same reasons discussed at paragraphs 20 and 21 above, the former would be reviewable on a standard of correctness (see also *Koky v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1407, at para 19 [*Koky*]), whereas the latter would be reviewable on a standard of reasonableness. In short, the jurisprudence has established a clear test for state protection (see, e.g., *Burai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 565, at para 28 [*Burai*]; *Lakatos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1070, at paras 13-14; *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668, at para 25; and *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, at paras 42-52). Therefore, it is not open to the RPD to apply a different test, and the issue of whether the RPD applied the proper test would be reviewable on a standard of correctness. However, the issue of whether the RPD erred in applying the settled law to the facts in this case would be a question of mixed fact and law that is reviewable on a standard of

> reasonableness (*Dunsmuir*, above, at paras 51-53; *Hinzmanv Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at para 38 [*Hinzman*].
>
> 23 In my view, the RPD's decision in this case turned on its application of the settled law to the facts of this case, and is therefore reviewable on a standard of reasonableness.
>
> [Emphasis]

[18] I am in full agreement with this reasoning, and with the conclusion that a standard of correctness should apply where it is truly the test for state protection that is at issue. However, it is my view that, as in *Ruszo*, the Board's conclusion in the present case turned not on its understanding of the proper test for state protection, but rather on its application of that test to the facts of the case, which is reviewable on a standard of reasonableness.

[19] 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 para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 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

[20] The following provisions of the Act are applicable in these proceedings:

Convention refugee

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,

(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; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Définition de « réfugié »

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) 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;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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 subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

Personne à protéger

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 habituelle, exposée :

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,
[…]	[…]

ARGUMENT

Applicants

[21] The Applicants submit that the Board breached the duty of procedural fairness that is owed to all claimants before it: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643. The Board breached this duty by relying heavily on the 2012 United States Department of State [USDOS] report, despite the fact that it was not provided to the Applicants in advance of the hearing, was not put on the record, and the Applicants were not given notice that it was being considered by the Board when rendering its Decision. This evidence features prominently in the Board's Decision, despite the Respondent's assertion that the undisclosed document does not differ substantially from other information on the record. The Applicants quote from *Abasalizadeh v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1407 [*Abasalizadeh*], in which Justice Mosley wrote at paragraph 22: "if a document is to be used without giving adequate time to examine it, some accommodation must be afforded the affected party."

[22] Given the Board's routine practice of providing the evidence to be relied upon to claimants before a decision is rendered, the Applicants had a reasonable expectation that no information beyond what was entered at the hearing would be considered by the RPD without such notice: *Turton v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1244 [*Turton*] at para 64 and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589. The presence of counsel at a hearing does not alleviate the need for the Applicants and their counsel to be able to know and respond to the case they have to meet.

[23] The Applicants also insist that, although the Board stated the correct test for state protection at para 39 of the decision, it applied the incorrect test. The Board looked at whether the state is undertaking initiatives that *could* provide protection in the future rather than assessing, as it should have, whether the state is actually able to provide adequate state protection at the operational level. The Applicants cite the recent decision of this Court in *Rezmuves v Canada (Minister of Citizenship and Immigration)*, 2012 FC 334 at para 11 on this point:

> The Board's state protection analysis is also problematic. The Board reviews evidence related to arbitrary detention in Hungary, the structure of the Hungarian police forces, police corruption, the Roma Police Association and its protection of Roma members of the police and military, other related police associations in Hungary and Europe for Roma military and police officers, the Independent Expert, and the body responsible for monitoring of the implementation of legislation dealing with anti-discrimination. However, the Board fails to focus on the relevant question: Is there adequate state protection available for Roma in Hungary?

[24] Since the Supreme Court's decision in *Ward v Canada (Attorney General)*, [1993] 2 SCR 689, a claimant must personally exhaust avenues of protection only if it is found that protection

would have been reasonably forthcoming. The Board's negative findings regarding the Applicants' personal efforts to seek state protection are not determinative of the issue. Rather, a finding of adequate state protection requires not only an assessment of the existence of protection mechanisms, but also an examination of the adequacy of such mechanisms at providing protection in practice. According to the Applicants, the Board did not address the evidence before it concerning the inadequacy of protection measures in operation for persons similarly situated to the Applicants. This Court has repeatedly found that this is a fatal error: *Koky*, above; *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 [*Hercegi*]; *J.B. v Canada* (*Minister of Citizenship and Immigration)*, 2011 FC 210. The Applicants suggest that the Board committed the same error as the Board in *E.Y.M.V v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 [*E.Y.M.V.*], cited at para 16:

> The Member did not provide any analysis of the operational adequacy of the efforts undertaken by the government of Honduras and international actors to improve state protection in Honduras. While the state's efforts are indeed relevant to an assessment of state protection, they are neither determinative nor sufficient. Any efforts must have "actually translated into adequate state protection" at the operational level. [citations omitted]

[25] Further, it is unreasonable for the Board to find that the Applicants should have exhausted avenues of state protection that did not yet exist prior to their departure from the country in August and September of 2011. The Board's "tangential findings" on credibility are also unreasonable, and not determinative of this claim.

[26] In addition, the Applicants contend that the Board erred by ignoring reliable, up to date information before it regarding current conditions faced by Roma in Hungary, and whether state protection is available to persons similarly situated to the Applicants. Although a decision-maker

need not reference every piece of documentary evidence before it, when such evidence contradicts the decision-maker's conclusions and pertains to a primary issue, a failure to specifically reference this evidence may support a reasonable inference that it was ignored: *Ozdemir v Canada (Minister of Citizenship and Immigration),* 2001 FCA 331 [*Ozdemir*]; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 [*Cepeda-Gutierrez*]).

[27] By failing to consider the evidence of significant anti-democratic changes that have recently occurred in Hungary, the Board failed to consider whether the Applicants face a *forward-looking* risk of persecution. The Applicants refer in particular to evidence of changes to the Hungarian Constitution made on 1 January 2012 and what they describe as the usurpation of Hungary's once-democratic political institutions by the ruling Fidesz party. They argue it is reasonable to infer that this material was ignored, since it was not referred to: see *Ozdemir*, above; *Cepeda-Gutierrez*, above. They say this case parallels that of *E.Y.M.V.*, above, in which this Court found at para 19 that the Board erroneously concluded that the country of origin was a "functioning democracy," without referring to recent political changes:

> To the extent that the Member based its findings on the fact that Honduras is a functioning democracy, it also failed to consider the evidence regarding the situation in the months following Ms. Varela's attack. Honduras was in a situation of political tension culminating in a military coup in June of 2009. While the Member could have considered whether a change in circumstances had occurred … it did not.

[28] The Board also cited facts which are no longer true:

a) The Board repeatedly mentioned the existence of the Minority Ombudsman as part of the state protection mechanisms, failing to acknowledge that this position was eliminated in the sweeping reforms of January 2012;

b) These reforms also eliminated the Anti-Discrimination Network, which provided free legal services to minorities, including Roma, but this was not mentioned by the Board.

[29] This reliance on out-dated information led to unreasonable findings, including that Hungary is a functioning democracy, that it is making advancements in the protection of minorities, and that the Applicants could report police abuses to the Minorities Ombudsman.

Respondent

[30] The Respondent argues that the negative credibility findings and inferences made by the Board have not been challenged by the Applicants, and that these findings undermine the claim that there is inadequate state protection for them in Hungary. Since the Applicants did not produce corroborative evidence for their claims, and since the credibility findings remain unchallenged, they are determinative and sufficient to dispose of the claim, as stated in *Quintero Cienfuegos v Canada*, 2009 FC 1262 at paras 25 and 26 (see also *A.M. v Canada (Minister of Citizenship and Immigration)*, 2005 FC 579 at para 20 and *Minister of Citizenship and Immigration v Sellan*, 2008 FCA 381 at para 3).

[31] The Respondent asserts that the differences between the 2010 USDOS report submitted as evidence and the newer 2011 USDOS reports relied on by the Board are not substantial and do not apply to the Applicants in this case. The Board took a holistic view of the situation for Roma in

Hungary and the evidence before it and assessed the availability of state protection for the Applicants in particular. Essentially, the Board's lack of disclosure does not render the findings of the Board unreasonable, nor have the Applicants indicated how these materials changed the Board's conclusions. Therefore, no purpose would be served by remitting the Board's Decision for reconsideration on this ground: *Yassine v Minister of Employment and Immigration* (1994), 172 NR 308, [1994] FCJ No 949 (FCA) at para 9; see also: *Mobile Oil Canada Ltd. et al. v Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 SCR 202 at p. 228.

[32] The Respondent say *Abasalizadeh* and *Turton*, above, are distinguishable because in those cases the Applicants were not represented by counsel. Conversely, in this case the Applicants had legal counsel at the hearing, and therefore the disclosure issue does not in and of itself amount to a breach of procedural fairness. The Court noted in *Abasalizadeh* at para 23:

> The disclosure issue may not in itself amount to a breach of natural justice or procedural fairness. However, when coupled with the absence of counsel in these particular circumstances, I am satisfied that the cumulative effect amounted to at least the appearance of unfairness.

[33] The Respondent also argues that the Board's state protection analysis was reasonable. The Board is entitled to prefer documentary evidence over testimony, and in this case the documentary evidence indicated that there was adequate state protection for Roma in Hungary. It is not the role of this Court to re-weigh the evidence before the Board: *Zhang v Canada (Minister of Citizenship and Immigration,* 2011 FC 654 at para 23 and *Barua v Canada (Minister of Citizenship and Immigration Canada),* 2012 FC 607 at para 22. The Applicants failed to establish a personalized risk upon return (*Canada (Minister of Public Safety and Emergency Preparedness) v Gunasingam,*

2008 FC 181 at para 18 and *Krishnapillai v Canada (Minister of Citizenship and Immigration),* 2007 FC 563 at para 14) and did not demonstrate that they diligently pursued state protection in Hungary before seeking Canada's protection: *Guzman Sanchez v Canada (Minister of Citizenship and Immigration),* 2008 FC 66 at para 12 and *Hinzman v Canada (Minister of Citizenship and Immigration),* 2007 FCA 171 at para 57.

[34] The Respondent submits that a fair reading of the Board's reasons indicates that it applied the proper test for state protection. In keeping with *Flores Carillo,* above, the Board concerned itself with the "adequacy rather than effectiveness" of state protection. The Board was not required to establish that state protection was fully effective. The case of *E.Y.M.V,* above, can be distinguished on the facts. The Applicants' own evidence shows that when they reported incidents, the state took action. Further, in *E.Y.M.V*. there were no adverse credibility findings, whereas here there were unchallenged negative credibility findings.

[35] The Applicants did not adduce sufficient evidence to demonstrate that they are similarly situated to other Roma who are persecuted – a requirement expressed at para 7 of *Raduly v Canada (Minister of Citizenship and Immigration),* 2002 FCT 354 (FCTD):

> … There is no case to be made that all Roma are persecuted and automatically become refugees, it is still up to the applicants to show that they were persecuted. If there is a considerable number of a minority who are persecuted, it will certainly go toward the objective test of showing that the applicants would be subject to persecution but there is both an objective and subjective test of persecution.

[36] Overall, the Board handled the documentary evidence reasonably. The Board is presumed to have reviewed the totality of the evidence, including the Applicants' evidence which pre-dates the USDOS report relied upon by the Board: *Monzon Ortega v Canada (Minister of Citizenship and Immigration),* 2011 FC 657 at para 9 and *Florea v Minister of Employment and Immigration,* [1993] FCJ No 598 (FCA). The Applicants claim that the Board ignored documentary evidence but have not shown that the information would have changed the Board's conclusions: *Ogbeide v Canada (Minister of Citizenship and Immigration),* 2003 FCT 677; *Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317, [1992] FCJ No 946 (FCA); and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at paras 16, 18.

[37] Further, the Board's reference to the Minority Ombudsman was an immaterial error and does not suggest that the Decision as a whole was unreasonable. That office still exists in a restructured form and the Board also referred to other bodies where abuses could have been reported by the Applicants. Justice Abella recently commented in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 54 that "[t]he board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error" (see also *Newfoundland Nurses,* above, at para 14).

ANALYSIS

[38] As regards procedural fairness, there is no dispute that the RPD relied upon the 2011 USDOS Report which was not on the record before it and which was not placed before the Applicants. A reading of the Decision reveals that heavy use of, and reliance upon, this report

occurred throughout. At the refugee hearing the RPD entered the 31 October 2011 National Documentation Package which continued to show the USDOS Report for 2010 in its list of exhibits.

[39] The Respondent's only acceptable argument against procedural unfairness is that the RPD's reliance upon this report was immaterial because the 2010 and 2011 USDOS Reports are not substantially different with respect to the Roma-specific information. I cannot accept the Respondent's position on this issue.

[40] It is true that both reports present a "mixed" picture of the situation of Roma in Hungary, with continuing discrimination and disadvantage on the one hand, and government initiatives to ameliorate these problems on the other. However, the 2011 report makes reference to specific changes and initiatives that were not referred to in the 2010 report that could weigh against the Applicants' position on state protection. The Applicants did not have the opportunity to respond to these changes. Based on the actual use of the report by the RPD in its reasons, as discussed below, I do not think that it is possible to say that these new or changed portions of the 2011 report were immaterial to the RPD's conclusion on state protection.

[41] Particularly problematic is the RPD's reliance on the evidence from the 2011 USDOS Report quoted at paras 41 and 43 of the Decision.

[42] The Applicants have identified several specific paragraphs of the Decision that rely on the 2011 USDOS report, and I have focused my analysis primarily on the sections of the report quoted in those paragraphs: 32, 33, 37, 41, 42, 43, 50, and 52. Since it is the materiality of procedural

unfairness to the Applicants that is at issue, I have focused solely on changes that are potentially adverse to the Applicants' position on state protection.

[43] While the RPD's footnotes refer to the 2011 Report ("Exhibit R/A-1, item 2.1" in the RPD's record) in several places apart from the direct quotations, these footnotes do not cite page numbers and so it is difficult to identify which portions of the Report the RPD is relying upon. Also difficult to analyze are portions of the 2010 Report that may have been more favourable to the Applicants' position but were omitted from the 2011 Report. However, I think procedural unfairness can be demonstrated without referring to such omissions.

[44] ***Paragraph 32*** of the Decision quotes a portion of the Executive Summary of the 2011 Report (page 1, AR at p. 170) that was not included in the 2010 Report. However, in my view this quotation is not prejudicial to the Applicants' position on state protection as it speaks of continuing discrimination and an increase in right-wing extremism, and does not address state protection or amelioration initiatives.

[45] ***Paragraph 33*** of the Decision quotes from page 34 of the 2011 Report (AR at p. 203). While the ordering is different, similar information appears at pages 33 and 34 of the 2010 Report (CTR at pp. 149-150), and it consists mainly of statistical information that is not prejudicial to the Applicants' position on state protection.

[46] ***Paragraph 37*** of the Decision quotes from page 35 of the 2011 Report (AR at p. 204). This paragraph discusses events "during the year," and so obviously was not included in the 2010

Report. Most of the information is not prejudicial to the Applicants' position, as it discusses the activities of right-wing extremist and paramilitary groups. However, the final sentence of the quotation speaks to the state response:

> … On April 22, Interior Minister Sandor Pinter visited Gyongyospata, ordered increased police presence in the town, and instructed the police to expel the extremists.

[47] On the same page of the 2011 Report is another statement relevant to state protection that is not directly quoted by the RPD but which seems relevant to its analysis (page 35, AR at p. 204, emphasis added):

> NGOs accused far-right groups of intentionally provoking ethnic tension in Gyongyospata and asserted that the government failed to protect the local Roma minority against racist provocation. However, the government responded vigorously, adopting legislation in April and May to halt the "uniformed criminal activity" of far-right groups (see section 1.d).

[48] Again, because it discusses events "during the year," this portion of the 2011 Report was absent from the 2010 Report.

[49] ***Paragraph 41*** of the Decision speaks of "a number of new initiatives" and quotes extensively from pages 37-38 of the 2011 Report (AR at pp. 206-207). Some portions of this quotation mirror the information at page 35 of the 2010 Report (CTR at 151), but some are new. I have underlined below the portions of the 2011 Report that are new or altered and potentially adverse to the Applicants' position on state protection:

> During the year the state secretary for social integration at the Ministry of Public Administration and Justice, Zoltán Balog, continued to play a critical role in advancing Roma affairs within the government ***[compare with p. 151 of 2010 Report which simply noted Balog's appointment to the role].*** The office harmonized the

government's inclusion policy as well as that governing Roma-related government programs (e.g., scholarships, Decade of Roma Inclusion Program). The Ministry of National Resources continued to offer financial incentives to encourage schools to integrate Romani and non-Romani children in the same classrooms and to reintegrate Roma inappropriately placed in remedial programs. On September 26, the government established the 27-member Roma Coordination Council, chaired by the minister for public administration and justice and co-chaired by the head of national Roma self-government, Florian Farkas, who was elected on January 20. The new council includes representatives of local Roma self-governments, NGOs, and churches. Most ministries and county labor affairs centers had special officers for Romani affairs focused on the needs of the Romani community.

On November 30, the cabinet approved the National Social Inclusion Strategy. The national strategy identifies specific actions the government aims to take to reduce the percentage of the population living under the poverty line, integrate Roma into the labor market, and increase the level of education of Roma. On December 13, the cabinet adopted the Governmental Action Plan for the implementation of the National Social Inclusion Strategy for 2012-2014. The action plan determines specific tasks, identifies responsible members of the cabinet, and sets deadlines in the areas of child welfare, education, employment, health care, housing, raising awareness, and fighting discrimination against Roma.

On December 19, parliament passed a new law on "nationalities," scheduled to enter into force in January 2012. The new law defines the cultural autonomy of the nationalities and recognizes as collective rights the fostering and enrichment of historic traditions, language, culture, educational rights, as well as establishing and operating institutions and maintaining international contacts.

Roma and the other 12 official minorities are entitled to elect their own minority self-governments to organize minority activities and handle cultural, educational, and linguistic affairs. The president of each minority self-government has the right to attend and speak at local government assemblies.

[50] Thus, the new portions speak to:

i. the "critical role" played by the Minister of Public Administration and Justice in advancing Roma affairs within the government;

ii. harmonization of the government's inclusion policy and that governing Roma-related government programs;

iii. a new 27-member Roma Coordination Council;

iv. a new cabinet-approved National Social Inclusion Strategy and an associated Governmental Action Plan; and

v. a new law on "nationalities" that defines their cultural autonomy and recognizes their collective rights.

[51] While these initiatives do not speak directly to state protection, they do speak to the state's attitude toward Roma and efforts to ameliorate the discrimination and persecution they face. Despite the RPD's observation that these were "new" initiatives and the evidence did not indicate whether they were successful at the operational level, they clearly had an impact on the RPD's reasoning, as evidenced by the paragraph that follows (para 42):

> Taking into account the above-mentioned, a fair reading of the documentary evidence indicates that the central government is motivated and willing to implement measures to protect the Roma, but the panel does acknowledge that these measures are not always implemented effectively at the local or municipal level. In this regard, the documentary evidence relating to government efforts to protect the Roma and to legislate against broader forms of discrimination and persecution is mixed. Even it if is acknowledged that the documentary evidence is mixed, in the circumstances particular to this case, the claimant has not demonstrated that state protection in Hungary is so inadequate that he need not have approached the authorities at all, or that he need not have taken all reasonable efforts to seek state protection in his home country…

[52] ***Also at paragraph 42*** of the Decision, the RPD quotes from page 5 of the 2011 Report (AR at p. 174) in relation to the structure of police and national security apparatus in Hungary. While not identical, similar information appears at page 7 of the 2010 Report (CTR at 123). The bigger

problem with the RPD's reasoning here, in my view, is that the quoted portion of the report does not really speak to the proposition it is purported to support, namely that

> the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Hungary for Roma who are victims of crime, police abuse, discrimination or persecution, that Hungary is making serious efforts to address these problems, and that the police and government officials are both willing and able to protect the victims.

[53] ***At paragraph 43*** of the Decision, the RPD quotes extensively from pages 5-7 of the 2011 Report (AR at pp. 174-176). Some of the quoted information is included at pages 123-124 of the 2010 Report, and some of it is new. I have underlined below the portions of the 2011 Report that are new or altered and potentially adverse to the Applicant's position on state protection:

> On January 1, the new NDS [National Defense Service] commenced operations aimed at eliminating corruption within law enforcement agencies, replacing the former Defense Service of Law Enforcement Agencies. The new NDS had increased authority, including the authority to use covert intelligence tools, and operated under the direct supervision of the minister of interior and the prosecutor general.
>
> Organized citizen groups, such as neighborhood and town watches, played an important role in helping police prevent crime. At the beginning of the year, far-right extremists continued to take advantage of the law to form vigilante groups and conduct patrols in smaller towns in eastern Hungary, apparently to intimidate the local Roma population. On April 23, the government issued a decree providing for fines of up to 100,000 forints ($414) for any failure of local neighborhood watch members to cooperate with the police. On May 2, parliament amended the penal code to increase sentences for unauthorized law enforcement activities. According to the amended code, anyone who organizes an unauthorized law enforcement effort commits an offense punishable by up to two years in prison. On November 29, parliament amended the law in order to require neighborhood watch groups to complete a written agreement with relevant police stations. The prosecutor's office maintained legal control over the operation of the neighborhood watch groups and

could initiate legal proceedings at court upon the lack of the written cooperation agreement with the police.

Civilian authorities maintained effective control over police, the NDS, and the armed forces, and the government has effective mechanisms to investigate and punish abuse and corruption. There were no reports of security forces acting with impunity.

[New but not adverse to the Applicant's position]
While there were no reports of impunity, the HHC noted that there was a great disparity between the number of indictments of members of security forces alleged to have committed abuses and the indictment of persons alleged to have committed violent acts against officials. In the first six months of the year, only 6 percent of complaints of abuse by members of the security forces resulted in an indictment, while 76 percent of alleged acts of violence against an official person resulted in an indictment. There was also a significant disparity between the conviction rate of members of the security forces charged with a crime (60 percent) and the conviction rate for persons indicted for violence against an official person (96 percent).

The Military Prosecutor's Office is responsible for conducting proceedings involving any member of the armed forces charged with a criminal offense. On November 28, parliament amended the law integrating the formerly independent Military Prosecutor's Office into a united Prosecutor's Office under the supervision of the Central Investigative Chief Prosecutor's Office. The law was scheduled to come into effect in 2012.

[Similar to information in the 2010 Report]
In the first nine months of the year, authorities found 3,022 police officers responsible for breaches of discipline, 766 guilty of petty offenses, 283 guilty of criminal offenses, and 10 unfit for duty. In the same period, courts sentenced four police officers to prison terms, gave suspended sentences to 39, fined 106, and dismissed 12. In the same period, courts convicted 37 officers of corruption. No information was available on the number placed on probation.

[Similar to information in the 2010 Report]
Victims of lesser police abuses may complain either to the alleged violator's unit or to the Independent Police Complaints Board

> (IPCB), which investigated violations and omissions by the police that affected fundamental rights. The five-member body, appointed by a two-thirds majority of parliament, functions independently of police authorities. At year's end the board had received 805 reports from the public. It reviewed 458 complaints (including some cases filed in 2010) and found serious legal violations in 67 and minor legal violations in 33. The board forwarded the 67 cases to the national police chief, who agreed with the findings in two cases, partially accepted the findings in three, and rejected the findings in three. The rest remained pending. The IPCB's authority is limited to making recommendations to the NPH and reporting its findings to parliament.

[54] Thus, the new information includes:

i. new operations aimed at eliminating corruption within law enforcement agencies, with increased authority, the ability to use covert intelligence tools, and operating under the direct supervision of the minister of interior and the prosecutor general;

ii. a new decree providing for fines of up to 100,000 forints ($414) for any failure of local neighbourhood watch members (which include vigilante groups that patrol smaller towns in eastern Hungary with the apparent intent to intimidate the local Roma population) to cooperate with the police;

iii. amendments to the penal code increasing sentences for unauthorized law enforcement activities, which are punishable by up to two years in prison;

iv. amendments to the law to require neighbourhood watch groups to complete a written agreement with relevant police stations;

v. the authority of the prosecutor's office to initiate legal proceedings at court upon the lack of such a written cooperation agreement with the police;

vi. a conclusion that "Civilian authorities maintained effective control over police, the NDS, and the armed forces, and the government has effective mechanisms to investigate and punish abuse and corruption";

vii. amendments to the law integrating the formerly independent Military Prosecutor's Office into a united Prosecutor's Office under the supervision of the Central Investigative Chief Prosecutor's Office.

[55] The quotation of this evidence in the Decision is preceded by the statement that "the evidence also shows that the state takes action when complaints are made" (at para 43), and is followed immediately by the observation (at para 44):

> Therefore, regarding the totality of the evidence before the panel, while there is evidence to indicate that police do still commit abuses against people, including the Roma, the evidence also demonstrates that it is reasonable to expect authorities to take action in these cases and that the police [sic] both willing and capable of protecting Roma and that there are organizations in place to ensure that the police are held accountable.

[56] ***At paragraph 50*** of the Decision, the RPD quotes from page 36 of the 2011 Report (AR at p. 205) regarding the higher rates of unemployment and discrimination faced by Roma. While this quotation includes some new information (compare page 34 of the 2010 Report, CTR at p. 150), there is nothing that is clearly adverse to the Applicants' position on state protection.

[57] ***At paragraph 52*** of the Decision, the RPD quotes from page 37 of the 2011 Report (AR at p. 206) regarding the inadequate housing conditions experienced by Roma in Hungary and efforts of the state to ameliorate these conditions. While some of the same information appears at pages 34-35 of the 2010 Report (CTR at p. 150-51), there is some new information about the government's efforts, as underlined below:

> Inadequate housing continued to be a problem for Roma, whose overall living conditions remained significantly worse than those of the general population. According to Romani interest groups, municipalities used a variety of techniques to prevent Roma from living in more desirable urban neighborhoods. In order to apply for EU and government funds for urban rehabilitation and public education projects, municipal authorities must attach to their proposal a desegregation plan outlining planned actions to eradicate segregation in housing and public education. According to a 2010 survey by the Ministry of National Resources, approximately 100,000 seriously disadvantaged persons, mainly Roma, lived in

> approximately 500 settlements that lacked basic infrastructure and were often located on the outskirts of cities. During the year, the government launched a new program worth 3.5 billion forints ($14.5 million) to rehabilitate these settlements aimed at improving the living conditions of the residents. The government program involved four segregated settlements, accommodating approximately 5,000 people.

[58] In my view, the analysis above does not support the Respondent's argument that the "2010 and 2011 USDOS reports are not substantially different with respect to Roma-specific information." The 2011 Report contained new information relevant to the determinative issue of state protection to which the Applicant did not have an opportunity to respond. The RPD's Reasons make it clear that it relied on this evidence, and I do not think it can be safely concluded that it had no material impact on the Decision.

[59] As paragraph 44 of the Decision makes clear, the RPD made extensive reference to certain new initiatives by the Hungarian authorities (para 43) in reaching its conclusion that

> regarding the totality of the evidence before the panel, while there is evidence to indicate that police do still commit abuses against people, including the Roma, the evidence also demonstrates that it is reasonable to expect authorities to take action in these cases and that the police both (sic) willing and capable of protecting Roma and that there are organizations in place to ensure that the police are held accountable.

[60] Part of the evidence examined and relied upon, as paragraph 43 of the Decision makes clear, included the following:

> (a) A government decree for fines of up to 100,000 forints ($414) for any failure of local neighbourhood watch members to cooperate with the police;

(b) A parliamentary amendment to the penal code to increase sentences for unauthorized law enforcement activities up to two years in prison;

(c) A parliamentary amendment to require neighbourhood watch groups to complete a written agreement with the police and possible legal proceedings for failure to do so;

[61] The RPD accepts that "a fair reading of the documentary evidence indicates that the central government is motivated to implement measures to protect the Roma, but the panel does acknowledge that these measures are not always implemented effectively at the local or municipal level."

[62] The extent to which government action translates into operational adequacy was clearly a key issue for the RPD to decide, as acknowledged in paragraph 39 of the Decision. Reliance upon the 2011 USDOS Report that was not on the record deprived the Applicants of the opportunity to introduce evidence and make submissions on the operational adequacy of the new government initiatives that were part of the totality of the evidence the RPD looked at for its state protection finding.

[63] I also agree with the Applicants that, although the RPD states the correct test to be used in assessing whether the presumption of adequate state protection has been rebutted, the RPD does not, in fact, examine "operational adequacy."

[64] This can be seen, for example, in those paragraphs of the Decision where the RPD examined societal discrimination and concluded that it does not amount to persecution. The evidence cited by

the RPD in paras 45-49 appears to show that the situation is, in fact, deteriorating. The RPD then provides the following conclusion at para 54:

> [54] Hungary faces criticism regarding the implementation of the laws it has enacted to address the discrimination and persecution of its minorities, especially the Roma. While there may be motivation within the central government to have its laws enforced, there is difficulty in implementing the enforcement of these laws at the local level, and resources routinely fail to reach the groups with the greatest needs. The criticism against Hungary may be deserved, but what is important to note is that Hungary is a part of the European Union and is therefore responsible for upholding a number of various standards to maintain its membership in the Union. For instance, the European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialized in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognized expertise in dealing with racism, xenophobia, and anti-Semitism and intolerance. The ECRI published a report on Hungary in which it gives praise to Hungary for its accomplishments, cites issues of concern, and gives recommendation for future action. What is important to note in this instance, is that Hungary is not an island unto its own, but it is a responsible member of the European Union and reports regularly to the governance structures within that Union.
>
> > The Republic of Hungary was one of the first signatories to the Framework Convention on the Protection of National Minorities of the Council of Europe and deposited its instrument of ratification on 25 September 1995. The Parliament of the Republic of Hungary ratified the Framework Convention in 1990.
>
> [footnotes omitted]

[65] In my view, this is an unreasonable conclusion. The RPD appears to be saying that the measures implemented by the state are ineffective and that the "criticism against Hungary may be deserved," but this doesn't matter because, as a member of the European Union, Hungary is supposed to uphold "a number of various standards to maintain its membership in the Union." And this means that (para 55):

> Even if criticism of Hungary's measures to combat racism is warranted, particularly against the Romani population, on a balance of probabilities, Hungary is taking measures to implement the standards that are mandated as a member of the European Union.

[66] Hungary may be taking measures but, as the RPD itself says, this is not how the adequacy of state protection is assessed: "Regard must be had to what is happening and not what the state is endeavouring to put in place." See *Beharry v Canada (Citizenship and Immigration)*, 2011 FC 111 at para 9, and *Jaroslav v Canada (Citizenship and Immigration)*, 2011 FC 634 at para 75. As Justice Hughes made clear in *Hercegi*, above at para 5:

> 5 […] It is not enough to say that steps are being taken that some day may result in adequate state protection. It is what state protection is *actually provided* at the *present time* that is relevant. In the present case, the evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens. […]
>
> [Emphasis in original]

[67] Similar problems arise in relation to the RPD's state protection analysis regarding violence against Roma and the police response. However, on the basis of what I have already reviewed, I think this matter must go back for reconsideration and there is nothing to be gained from further analysis.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and set aside and the matter referred back for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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