Federal Court  Cour fédérale

Date: 20140314

Docket: IMM-13104-12

Citation: 2014 FC 255

Ottawa, Ontario, March 14, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DEZSO RUSZNYAK, DEZSONE RUSZNYAK, BRIGITTA ADAM

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 November 23, 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 are citizens of Hungary and are of Roma ethnicity. They claim to have faced persecution and discrimination due to their ethnicity, and to have a well-founded fear of further persecution if they are returned to Hungary. They arrived in Canada on May 19, 2011 and made claims for refugee protection on May 21, 2011.

[3] The claims were based on a single narrative set out by Dezsone Rusznyak [Ms. Rusznyak] in her personal information form [PIF] on behalf of herself, her husband Dezso [Mr. Rusznyak] and their now four-year-old daughter Brigitta. In that narrative, the Applicants claimed to fear physical attacks by racist and right-wing groups in Hungary, which attacks and threats had, in their view, increased over the previous few years. They claimed to have been segregated in school and denied access to education after grade 8, and they say that they and their family members have been physically attacked on several occasions by skinheads or "Hungarian Guards." They claimed that Mr. Rusznyak and his father were attacked while fishing at a local lake in 2002, that the two adult Applicants were attacked by three men while walking together in a park in the spring of 2008, both receiving knife wounds, and that Mr. Rusznyak was confronted and thrown into a lake while fishing in the Summer of 2010. Ms. Rusznyak says four Hungarian Guards attacked her and her sister in 2008, knocking out two of her teeth and breaking her sister's rib. She claimed that her sister was attacked by skinheads in 2000, her brother was attacked in 2001, she and her parents were chased out of a shop by skinheads in 2003, her sister's husband and son were beaten up in the village of Martonyi in August 2007 while she was out with them for a "village day," and her parents were attacked by Guardists in the Spring of 2009 as they went to the store. The Applicants described reporting some of these

incidents to police, but say they were denied help or received notice a short time later that the files had been closed due to a lack of evidence, or because the perpetrators were unknown.

[4] The Applicants also say they faced discrimination on an everyday basis, and described being denied access to a bus, swimming pools and a local pub by people who called them "dirty rotten gypsies" or other names.

[5] The Applicants' claims were heard together by the RPD on November 2, 2012, with Mr. Rusznyak acting as his daughter's designated representative, and all three were rejected in the Decision dated November 23, 2012. Ms. Rusznyak was the main witness at the hearing, with her husband also giving brief evidence.

[6] Ms. Rusznyak attests that two of her sisters and their families came to Canada around the same time and successfully claimed refugee status based on essentially the same facts. One of these families had their claims heard and approved on the same day by the same Board member who made the Decision at issue here.

DECISION UNDER REVIEW

[7] The RPD identified the determinative issues as credibility and state protection.

[8] On the issue of credibility, the Board found Ms. Rusznyak to be an untrustworthy witness, and therefore concluded that it did not have sufficient credible and trustworthy evidence

to find that the Applicants were Convention refugees. In the alternative, the Board found that the Applicants had access to adequate state protection in Hungary.

[9] The Board found serious contradictions and material inconsistencies between Ms. Rusznyak's PIF and her testimony at the hearing for which she did not provide a reasonable explanation when given the opportunity. The PIF narrative stated that the attack in the park occurred in the Spring of 2008, while Ms. Rusznyak stated in her testimony that it occurred in the Spring of 2009, while she was pregnant. The Board rejected Ms. Rusznyak's explanation that she made a mistake in the PIF, finding that she associated the event with her first pregnancy and was therefore not likely to make a mistake about its timing. The Board also found a discrepancy regarding whether the Applicants sought medical attention following this attack. The PIF stated that they received care from a doctor's assistant, while Ms. Rusznyak testified that they did not seek medical attention. The RPD did not accept the explanation that they got mixed up while writing the narrative because they had suffered many injuries. The Board also found inconsistencies in the evidence regarding who reported this incident to the police and the police response, and observed that when questioned on the discrepancies Ms. Rusznyak "could not keep her story straight." Based on these inconsistencies, the RPD was "not persuaded that the [claimants] were attacked in a park by three racists."

[10] The Board also noted discrepancies in the Applicants' evidence regarding their complaint to the mayor of their village about being refused service at a local pub / café and the mayor's response. The PIF stated that the mayor refused to deal with it, while Ms. Rusznyak testified that the Mayor said he would speak with the pub owner but she did not know whether he actually

intervened. She also made allegations in her testimony that the mayor was a racist and a member of racist groups, which was not stated in the PIF and which the RPD found to be an embellishment of the claim. In addition, Mr. Rusznyak's testimony differed from the PIF regarding what year he was confronted and thrown into a lake while fishing; when asked about the discrepancy he testified that he did not know exactly when it happened.

[11] The Board also noted that the Applicants claimed to have made reports to the police on numerous occasions but had provided no police reports. When asked, Ms. Rusznyak testified that she asked her sister in Hungary to obtain the reports, but her sister was told that Ms. Rusznyak would have to appear in person to get them. She testified that she had not asked her parents-in-law to obtain any of the reports, despite the fact that, according to her testimony, they had been involved in making some of the reports to the police. The RPD found that "the female claimant has failed to provide, contrary to her onus to do so, relevant documentation to establish her claim," and observed that "she could have at least asked her in-laws to request a report from the police." The Board noted that "Rule 7 of the Refugee Protection Division stipulates that the claimant 'must provide acceptable documents establishing identity and other elements of the claim,' and that if a claimant does not provide such documents 'he/she must be able to explain the reason they were not provided or at least relay what steps were taken to obtain them'." As such, the Board found that the Applicants had failed to establish that they were beaten and injured in an attack in 2009 or refused service in a pub because of their ethnicity.

[12] The Board then went on to make a broader credibility finding based on the perceived contradictions and inconsistencies noted above, stating (Decision at para 19):

> [19] When I consider the evidence as a whole, the evidence raises serious issues related to the credibility of the claimants. The sworn testimony of a claimant is presumed to be truthful, unless there is valid reason to doubt its truthfulness. The female claimant and the claimant in this case have failed to advance their claims with evidence that is consistent or credible. I am aware that none of the credibility concerns raised here may be sufficient, each on its own, to negate this claim. However, the cumulative effect of all of them is that I do not have sufficient credible and trustworthy evidence upon which to base a determination that the female claimant and claimant are Convention refugees. As the Court of Appeal in [*Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 (FCA)], MacGuigan, J.A. held:
>
> > … even without disbelieving every word [a claimant] has uttered, a… panel may reasonably find him so lacking in credibility that it concludes that there is no credible evidence relevant to his claim… In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant information emanating from his testimony.
>
> The female claimant and that claimant are, therefore, not Convention refugees.

[13] The RPD went on to state that: "In the alternative, I find that the claimants have adequate state protection as this issue was raised at the beginning of the hearing."

[14] The RPD noted that the Applicants bore the burden of rebutting the presumption of state protection with "clear and convincing" evidence of the state's inability to protect its citizens, and of showing that they had taken all reasonable steps in the circumstances to seek protection.

[15] The Board acknowledged that the documentary evidence showed that "the attitude of some Hungarian people, including some in positions of authority, toward the Roma is discriminatory and prejudicial," that "Roma are discriminated against in almost all fields of life," and that "the situation for Roma individuals in Hungary has not improved, but rather worsened" and "previously hidden anti-Roma attitudes are becoming more open." With respect to the police, the Board observed that "human rights problems during [2012] included police use of excessive force against suspects, particularly Roma," and that "Roma victims of crime very often face discriminatory treatment by the police; police officers are reluctant to register reports made by Roma and especially the racial motivation of a crime reported." Based on this evidence, the Board stated (Decision at paras 31):

> I acknowledge and have considered that there is evidence to indicate that there is widespread reporting of incidents of intolerance, discrimination and persecution of Romani individuals in Hungary…

[16] And further (Decision at para 42):

> A fair reading of the documentary evidence indicates that the central government is motivated and willing to implement measures to protect the Roma, but these measures are not always implemented effectively at the local or municipal level. The documentary evidence relating to government efforts to protect the Roma and to legislate against broader forms of discrimination and persecution is mixed.

[17] Nonetheless, the Board found (Decision at para 43) as follows:

> [T]he 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 victims."

[18] The Board noted the progress of prosecutions in cases where Roma were the victims of violent attacks, as well as the creation in 2009 of a task force for investigating anti-Roma attacks and the strengthening of that task force in 2010. It found that the "documentary evidence shows that police take action when racially-motivated criminal acts are perpetrated by extremist groups, including purported members of the banned Hungarian Guard." It noted Criminal Code provisions and amendments targeting incitement of hatred and hate-inspired violence, and found that the central government did not support, condone or acquiesce to discrimination and racism against the country's minorities, including Roma. While there were reports of police corruption and use of excessive force against Roma, there were penalties in place for officers found guilty of wrongdoing, and evidence indicating that "it is reasonable to expect authorities to take action in these cases." The Board noted a number of complaint mechanisms and oversight bodies, including the Independent Police Complaints Board (IPCB), complaint procedures within the police hierarchy, and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities (Minorities Obudsman). Thus, while "criticism of Hungary's treatment of the Roma is warranted," the Hungarian government is "motivated and willing to implement measures to protect the Roma" and there were "specific examples of how this is effective at the operational level." The Board observed (Decision at para 62):

> …[R]egarding the totality of the evidence before me, while there is evidence to indicate that police do still commit abuses against people, including Roma, the evidence also demonstrates that it is reasonable to expect authorities to take action in these cases and that the police are both willing and capable of protecting Roma and that there are organizations in place to ensure that the police are held accountable. Therefore, in the circumstances of this case, the presumption that adequate state protection exists in Hungary is not rebutted.

[19] With respect to broader issues of discrimination, the Board found that redress could be sought through the Equal Treatment Authority, the Parliamentary Commissioner for Civil Rights (PCCR), the Hungarian Labour Inspectorate, the National Consumer Protection Authority, the Commissioner for Educational Rights, the Health Insurance Supervisory Authority, the Patients' Rights Representatives, and the Central Office of Justice, as well as the courts. The Board observed (Decision at para 83):

> … it is not only the police authority from whom claimants are expected to seek state protection. In instances of systemic discrimination, where the state has in place other institutions to provide civil remedies, it is reasonable for the claimant to seek redress from those institutions.

[20] Thus, the Board concluded (Decision at para 86) as follows:

> Based on the totality of the evidence… I find that the claimants had and have recourse to seek remedies against institutional and non-institutional discrimination and racist practices, to obtain state protection against violence, and that there are numerous mechanisms in place to seek redress if they were to be denied protection by the police due to their Roma ethnicity.

ISSUES

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

a. Did the Board err by failing to reasonably assess the evidence as a whole and by not having regard to the totality of the evidence?

b. Did the Board err in the definition and/or assessment of credibility and state protection?

STANDARD OF REVIEW

[22] 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 (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[23] The parties are in agreement that a standard of reasonableness applies in reviewing the Board's conclusions on credibility and state protection: see *Stephen v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1054 at paras 15-16. The Applicants' also raise the issue of whether the Board applied the right "definition" of state protection, which I take to be a question of whether the Board applied the proper test. This Court has recently affirmed that issue of whether the proper test for state protection was applied is reviewable on a standard of correctness: *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 22 [*Ruszo*]; *Buri v Canada (Minister of Citizenship and Immigration)*, 2014 FC 45 at paras 16-18 [*Buri*]. On the other hand, the issue of whether the Board erred in applying the settled law on state protection to the facts of a particular case is a question of mixed fact and law that is reviewable on a standard of reasonableness. In this case, I think the real issue is not

whether the Board properly understood the test, but whether it erred in applying it, which is a question upon which the deferential standard of reasonableness applies.

[24] 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

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

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	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut

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.

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

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*) 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

(ii) elle y est exposée en tout lieu de ce pays

every part of that country and is not faced generally by other individuals in or from that country	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

ARGUMENT

Applicants

[26] The Applicants argue that the Board's credibility and state protection findings were both unreasonable, and that the Decision should therefore be set aside.

[27] With respect to credibility, the Applicants argue that, unless contradicted or undermined, the allegations of the Applicants should be accepted as fact: *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729, 167 FTR 309 (TD). The benefit of unsupported doubts must go to the person giving the evidence: *Pinzon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1138 at para 5.

[28] The Applicants say there were no omissions, contradictions or inconsistencies in their evidence that were not reasonably explained. Rather, the credibility finding resulted from a "microscopic" analysis in search of inconsistencies, focusing on peripheral details in the evidence and ignoring serious incidents that were central to the evidence: *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444, 99 NR 168 (FCA); *Huang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 346 at para 10; *Chen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 270 at para 16; *Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55. The Applicants quote from Justice Rennie's judgment in *Wardi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1509 at paras 18-21, where he observed in part:

> 19 The Manual cautions against dwelling on credibility concerns relating to peripheral details of a traumatic event. The Board should not have inflated expectations in terms of accuracy and consistency of recall…
>
> […]
>
> 21 The Manual also notes that a claimant may be fabricating aspects of a story but still fulfill the criteria for refugee protection. False allegations exist on a spectrum, from a slightly distorted report to a complete fabrication. Accordingly, the Board was obliged to carefully consider what aspects of a story could be corroborated with supporting evidence...

[29] The Applicants argue that the inconsistency regarding the date of the attack in the park was a simple mistake or typographical error in the PIF, and it was unreasonable not to accept this explanation. The same is true on the issue of whether the Applicants sought medical attention after the attack: the PIF stated that medical attention was received, but the Applicants corrected this error during testimony. They argue that the evidence on who reported this incident to police was clear and consistent, but the Board created a possible contradiction through its mode of

questioning and then wrongly concluded that Ms. Rusznyak "could not keep her story straight." The testimony regarding the negative reaction of the police was not an omission from the PIF but simply an elaboration. Mr. Rusznyak's explanation that he did not know exactly when the incident at the lake happened was also reasonable. Everyone is liable to make mistakes, and no recall is expected to be perfect. With respect to the complaint to the mayor, Ms. Rusznyak simply testified honestly that she did not know what, if anything, the racist mayor did about her complaint. In its fervent effort to find contradictions, the Board missed what was truly relevant about this evidence: the discriminatory act and the lack of an adequate response.

[30] Based on the evidence as a whole, the Applicants say, it was not reasonable for the Board to conclude that there were serious issues with their credibility. Rather than searching for inconsistencies, the Board should have tried to determine whether the Applicants had any credible evidence to offer: *Osman v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1414, 46 ACWS (3d) 101 (TD) at para 13. The Board is not entitled to draw a negative inference based on the omission of minor or elaborative details or peripheral matters from the PIF: *Akhigbe v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 249 (FCTD); *Ali v Canada (Minister of Citizenship and Immigration)*, 2012 FC 259; *Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101; *Naqui v Canada (Minister of Citizenship and Immigration)*, 2005 FC 282; *Refugee Protection Division Rules*, SOR/2002-228, Rule 6(4) (repealed after the date of the Decision). None of the supposed omissions or contradictions at issue go to the heart of the claim so as to support a negative credibility finding: *Cao v Canada (Minister of Citizenship and Immigration)*, 2012 FC 694; *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124 (TD) at para 11. To support a negative credibility

finding, an omission or inconsistency "should be major and not minor and sufficient by itself to call into question the applicant's credibility": *Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at para 25; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 67-69 [*Fatih*].

[31] With respect to the absence of corroborative evidence such as police reports, the Applicants submit that, while the Board is justified in requiring corroboration where there are serious concerns with the overall credibility of the claims (*Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288 at paras 6-7), no negative inference can be drawn from its absence unless there are valid reasons for doubting a applicant's credibility and the applicant has been unable to provide a reasonable explanation for the lack of corroborating material: *Dundar v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1026 at paras 19-23; *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571; *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12; *Fatih*, above. Rejecting a reasonable explanation for the absence of corroborating material can lead to unfair and perverse findings: *Buri*, above, at para 6. The Applicants submit that they provided reasonable explanations for any omissions or inconsistencies such that there were no valid reasons for doubting their overall credibility, and they provided reasonable explanations for their inability to obtain the police reports.

[32] The Applicants also argue that the Board should have considered the fact that Ms. Rusznyak's sisters were accepted as refugees based largely on the same evidence. While not determinative, the Applicants say this should have been considered in support of their credibility,

the well-foundedness of their fear and the availability of state protection: *Djouah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 884 at para 25; *Szabo v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 104, 2002 FCT 91 (TD) at para 12. While it may not be bound by them, the Board must give clear and compelling reasons for departing from previous decisions, both as a matter of fairness to the Applicants and because the failure to do so results in inconsistent and arbitrary decision-making: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4; *Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 500; *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714 at paras 12-15; *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6 at paras 17-20 [*Siddiqui*]; *Osagie v Canada (Minister of Citizenship and Immigration)*, 2007 FC 852 at paras 31-32 [*Osagie*]. The Applicants question how the same Board member could reach opposite conclusions on state protection for similarly situated family members based on the same evidence: either there is state protection available in Hungary for persons in the Applicants' situation or there is not: *Alexander v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1305 at para 8 [*Alexander*].

[33] The Applicants argue that it was incongruous and contradictory for the Board to add the "alternative" finding about state protection. In their view, this demonstrates that the Board was uncertain about its credibility assessment and was searching for any justification to reject their claim: *Csiklya et al v Canada (Minister of Citizenship and Immigration)*, October 30, 2012, IMM-654-12 (FC).

[34] The Applicants argue that the state protection analysis itself was superficial and inadequate and wholly influenced by the negative credibility finding. The Board's conclusion on state protection is contrary to its own findings, including that: the situation for the Roma has worsened rather than improved and anti-Roma attitudes are becoming more open (Decision at para 24); segregation has increased (Decision at para 26); police use excessive force against Roma (Decision at paras 27 and 55); and, the central government's general failure to maintain strong and effective control mechanisms over rights violations takes its toll on the Roma minority (Decision at para 63). The Applicants argue that the evidence is anything but mixed, as the Board pointed to no evidence that the police are protecting the Roma some of the time.

[35] While the Board correctly stated that it should look at what is "actually happening not what the state is endeavouring to put in place" (citing *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at para 5 [*Hercegi*]), the Applicants say that in actual fact the Board found "serious efforts" to be enough, which is contrary to recent jurisprudence. Serious efforts do not equal adequate protection: *Kumati v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1519 at paras 34, 39, 42; *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 at paras 5, 11-14; *Horvath v Canada (Minister of Citizenship and Immigration)*, 2013 FC 95 at paras 44-48; *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421 at paras 12, 18, 21 [*Majoros*]). These efforts must have "actually translated into adequate state protection" at the operational level: *Hercegi*, above, at para 5; *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16; *Jaroslav v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634 at para 75, among others. Furthermore, it is an error to focus on inadequate efforts to seek state protection where no

adequate protection exists: *Majoros*, above, at para 21; *Ignacz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1164 at para 23.

[36] Furthermore, the Applicants argue, the various organizations and complaint mechanisms cited by the Board, such as the Equal Treatment Authority, the Minorities Ombudsman and the Roma Police Officers Association, do not provide protection. The police force is "presumed to be the main institution mandated to protect citizens," and "other governmental or private institutions are presumed not to have the means nor the mandate to assume that responsibility": *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at paras 14-17; *Gulyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 254 at para 81. The fact that perpetrators may be unknown does not absolve the police from investigating complaints: *Pinter v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1119 at para 14. The Applicants note that this Court has previously found that the Roma have good reason to fear the police in Hungary (*Biro v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1120 at para 16). They argue that the evidence points to systemic, nationwide problems with state protection, and the Board's conclusion on state protection is therefore unreasonable.

Respondent

[37] The Respondent argues that the Applicants have merely expressed their displeasure with the Board's credibility and state protection findings, and that such displeasure, however earnest, does not establish a reviewable error.

[38] With respect to credibility, the Respondent notes that this is "the heartland of the Board's jurisdiction" (*Aguilar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 843 at para 34), and argues that the Board is entitled to make credibility findings on the basis of implausibilities, contradictions, irrationality and common sense, and may do so even where those deficiencies are not related to central aspects of the claim: *Zhai v Canada (Minister of Citizenship and Immigration)*, 2012 FC 452 at paras 14-17. When challenging such findings, an applicant must do more than demonstrate that the evidence could have supported a different conclusion; they must show that the Board's finding was unreasonable: *Cao v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1398 at para 31.

[39] The Applicants' argument that the Board engaged in a "microscopic" analysis suffers from the very infirmity of which it accuses the Board. By highlighting narrow factual discrepancies, the Applicants lose sight of the fact that any review of the Board's credibility assessment ought to be holistic. The Reasons show that the Board's credibility concerns, while largely driven by the discrepancies between the Applicants' written and oral evidence, arose from the Board's specific interactions with the Applicants during the hearing (Decision at paras 14-15). The Board was in the optimal position to assess the credibility of the Applicants' claims. The Applicants have not shown that the Board's findings were unreasonable, and therefore the Court should not interfere: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at paras 2-4.

[40] The Applicants are incorrect in arguing that the Board should have considered that the RPD granted the refugee claim of Ms. Rusznyak's sister on the basis of similar evidence. The

Board is not obliged to consider the claims of the Applicants' family when assessing their claim, because refugee status is determined on a case by case basis, and because previous decisions might be incorrect: *Bakary v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1111 at para 10; see also *Jackson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1098 at paras 39-40 [*Jackson*].

[41] In the alternative, the Respondent argues that any error in the credibility analysis is immaterial because the Board's finding on state protection, unless unreasonable, would be dispositive of the application: *Bolanos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 513 at para 77; see also *Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490 at para 2.

[42] The Respondent argues that the Board cannot be faulted for proceeding to make a state protection finding "in the alternative," as it would be absurd to fault the Board for adjudicating a refugee claim *more* conscientiously.

[43] Furthermore, the Board's assessment of the documentary evidence is thorough and balanced and evinces justification, transparency and intelligibility. The Applicants' argument that the Board erred by focusing on state protection "efforts" rather than state protection "abilities" is readily debunked by the Reasons themselves (see Decision at paras 40, 60). The suggestion that the Board was unable to point to any evidence that Hungarian police are protecting Roma rests upon a misconception of the Board's role in the refugee process. As the RPD pointed out, "the Board is not obliged to prove that Hungary can offer the claimant

effective state protection, rather the claimant bears the legal burden of rebutting the presumption that adequate state protection exists by adducing clear and convincing evidence which satisfies the Board on a balance of probabilities" (Decision at paras 34-36). In failing to establish that they made all reasonable attempts to seek state protection in Hungary, the Applicants clearly failed to meet this burden: *Ruszo*, above, at paras 29-34, 44-51.

ANALYSIS

[44] The Applicants have made strenuous efforts to undermine the Board's credibility and state protection analyses and urge the Court to find them unreasonable.

[45] The credibility findings were based upon "cumulative" inconsistencies. Whether these inconsistencies were sufficient to support a general finding that the Applicants lacked credibility, so as to impugn all of their evidence, is in my view a central issue in this case. It is clear that the RPD made such a finding (Decision at para 19), and that it was essential to the Decision. The question is whether this general finding was reasonable.

[46] In my view, this is a very borderline case on this issue. However, in the Decision the Board itself made it clear that the credibility finding was based upon cumulative concerns:

> [19] When I consider the evidence as a whole, the evidence raises serious issues related to the credibility of the claimants. The sworn testimony of a claimant is presumed to be truthful, unless there is valid reason to doubt its truthfulness. The female claimant and the claimant in this case have failed to advance their claims with evidence that is consistent or credible. I am aware that none of the credibility concerns raised here may be sufficient, each on its own, to negate this claim. However, the cumulative effect of all of them is that I do not have sufficient credible and trustworthy evidence upon which to base a determination that the female

> claimant and claimant are Convention refugees. As the Court of Appeal in [*Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 (FCA)], MacGuigan, J.A. held:
>
> > … even without disbelieving every word [a claimant] has uttered, a… panel may reasonably find him so lacking in credibility that it concludes that there is no credible evidence relevant to his claim… In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant information emanating from his testimony.
>
> The female claimant and that claimant are, therefore, not Convention refugees.
>
> [Emphasis added]

[47] It is my view that the reliance upon the minor discrepancies in dates was too microscopic and unreasonable. Indeed, I think that reasonable explanations were offered for most of the inconsistencies. However, because the Board's credibility finding was "cumulative" it is not possible to say whether, without these errors, it would have reached the same conclusions about general credibility. This means that, in my view, the general credibility finding is unsafe and unreasonable. See *Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586 at para 21; *Qalawi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 662 at para 17. However, this does not end the matter because the Board makes an "alternative" adequate state protection finding. The Applicants say that this finding is undermined by the negative credibility finding, but I don't think it is. I agree with the Respondent that what the board means by "alternative" in this instance is that, even if the Board accepts that the events happened as the Applicants say, and the Applicants went to the police, the Applicants have still not rebutted the presumption of adequate state protection.

[48] Even if the Applicants could not be believed on all aspects of their claim, it was certainly clear that the Applicants were Roma people who had come to Canada from Hungary and who said they would face serious discrimination and persecution if returned. The Board acknowledges the very difficult situation faced by Roma people in Hungary. Hence, the Board was obliged to conduct a state protection analysis in order to determine whether the Applicants had rebutted the presumption of state protection: see *Kulasekaram v Canada (Minister of Citizenship and Immigration)*, 2013 FC 388 at paras 37-39; *Joseph v Canada (Minister of Citizenship and Immigration)*, 2011 FC 548 at paras 11-12; *Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501 at paras 6-8; *Bastien v Canada (Minister of Citizenship and Immigration)*, 2008 FC 982 at paras 8-12; *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 773 at para 5. Even a general finding of a lack of credibility does not end the inquiry if there is "independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim": see *Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381 at para 3.

[49] Contrary to what the Applicants argue, it is my view that the Board conducted a detailed and reasonable state protection analysis which does examine "operational adequacy" as well as the serious efforts of the state to eradicate discrimination against the Roma people and to protect them from persecution and the brutal, racist violence that is often perpetrated against them. It is possible to disagree with this analysis but, in my view, it is not possible to say that it falls outside of the range posited by *Dunsmuir*, above, except for one reason which I now turn to.

[50] Where the Decision does become very problematic, in my view, is with regard to the Board's handling of the post-hearing submissions in which Applicants' counsel drew the Board's attention to the fact that the Board member who decided this claim had also decided on the same day the claim of one of Ms. Rusznyak's sisters and her family, and had granted refugee protection to that sister and her family. What is more, the refugee claim of another sister and her family had previously been accepted by another Member of the Board.

[51] The Board's treatment of this issue is curt and, in my view, unreasonable:

> Each claim is determined by its individual merits. It is not feasible to reach definitive findings for people who are family members. I am not bound by another decision I have made or by a decision made by another Member of the Board.

[52] The Applicants did not allege that the Board was "bound" by any person's decision. They simply thought the treatment of the other sisters who had faced similar problems in Hungary was evidence of "similarly situated people" that should be considered by the Board.

[53] In the present case, this renders the Board's state protection analysis problematic. It is true, of course, that in considering state protection the Board takes into account the evidence as to how individual applicants sought protection from the state authorities. But in the present case, the state protection finding is presented as an "alternative" to the credibility findings and is, in any event, a very comprehensive examination of the Hungarian state's willingness and ability to protect its Roma citizens based on the documentary evidence. It is strange then, that the Member would conclude that one sister had rebutted the presumption of adequate state protection and the other sister had not on the same day and on the basis of the same information package.

[54] The Respondent directs me to the decision in *Jackson*, above, at paras 39-40. However, I don't think Justice Gagné was dealing in *Jackson* with quite the same issue as is before me. It is accepted that the Board is not bound by the result in another claim, even if the claim involves a relative, because refugee status is determined on a case-by-case basis and because it is possible that the other decision was incorrect. The issue before me, however, involves an "alternative" state protection finding based upon the same package of documents that, on the same day, the same Member had used to find that the presumption of state protection had been rebutted.

[55] As the Applicants point out, there is strong recent case law from this Court that the Applicants were entitled to a full explanation of why this particular Board member, reviewing the same documents on the same issues on the same day could reach a different conclusion. See *Siddiqui*, above, at paras 17-19. Justice Harrington followed *Siddiqui*, in *Alexander*, above:

> [8] Although the standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339) and although there may be more than one reasonable decision, either there is state protection available for persons in Ms. Alexander's situation or there is not. In *Siddiqui v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 6, Mr. Justice Phelan was reviewing a decision in which the MQM-A of Pakistan was found to be a terrorist organization. There had been earlier decisions to the contrary. I fully subscribe to what he said at paragraphs 17 and 18:
>
> > [17] There is no strict legal requirement that the Board members must follow the factual findings of another member. This is particularly so where there is one of the "reasonableness" standards in play - reasonable people can reasonably disagree.
> >
> > [18] What undermines the Board's decision is the failure to address the contradictory finding in the

> Memon decision. It may well be that the member disagreed with the findings in Memon and may have had good sustainable reasons for so doing. However, the Applicant is entitled, as a matter of fairness and the rendering of a full decision, to an explanation of why this particular member, reviewing the same documents on the same issue, could reach a different conclusion.

[56] Justice Lagacé also followed *Siddiqui* in *Osagie*, above:

> [32] In the present instance, a member of the Immigration Division had previously determined that Mr. Osagie's national identity card was authentic. The Board was entitled to depart from this conclusion based on its own review of the evidence, and in fact did so. However, given the existence of the previous decision, the Board was required to explain why it was departing from the conclusion of the Immigration Division. The failure to do so results in inconsistent and arbitrary decision-making

[57] In the present case, the Board was not bound by a previous decision, but it was bound to review the issue and explain why, based upon the same information package, state protection was not available in its other case but was available to the Applicants. As Justice Harrington says in *Alexander*, above, either there is state protection available for persons in the Applicants' situation or there is not. In my view, the Board's failure to address this issue renders its state protection analysis unreasonable.

[58] In conclusion, then, I find that the Decision is unreasonable and must be returned for reconsideration.

[59] Counsel agrees that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted Board; and

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

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