

Federal Court



Cour fédérale

**Date: 20140509**

**Docket: IMM-1806-13**

**Citation: 2014 FC 449**

**Ottawa, Ontario, May 9, 2014**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**LASZLO BALOG, BEATA KOTAI,  
SZABOLCS BALOG, GYULA BALOG,  
GERGO BALOG and SZILVIA BALOG**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Refugee Protection Division [RPD] issued a decision in this matter with a state protection analysis that the respondent describes as “multifaceted, transparent and individualized”. In doing so, however, the RPD failed to address a *sur place* claim arising from a tragic event in Canada and the response to it by extremists in Hungary. That failure, in the

particular circumstances of this matter, requires that the decision be overturned and the applicants' claim returned to the Immigration and Refugee Board for reconsideration.

I. **BACKGROUND:**

[2] Mr. Laszlo Balog, the principal claimant before the RPD, and his common-law wife Mrs. Beata Kotai are 32 year-old Hungarian citizens of Roma ethnicity. They have four minor children: Szabolcs, Gyula, Gergo, and Szilvia. A fifth child, Laszlo Balog Jr, was killed on July 17, 2012 as a result of a motor vehicle accident enroute to Niagara Falls, Ontario. The family had come to Canada on April 12, 2011 and claimed refugee protection asserting persecution by reason of their Roma ethnicity in Hungary.

[3] The accident, which involved the applicants and other members of their extended family who were also in Canada seeking protection, attracted the attention of the media. A report in the Toronto press identified the family and described their status as refugee claimants. The article discussed the family's dilemma as to where to bury the child, as they awaited results of their asylum claim. They did not want to bury the child's body in Canada if they were to be sent back to Hungary.

[4] The Toronto newspaper article was picked up by the Hungarian media and widely disseminated. As reported by the Athena Institute, a non-governmental human rights organization based in Budapest, all major Hungarian news outlets, both print and electronic, covered the incident. This generated some reactions on the Internet, characterized by the Institute

as racist, and led to publication of the story, including the family's names, on the website of the kuruc.info group.

[5] According to a report prepared by the Athena Institute, kuruc.info is one of the most active extremist groups operating in Hungary. Its main activity is the production of an online "news portal" that publishes content against the Hungarian Roma, Jewish and LGBT communities. The group hosts its website in the United States in order to avoid closure and/or prosecution in Hungary for inciting hatred and violence. The group has published the names and addresses of judges and prosecutors involved in efforts to address extremist violence in Hungary. The group has published articles on its website portraying Hungarian Roma seeking asylum in Canada as "criminals" and "traitors". As a result of its publishing information relating to the situation of the Balog family, a number of comments of a threatening nature were posted online accompanied by the insignias of other extremist groups. This was the only occasion known to the Institute where a specific person or family seeking asylum in Canada had been identified on this website.

[6] At the hearing of the applicants' claim on December 4, 2012, the presiding Board Member took care to avoid adding to the family's grief and limited his questions to incidents that occurred in Hungary related to state protection. However, the Member's attention was drawn to the publication of the online threats and a translation of some of the comments was submitted in evidence. Mr. Balog testified about his fear that as a result of this publicity, the family would be at an increased risk of harm if returned to Hungary. The Member questioned why this would

result in a higher profile for the family and Mr. Balog referred to the fact that they had been identified as refugee claimants and threatened with harm as a result.

[7] Following the hearing, the applicants submitted extensive written submissions and evidence including the above-mentioned report from the Athena Institute, within the time-line fixed by the Board. The decision was issued on February 1, 2013.

## II. DECISION UNDER REVIEW:

[8] The Board determined that the applicants had not provided clear and convincing evidence that, on a balance of probabilities, state protection was not available in Hungary since their evidence indicated that they had made little to no effort to seek state protection. Further, the Board preferred the documentary evidence on the effectiveness of state protection to the applicants' evidence, which was "largely unsubstantiated" and inconsistent with the documentary evidence. The Board acknowledged that the documentary evidence was "mixed" with "widespread reporting of incidents of intolerance, discrimination and persecution" of Roma individuals in Hungary. After an extensive review of the services available to the Roma community, the Board found that in the circumstances of the case, state protection in Hungary is not so inadequate that the applicants need not have approached the authorities at all, or that they need not have taken all reasonable efforts to seek state protection. The Board therefore concluded that while imperfect, adequate state protection is available for Roma individuals in Hungary.

[9] The Board did not discuss the *sur place* claim.

III. **ISSUES:**

[10] The respondent submits that there is no arguable issue. I agree with the applicants that the issues are whether the Board erred in failing to assess the applicants' *sur place* claim and, as a result, erred in its assessment of state protection.

IV. **ANALYSIS:**

[11] The standard of review for state protection findings has been determined by the jurisprudence to be reasonableness: *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36. Recent cases dealing with *sur place* claims arising from the arrival of the *Sun Sea* and *Ocean Lady* vessels have also determined that reasonableness is applicable to the Board's assessment of such claims: *Sivaraththinam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 162 at para 33; *S.A. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 146 at para 21.

[12] In *Hannoon v Canada (Minister of Citizenship and Immigration)*, 2012 FC 448 at para 42, Justice O'Keefe concluded that a Board's omission to deal with part of an applicant's claim, such as a *sur place* matter, involves an error of law that is reviewable on a standard of correctness. Justice Rennie, in *Varga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 494 at para 6 considered that the failure to address a ground of persecution raised on the face of the record was a breach of procedural fairness, reviewable on a correctness standard.

[13] In my view, the issues involves question of mixed fact and law and are therefore properly reviewable on the reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-53. On the facts of this matter, I would have found a reviewable error on either standard.

[14] The respondent concedes that there is nothing in the Board's decision which acknowledges the disclosures about the applicants in the Hungarian media or refers in any way to the resulting extremist comments and threats published online. The Board's discussion of the applicants' personal circumstances is limited to the events which preceded their departure for Canada. The respondent contends that this is immaterial as the basis of the applicants' claim remained the same – fear of persecution by reason of their ethnicity – and the state protection analysis was reasonable.

[15] The respondent argues that the applicants have not established that the publication of their situation in Canada has given rise to new circumstances, constituted a dramatic intensification of pre-existing conditions or jeopardized the possibility of a safe return to Hungary. To the extent that they have faced any backlash as a result of these new developments, it emanates from the same agents of persecution and for the same reason for which they initially sought asylum. The applicants have failed to show how the death of their son in Canada or the publicized nature of their situation affects the Board's finding that Hungary is willing and able to provide protection.

[16] The applicants submit that the evidence before the Board established that their situation has changed dramatically since the death of their son and the resultant targeting of the family. The Board ignored evidence that individuals or groups had publicly promised to kill the family if they returned to Hungary. This ground for seeking asylum is distinct, they argue, from that which led the applicants to flee Hungary.

[17] A *sur place* claim normally arises where an individual expresses views or engages in activities that jeopardize the possibility of safe return to their state. The key issue is usually whether the activities abroad are likely to have come to the attention of the authorities in the claimant's country of origin where the state is the agent of persecution: *The Law of Refugee Status*, James Hathaway, Butterworths, 1991; *Ghazizadeh v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 465 (FCA), 154 NR 236; *Manzilla v Canada (Minister of Citizenship and Immigration)* (1998), 165 FTR 313 (FCTD).

[18] The Court has recognized *sur place* claims where the agent of persecution is not the state but a third party: *A.D. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584; *Moreira v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 608 (FCTD); *Caicedo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 749. I note that in *Darcy v Canada (Minister of Citizenship and Immigration)* 2011 FC 1414 at paras 8-10, the Court declined to recognize a *sur place* claim relating to the risk presented by an individual. In that case, the basis for the claim arose prior to the departure of the applicant from her home country. See also *Aleziri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 38 at para 17.

[19] This Court has also held that credible evidence of an applicant's activities in Canada that are likely to substantiate harm upon return must be expressly considered by the Board even if the motivation behind the activities is not genuine. See for example *Chen v Canada (Minister of Citizenship and Immigration)*, 2009 FC 677. The question of suspect motive was discussed in *Ejtehadian v Canada (Minister of Citizenship and Immigration)*, 2007 FC 158 at para 11:

11 The IRB's articulation of the test in a sur-place claim is incorrect. In a refugee sur-place claim, credible evidence of a claimant's activities while in Canada that are likely to substantiate any potential harm upon return must be expressly considered by the IRB even if the motivation behind the activities is non-genuine: *Mbokoso v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1806 (QL). The IRB's negative decision is based on a finding that the Applicant's conversion is not genuine, and "nothing more than an alternative means to remain in Canada and claim refugee status." The IRB accepted that the Applicant had converted and that he was even ordained as a priest in the Mormon faith. The IRB also accepted the documentary evidence to the effect that apostates are persecuted in Iran. In assessing the Applicant's risks of return, in the context of a sur-place claim, it is necessary to consider the credible evidence of his activities while in Canada, independently from his motives for conversion. Even if the Applicant's motives for conversion are not genuine, as found by the IRB here, the consequential imputation of apostasy to the Applicant by the authorities in Iran may nonetheless be sufficient to bring him within the scope of the convention definition. See *Ghasemian v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1591, 2003 FC 1266, at paragraphs 21-23, and *Ngongo c. Canada (M.C.I.)*, [1999] A.C.F. No 1627 (C.F.) (QL).

[20] There is no suggestion in the present matter that the applicants are responsible for the publicity and resulting threats that the death of their child in Canada engendered in Hungary. They were not seeking attention in an effort to provoke an adverse reaction in their country of origin. Rather, the situation evolved from the decision of a Canadian press outlet to publish the story of their tragic loss and efforts to obtain protection from this country. Credible evidence submitted to the Board was to the effect that this family alone, out of all of the Hungarian Roma



who have sought protection in Canada, had been publicly identified and vilified by extremist elements in that country. This presented a personalized risk to the applicants distinct from the type of generalized discrimination and street violence that they had previously experienced. Here they faced direct threats from members of a broad network of racist extremists linked to authoritarian political parties. The question of whether the protection of the state would be adequate in those circumstances had to be squarely addressed by the Board.

[21] The Board was required to consider this evidence to determine whether the presumption of state protection remained valid. Its failure to do so rendered the decision unreasonable.

[22] No serious questions of general importance were proposed and none will be certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is granted and the matter is remitted to the Board for reconsideration by a differently constituted panel. No questions are certified.

“Richard G. Mosley”

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Judge

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

**DOCKET:** IMM-1806-13

**STYLE OF CAUSE:** LASZLO BALOG, BEATA KOTAI,  
SZABOLCS BALOG, GYULA BALOG,  
GERGO BALOG and SZILVIA BALOG  
v  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 5, 2014

**JUDGMENT AND REASONS:** MOSLEY J.

**DATED:** MAY 9, 2014

**APPEARANCES:**

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