

Federal Court



Cour fédérale

Date: 20141030

Docket: IMM-4383-13

Citation: 2014 FC 1030

Toronto, Ontario, October 30, 2014

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**CSONGOR VARGA
KRISZTINA HOMONNAI
MARTON VARGA
(A MINOR)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

[1] The Applicants are a family composed of a father, mother, and infant child, all citizens of Hungary. The Applicants claim refugee protection in Canada based on the Romani ethnicity of the mother, Krisztina Homonnai, as “claimant”. By the present Application, the Applicants challenge a decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) dated May 14, 2013, in which their claim for refugee protection was denied. The RPD

rejected the claim on the determinative issue of state protection for two reasons: the Applicants did not provide “clear and convincing evidence that, on a balance of probabilities, state protection in Hungary is inadequate” and the Applicants “did not take all the reasonable steps, under the circumstances, to seek state protection in Hungary prior to seeking international protection in Canada” (Decision, para. 17). It is important to note that, regardless of the burden being on the Applicants to rebut the presumption of state protection, the RPD made a positive finding that “adequate” state protection does exist for Roma in Hungary.

[2] For the reasons that follow, I find that the RPD’s decision was made in reviewable error because it exhibits fundamental failure in fact finding.

I. The RPD’s Finding of State Protection

[3] There are two elements of fact-finding leading to a determination of the presumption of state protection in Hungary. Finding on the first element, which engages the nature of the state and its institutions, is not difficult, and is not contested in the present Application. Because Hungary is a functioning democracy in effective control of its territory, and has in place a functioning security force to uphold its laws and constitution, the presumption properly arises (Decision, para. 13).

[4] Finding on the second element is more difficult. At issue in this part of the analysis is the content of state protection: that is, what is it? It is recognized in law that state protection need only be “adequate”. In this context, the word is an adjective used to describe the condition of protection that a certain state offers. It is not possible to say whether that condition is adequate or

inadequate without the engagement of an adequate state protection comparator. The comparator sets the factual standard against which the protection the state offers can be judged as compliant. Thus, the primary preliminary question becomes, what is the factual standard of protection that is considered to be “adequate”? Once the standard is identified, it is possible to conclude whether, compared to the standard, a given condition of state protection meets the standard.

[5] Thus, for the RPD in the present case to conclude that the state protection that exists for Roma in Hungary is “adequate”, a two-step analysis is required: ascertaining the factual standard to be used; and applying the evidence to the standard to determine whether the standard is met.

[6] Most recently, such a factual standard of adequate state protection has been repeated in *Hanko v Minister of Citizenship and Immigration*, 2014 FC 47 at paragraph 9:

Actual police surveillance, visible presence, and immediate response to investigate and take action against the commission of crime and when crime occurs can be considered to be adequate state protection at the operational level. While it is true that even the best trained, educated, and properly motivated police force might not arrive in time, the test for “serious efforts” will only be met where it is established that the force’s capability and expertise is developed well enough to make a credible, earnest attempt to do so, from both the perspective of the victim involved, and the concerned community (see: *Garcia v Canada (MCI)*, 2007 FC 79 at para. 16). [Emphasis added]

The RPD’s key factual analysis on the existence of state protection for Roma in Hungary is based on evidence found in the RPD’s National Documentation Package for Hungary (NDP) as follows:

[28] I acknowledge that there is information in the documentation to indicate that Roma and other ethnic minorities face discrimination in Hungary. However, weighted against this is

persuasive evidence that indicates Hungary candidly acknowledges this problem and is making serious efforts to rectify the discrimination and problems that exist. There is also persuasive evidence that Hungary's efforts to rectify the discrimination and problems that exist have been effective.

[29] The preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Hungary for victims of crime, including crimes committed against Roma, that Hungary is making serious efforts to address the problems of criminality, and that the police are both willing and able to protect victims. Police corruption and deficiencies, although existing and noted, are not systemic. I am of the view in canvassing the documentary evidence, that, as a whole, the issues of corruption and deficiencies are being addressed by the state of Hungary.

[30] Hungary is a multiparty parliamentary democracy. Legislative authority is vested in the unicameral National Assembly (parliament). The parliament elects the president (the head of state) every five years. The president appoints a prime minister from the majority party or coalition following a two-round national election every four years. The last parliamentary elections in April 2010 were assessed as free and fair. The conservative Fidesz-Christian Democrat (KDNP) coalition won a two-thirds majority. Fidesz's prime ministerial candidate, Viktor Orban, took office in May 2010. Security forces reported to civilian authorities.

[31] On January 1, 2011, the new National Defence Service (NOS) commenced operations aimed at eliminating corruption within law enforcement agencies, replacing the former Defense Service of Law Enforcement Agencies. The new NOS 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.

[32] 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.

[33] In the first nine months of 2011 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.

[34] Victims of 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.

[35] Hungary has one of the most advanced anti-discrimination laws and a system for minority protection in the Central and Eastern European region. A number of mechanisms have been developed to ensure that minority groups enjoy civil and political rights. However, the central government's general failure to maintain strong and effective control mechanisms over rights violations takes its toll on Hungary's largest minority, the Roma.

[36] Authorities have made efforts to curtail abuse by the police by increasing the recruitment of Roma police officers, providing training in human rights and setting up, in 2008, the Independent Police Complaint Committee (IPCC) responsible for receiving complaints against misbehaviour of the police. However, according to the resolution, racially motivated abuse allegedly committed by members of the police force continues to be reported. Discriminatory behaviour on the part of the police seems to be, in general, a problem.

[37] It is reported that, on March 25, 2011, the trial of four persons charged in connection with the 2008-09 serial killings of six Roma, including a father and child who were shot fleeing their burning home, began at the Pest County Court. Three of the defendants were charged with multiple homicides, and the fourth was charged as an accomplice in the killings. The case remained pending at year's end.

[38] Documentary evidence indicates that the Independent Police Complaints Board (IPCB) began operation in January 2008. The IPCB, which is independent of the police, reviews complaints of police actions which violate fundamental rights. Sources report that the IPCB is composed of five members who make recommendations to the head of the National Police. If the recommendations are not accepted, the matter can be referred to a court. A report by the COE's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) states that, according to the IPCB members, the police followed up on only a small proportion of the IPCB's

recommendations. Country Reports 2009 indicates that by 15 December 2009, the IPCB had received 697 complaints from the public, reviewed 457 complaints and found violations in 215 cases; of 52 cases forwarded to the National Police Chief, the Chief agreed with 8 cases, partially accepted the findings of 23 cases, and rejected the findings of the other 21 cases.

[39] Another avenue of redress is the Parliamentary Commissioners' Office (also known as the Ombudsmen). There are four Parliamentary Commissioners: the Parliamentary Commissioner for Data Protection and Freedom of Information, the Parliamentary Commissioner for the National and Ethnic Minorities Rights, the Parliamentary Commissioner for Future Generations, and the Parliamentary Commissioner for Civil Rights. The General Guide to the Parliamentary Commissioner's Office states that anyone whose constitutional rights were violated, or who has received threats of violations, by a public employee or official (including police), could apply to the Ombudsman for Civil Rights. Examples of grievances listed in the guide are: "unreasonably long procedures; discrimination; inaccurate or wrong information provided; inequitable personal treatment; unreasonable refusal of information dissemination; unlawful decision; and other omission". The ombudsmen are elected by Parliament to six-year terms and are responsible solely to Parliament. Although the recommendations of the ombudsman institutions have no binding effect, the proportion of recommendations accepted is high. Country Reports 2009 states that the ombudsmen operate without government interference and that the public is generally positive about their activities.

[40] There is also a complaints office at the National Police headquarters. Police action, or inaction, can be challenged in the civil courts; victims can file lawsuits for damages to remedy personal rights violations. There is no single independent institution in Hungary to investigate corruption cases, but there are a number of governmental departments mandated to fight different types of corruption. The Defence Service of Law Enforcement Agencies, which falls under the Ministry of Justice and Law Enforcement, investigates if a member of law enforcement is involved in a corruption case; citizens can turn to them with information. High-level corruption and organized crime cases are under the jurisdiction of the Central Investigation Department of the National Office of the Prosecutor.

[41] The above noted evidence demonstrates that Hungary has made significant efforts to provide better protection for all its citizens, including Roma and other ethnic minorities. The evidence

also demonstrates that Hungary is serious about curbing crime and corruption. Although not perfect, the effectiveness of many of the measures Hungary has taken in recent years is also evident in this documentation. The above noted evidence also demonstrates that police investigate crimes committed against Roma and their property and that the perpetrators are charged and prosecuted when there is sufficient evidence.

[...]

[53] While many of the reports, articles and other documents contained in counsel's documentary evidence describe the problems Roma face in Hungary and throughout Europe, accounts of Hungary and the European Union's efforts and successes in improving the situation of Roma are often contained in the same documents. Information on Hungary's efforts and successes in policing, prosecuting the perpetrators of hate crimes and providing better protection for the Roma are also contained in some of these documents. This reflects Hungary and the European Union's commitment to address the problems encountered by Roma and to eradicate violence and discrimination against this group.

[Emphasis added] [Footnotes omitted] (Decision, paras. 28–41, and para. 53)

Because no factual standard was ascertained or applied in the analysis, I find that the RPD's conclusion that adequate state protection exists for Roma in Hungary was rendered in reviewable error of fact.

[7] In addition, in an un-contradicted and unchallenged argument, Counsel for the Applicants provides a highly detailed critique of the "best efforts" evidence proffered by the RPD as support for the factual proposition advanced that "adequate" state protection exists for Roma in Hungary. The critique contrasts the NDP evidence relied upon by the RPD to the Applicants' wealth of evidence before the RPD that fundamentally challenges the RPD's key factual analysis as follows:

The second aspect of the Board's state protection analysis concerned the objective evidence on country conditions in Hungary. Here, the Board concluded that despite evidence of persecution of Roma in Hungary, there is nevertheless adequate state protection available to them. In this regard, the Board stated that Hungary is making "serious efforts" to rectify the problems faced by its Roma minority and that these efforts have been effective. However, the Board's claim of operational adequacy is contradicted by the evidence, which indicates that the efforts of the Hungarian government have overwhelmingly failed.

(Decision, paras. 27-28)

To illustrate this point, the "efforts" that the Board relied upon as evidence of effective state protection are canvassed below:

- The Board stated that on January 1, 2011, the Hungarian National Defense Service ("NDS") commenced operations aimed at eliminating corruption within law enforcement agencies. However, the Board cited no evidence whatsoever as to whether these operations have had any meaningful effects vis-à-vis the Roma minority. Moreover, the existence of an organization aimed at reducing police corruption is simply not relevant to the question of whether there is adequate protection for Roma victims of racist crime.

(Decision, paras. 31-32;

Gulyas v. Canada (MCI), 2013 FC 254, paras 76-81

Katinkszki v. Canada (MCI), 2012 FC 1326

Orgona v. Canada (MCI), 2012 FC 1438

Rezmuves v. Canada (MCI), 2012 FC 334)

- The Board relied on evidence regarding penalties for police officers found to have engaged in wrongdoing. However, there was no evidence that any of the penalties imposed were in respect of Roma complainants. It is therefore difficult to see what relevance this has to the availability of state protection for Roma.

(Decision, paras. 32-33)

- The Board repeatedly stated that victims of police corruption (including the Applicants) can complain to the IPCB. However, as discussed above, this

program has been sharply criticized, as the police follow up on a very small proportion of the IPCB's recommendations. Moreover, the IPCB's authority is limited to making recommendations and reporting its findings to Parliament. The IPCB is also not vested with the right to interfere with the judicial review of the National Police Chief's decisions. It does not have authority to initiate inquiries and has been criticized as having "insufficient" investigative rights, which are usually limited to the complaint and the file of the case as submitted by the police and make it difficult for the member to reconstruct the facts.

(Decision, paras. 26, 34, 38; Exhibits "F", "G" to the Rojas Affidavit; Application Record Vol. I, pp. 102, 111

Gulyas v. Canada (MCI), 2013 FC 254, para. 19
Katinkszki v. Canada (MCI), 2012 FC 1326, para. 14
Orgona v. Canada (MCI), 2012 FC 1438, para. 14
Rezmuves v. Canada (MCI), 2012 FC 334)

- The Board relied on "efforts" by the Hungarian authorities to curtail police abuses by recruiting Roma police officers and providing training to officers in human rights. However, the document that the Board cited for this statement goes on to state that "racially motivated abuse allegedly committed by members of the police force continues to be reported" and discriminatory behaviour on the part of the police is a continuing problem. The document also states that training on matters related to Roma is "marginal" and that "there is no training at all concerning minorities, conflict management, non-violent crime resolution, mediation or intercultural skills, etc." The document also states that the training efforts that have been undertaken are "not yet sufficient."

(Decision, para. 36; Exhibit "H" to the Rojas Affidavit; Application Record Vol. I, pp. 118-119)

- The Board relied on the fact that, following a series of attacks on the Roma community in 2008 and 2009, the police conducted an investigation that resulted in the arrest of four suspects. However, the

Board failed to mention that despite these arrests, the police were accused of severe omissions and negligence in handling the investigation, and that racist motivation was not established in any of the cases. Moreover, despite these allegations, there is no information on whether the authorities have devised a plan to address the problem: there is still no professional training or capacity-building programs to train police to deal with hate crimes.

(Decision, paras. 37; Exhibits "E", "K" to the Rojas Affidavit; Application Record Vols. I-II, pp. 92-95, 223; *Organa v. Canada (MCI)*, 2012 FC 1438, paras 12-13)

- The Board relied on the avenues for recourse available to victims of discrimination, including recourse to the Minorities Ombudsman. However, the evidence indicates that the Minorities Ombudsman has been criticized as having a limited scope of corrective action. In any event, it is unclear how the Minorities Ombudsman, whose mandate is to deal with discrimination complaints, could provide state protection to the Applicants. At best, the Ombudsman can investigate complaints about police inaction after the fact.

(Decision, para. 39; Transcript, Rojas Affidavit; Application Record, p. 26; Exhibit "K" to the Rojas Affidavit; Application Record Vol. II, pp. 178-179 *Gulyas v. Canada (MCI)*, 2013 FC 254, paras. 76-81)

- The Board relied on the legal avenues of redress available to Hungarian Roma, particularly the ability to sue in court. However, the Board ignored the fact that the Hungarian Court has ruled as unconstitutional the attempts by the government to restrict and criminalize hate speech, and failed to mention that court procedures in Hungary are very long; the willingness of courts to acknowledge non-material damage is very low; and officials are reluctant to prosecute where there is no evidence of physical attack. The Board also failed to mention that the Criminal Code provisions that deal with violent racially-motivated acts are being increasingly used to convict Roma, whereas the law

was designed to protect members of minority groups.

(Decision, para. 40; Exhibits "E", "K","M" to the Rojas Affidavit; Application Record, Vols. I-III pp. 93, 179- 180, 192-195, 324; Transcript; Rojas Affidavit; Application Record, Vol. I, p. 28)

- The Board found that the European Union (“EU”) has implemented strategies to improve the situation of Roma in Hungary, but failed to mention that that the millions of dollars raised by the EU to aid Roma populations throughout Europe, the money is “soaked up by authorities, for studies or conferences, or by Roma organizations themselves [and]... it will take years of social work to improve the plight of the Roma throughout Europe.” The Board also failed to mention that the European Commission recently warned Hungary that it is not in line with the EU’s norms on freedoms and democratic rights, or that Hungary has become a centre of concern in Europe over deterioration of democratic principles.

(Decision, para. 53; See also Exhibits "K"- "M" to the Rojas Affidavit; Application Record, Vols. II- III, pp. 152-162, 275-276, 281, 304, 309-310)

(Applicant’s Memorandum of Law and Argument, paras. 30 – 31)

[8] I find that the critique accomplishes two important results. It confirms that unsuccessful “best efforts” to reach a standard of operational state protection is not state protection, let alone “adequate” state protection. And it also confirms that the application of irrelevant and inaccurate evidence in reaching a factual conclusion will render the conclusion as palpably erroneous. In my opinion, this is the case with respect to the RPD’s adequate state protection conclusion.

II. The Applicants' Rebuttal Evidence

[9] As was expected, in the hearing before the RPD the Applicants tendered evidence to rebut the presumption that state protection exists in the democratic and institutionally laden state of Hungary. The Applicants' position before the RPD was that state protection does not exist for Roma in Hungary because the security force found by the RPD as essential for the presumption to arise is not only incapable of protecting Roma, but is essentially an agent of persecution against Roma. There was ample evidence before the RPD going to establish this real life experience as follows:

The Board's error here was particularly egregious given that the Applicants' lack of faith in the Hungarian authorities was supported by the overwhelming objective evidence of police brutality and racism toward Roma in Hungary, and of the unwillingness of the police to help Roma citizens. This evidence indicates, among other things, that:

- Roma are disproportionately targeted by the police for "stop and search" checks;
- Roma are three times more likely to be stopped for identification checks than non-Roma;
- Hungarian authorities fail to take necessary steps to prevent and respond to violence against Roma;
- Police engage in ethnic profiling of Roma;
- Police selectively apply laws against the Roma to keep them segregated and restrict their freedom of movement;
- There is a lack effective agreements of cooperation between the police and Roma minority self-governments;
- Police brutality against Roma is a problem (especially during interrogations);

- Many Roma victims are fearful of seeking legal remedies, and it is almost impossible for the victims to prove crimes against them even if they have medical certificates about the injuries;
- Law enforcement authorities systematically fail to provide effective protection to Roma;
- Roma victims often experience discriminatory treatment (lack of information and legal help, reluctance from the police etc.) by the police from the very first moment when they want to report a crime. This problem is the most tangible in hate crime investigations, where Roma are the victims of serious racially motivated crimes;
- Provisions to combat hate crimes are not being properly implemented because: the police lack capacity to recognize and investigate hate crimes; the police lack training to enhance such capacity; there are no guidelines for police offices on how to investigate hate crimes and how to treat alleged victims; and there are no guidelines for prosecutors on how to oversee these investigations; and
- Roma officers are reluctant to register reports of Roma victims, especially the racial motivation of a crime reported.

(Applicant's Memorandum of Law and Argument, paragraph 21: Citing Exhibits "E"- "M" to the Rojas Affidavit, Application Record, Vols. I-III, pp. 90-328)

[10] As a result, the RPD was required to determine whether the evidence was sufficiently clear and convincing to establish the fact that, because the evidence exists, there is no state protection for Roma in Hungary. This the RPD completely failed to do. As a result, I find that the decision under review was rendered in further error of fact.

III. The Applicants' Unwillingness to Seek State Protection

[11] Before the RPD, the female Applicant explained her experience with persecution in Hungary. While the RPD did not take issue with the Applicant's credibility, the RPD found that the Applicants "did not take all reasonable steps, under the circumstances, to seek state protection in Hungary prior to seeking international protection in Canada" (Decision, para. 17).

[12] The Applicant testified to three incidents of persecution: in November 2008, she was physically assaulted and robbed by two skinheads after being called derogatory names related to her ethnicity; in January 2009, her car windshield was smashed and a derogatory message related to her ethnicity was spray-painted on her car; and in May, 2010, the Applicant and a friend were accosted by three members of the Hungarian Guard, who shouted racial slurs and also rattled the stroller containing the minor claimant. This final incident caused the Applicants to flee to Canada.

[13] The Applicant only made a complaint to the police following the 2008 incident. With respect to that incident, the Applicant was interviewed by the police, and an investigation was started, but was later terminated with no results. For that reason, no further attempts were made to access state protection. The RPD found that in response to the 2008 complaint, the police acted appropriately and reasonably. The RPD also found that it was "unreasonable that the claimants did not report any of the other incidents they were involved in considering that their evidence suggests that police were willing and able to assist them" and "[i]f the claimants were

to return to Hungary and encounter problems, I am not persuaded that police would not investigate all of their allegations” (Decision, para. 26).

[14] At the hearing of the present Application, Counsel for the Respondent argued that the Applicants’ contact with the police conclusively proves the fact that state protection for Roma exists in Hungary. In my opinion, a single contact with one police officer cannot be out of hand extended to a conclusion that “police are willing and able” to deliver protection. This is so given the Applicants’ evidence of serious police misconduct described in the rebuttal evidence tendered before the RPD.

[15] Thus, I find that the RPD was required to consider the Applicant’s contact with one policeman in context with all of the rebuttal evidence, and come to a conclusion on the appropriate weight to be placed on the single contact with police. Because the RPD failed to deal with the evidence in this manner, I find that the RPD’s expectation of reporting placed on the Applicant constitutes a fact finding reviewable error. I further find that the RPD’s “I am not persuaded” comment is speculation which contributes to the reviewable error.

IV. Conclusion

[16] The RPD’s fundamental failure in fact finding renders the decision under review unreasonable.

ORDER

THIS COURT ORDERS that for the reasons provided, the decision under review is set aside and the matter is referred back for re-determination by a differently constituted panel.

There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 23, 2014

ORDER AND REASONS: CAMPBELL J.

DATED: OCTOBER 30, 2014

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