Federal Court of Appeal Cour d'appel fédérale

Date: 20160614

Docket: A-147-15

Citation: 2016 FCA 178

CORAM: **STRATAS J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

ZSOLT JOZSEF MUDRAK
PATRICK ZOLTAN FEKE
ZSOLT MUDRAK
RENATA FUTO

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS
and CANADIAN COUNCIL FOR REFUGEES

Interveners

Heard at Toronto, Ontario, on February 23, 2016.

Judgment delivered at Ottawa, Ontario, on June 14, 2016.

REASONS FOR JUDGMENT BY:	SCOTT J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.

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REASONS FOR JUDGMENT

SCOTT J.A.

I. Introduction

[1] On August 17, 2011, the appellants left Hungary to come to Canada. Upon landing in Canada, the appellants claimed refugee status, asserting they had experienced racial persecution in their home country based on their Roma ethnicity. *Inter alia*, they alleged that, even though they made complaints to the police with regards to a series of events, state protection was ineffective.

[2] On April 29, 2013, a member of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) rejected the appellants' claim for refugee protection, finding that they had failed to rebut the presumption that the protection provided by the state of Hungary was adequate in the circumstances.

[3] The decision was judicially reviewed by Annis J. (the Judge) of the Federal Court who dismissed the application on February 16, 2015 (2015 FC 188).

[4] In his reasons, the Judge underlined what he perceived as a division within the Federal Court concerning the concept of state protection as it applies to cases involving Roma citizens from Hungary. In his view, some decisions of the Federal Court appeared to shift the onus of proving the inadequacy of state protection from the applicant to the Board, especially in cases involving Hungarian Roma.

[5] Accordingly, he certified the following questions pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

a) Whether the Refugee Protection Board commits a reviewable error if it fails to determine whether protection measures introduced in a democratic state to protect minorities have been demonstrated to provide operational adequacy of state protection in order to conclude that adequate state protection exists?

b) Whether refugee protection claimants are required to complain to policing oversight agencies in a democratic state as a requirement of assessing state protection, when no risk of harm arises from doing so?

[6] At the hearing, held on February 23, 2016, the issue of the propriety of certifying these two questions was raised by this Court. Both parties were invited to provide written submissions on this issue. The Court has received the parties submissions and reply on that issue.

II. Legislative history of section 74 of IRPA

[7] Over the last forty years, the legislation regulating the immigration regime has evolved greatly in this country. In the 1970s, the Federal Court of Appeal was the reviewing court in matters related to refugees, exercising multiple functions under several statutes. In 1978, the *Immigration Act 1976*, S.C. 1976-77 c. 52, rendered the decisions of the Immigration Appeal Board reviewable by this Court as of right. At the time, the Trial Division of the Federal Court only reviewed administrative matters (see the distinction between sections 18 and 28 of the *Federal Courts Act*, R.S.C. 1970 (2nd Supp.), c. 10).

[8] Further to the Supreme Court's decision in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, [1985] S.C.J. No. 11, a vast reform of the immigration regime

was undertaken with the enactment of Bill C-55 (*An Act to amend the Immigration Act and to amend other Acts in consequence thereof*, R.S.C. 1985 (4th Supp.), c. 28). Among several changes brought about, the Immigration and Refugee Board of Canada (IRB) was created. An important filter was also implemented with the requirement of obtaining leave to appeal decisions of the IRB. Even though many voices rose against this new requirement, it appears from the debates surrounding the adoption of that legislation that the objective pursued was a more effective management of resources dedicated to the adjudication process (House of Commons Debates, (12 May 1987) (Hon. Gerry Wiener, Mr. Dan Heap) at 6011; Canada, House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-55, 33rd Parl., 2d sess., (31 August 1987) at 3:5 to 3:6).

[9] In 1992, the *Federal Courts Act*, R.S.C. 1985, c. F-7, was amended. The Trial Division was given the jurisdiction to review most of the decisions rendered by federal administrative tribunals (see *An Act to amend the Federal Courts Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990. c. 8). The Federal Court of Appeal retained its jurisdiction over judicial reviews of decisions rendered by the Convention Refugee Determination Division (CRDD) of the IRB.

[10] Shortly after, further modifications were introduced to the immigration regime. Bill C-86 (*Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49) amended the *Immigration Act*, R.S.C. 1985, c. I-2 [Immigration Act]. Appeals from decisions of the CRDD of the IRB were abolished. The Trial Division was assigned the responsibility of reviewing all of the decisions taken pursuant to the Immigration Act.

[11] More importantly for this case, the certification requirement was introduced in subsection 83(1) of the Immigration Act. Like the leave requirement, the certification process was introduced as a second filter (*Varela v. Canada (Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 [*Varela*]). Subsection 83(1) read as follows:

83.(1) A judgment of the Federal Court-Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court-Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.	**83.(1)** Le jugement de la Section de première instance de la Cour fédérale rendu sur une demande de contrôle judiciaire relative à une décision ou ordonnance rendue, une mesure prise ou toute question soulevée dans le cadre de la présente loi ou de ses textes d'application " règlements ou règles " ne peut être porté en appel devant la Cour d'appel fédérale que si la Section de première instance certifie dans son jugement que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[12] Before the House of Common Legislative Committee on Bill C-86, it was explained that by assigning jurisdiction to the Trial Division of the Federal Court to judicially review the decisions of the IRB, there was in fact an additional level of judicial review. It was also underlined that the certification requirement was intended to filter significant questions of law from questions of fact (Canada, House of Commons, Minutes of Proceedings and Evidence of the House of Commons Legislative Committee on Bill C-86, 34th Parl., 3d sess., (30 November 1992) at 14:61 to 14:64).

[13] In 2001, when enacting IRPA, Parliament chose to maintain the certification requirement and it adopted section 74 which reads as follows:

74. Judicial review is subject to the following provisions:	**74**. Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
…	[…]
(d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	d) sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[14] This legislative context is relevant to understand the purpose of this requirement and its importance within the immigration system as a whole. In *Huynh v. Canada*, [1996] 2 F.C.R. 976, [1996] F.C.J. No. 494 (F.C.A.) [*Huynh*], this Court explained that appeal rights are solely created by the legislature. More recently, this Court has emphasized again one of the purposes of section 74 of the IRPA as being a gatekeeping provision to ensure that applications that have no merit are dealt with in a timely manner (*Varela* at paragraph 27).

III. Key principles

[15] This Court in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (QL), 176 N.R. 4 [*Liyanagamage*]) set the principles that should be considered when determining whether a question should be certified:

> [4] In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application (see the useful analysis of the concept of "importance" by Catzman J. in *Rankin v. McLeod, Young, Weir Ltd. et al.* (1986), 57 O.R. (2d) 569 (Ont. H.C.)) but it must also be one that is determinative of the appeal. The certification process contemplated by section 83 of the *Immigration Act* is neither to be equated with the reference process established by section 18.3 of the *Federal Courts Act*, nor is it to be used as a tool to obtain from the Court of

> Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.

[16] In *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 F.C.R. 290 [*Zhang*], at paragraph 9, this Court reaffirmed these principles. It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Liyanagamage*, at paragraph 4; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, [2004] F.C.J. No. 368 (QL) at paragraphs 11 and 12 [*Zazai*]; *Varela* at paragraphs 28, 29, and 32).

[17] In *Varela*, this Court stated that it is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified. The statutory requirement set out in paragraph 74(*d*) of the IRPA is a precondition to the right of appeal. If a question does not meet the test for certification, so that the necessary precondition is not met, the appeal must be dismissed.

[18] In recent years, this Court has regularly dismissed cases when questions were improperly certified (*Torre c. Canada (Citoyenneté et Immigration)*, 2016 CAF 48, at paragraph 3; *Kenguruka c. Canada (Citoyenneté et Immigration)*, 2015 CAF 202, [2015] A.C.F. no 1997 (QL) at paragraph 3; *Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, [2015] F.C.J. No. 125 (QL) at paragraph 11 [*Lai*]; *Zhang* at paragraph 16).

[19] As a certified question is a precondition to this Court's jurisdiction, it is a requirement that must not be taken lightly. Indeed, the Supreme Court has ruled that once the Court considers that a question was properly certified, the entirety of the judgement is under appeal (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46 (QL), at paragraph 25; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL)). If a question has been improperly certified, the Court must not look into the other issues of the case (*Kunkel v. Canada (Citizenship and Immigration)*, 2009 FCA 347, [2009] F.C.J. No. 1700 (QL) at paragraph 13 [*Kunkel*]).

IV. Issues

A. *The Propriety of the First Certified Question: Whether the Refugee Protection Board commits a reviewable error if it fails to determine whether protection measures introduced in a democratic state to protect minorities have been demonstrated to provide operational adequacy of state protection in order to conclude that adequate state protection exists?*

(1) Respondent's position

[20] The respondent argues that neither of the questions should have been certified as the questions are not dispositive of the appeal. It suggests that they are not of general importance since they have been answered by the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (QL) [*Ward*]. The respondent adds that similar questions have been raised and dealt with in *Canada v. Villafranca (Minister of Employment and Immigration)*, [1992] F.C.J. No. 1189 (QL), 99 D.L.R. (4th) 334 (F.C.A.); *Canada (Minister of Citizenship and Immigration) v. Kadenko,* [1996] F.C.J. No. 1376 (QL), 143 D.L.R. (4th) 532

[*Kadenko*]; *Hinzman v. Canada (Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413 [*Hinzman*]; and *The Minister of Citizenship and Immigration c. Flores Carillo*, 2008 FCA 94, [2008] 4 F.C.R. 636 [*Flores Carrillo*].

[21] The respondent underlines that inadequacy of state protection turns on its own facts. In the present case, the Board concluded that state protection was adequate and effective. That conclusion was supported by the evidence, such as the police response to the appellants, the evidence contained in the National Documentary Package (NDP) and the fact that oversight agencies ensure that the state programs put in place to improve Roma protection are implemented. The Respondent also points out that the Judge came to the same conclusion that state protection was adequate. Therefore, the concept of "operational adequacy" was not dispositive of the case, thus it is not relevant.

[22] The respondent concludes that in view of these findings the first question does not arise from the facts of this case and therefore fails to meet one of the requirements for certification.

(2) Appellants' position

[23] The appellants take the opposite view and argue that the question is dispositive of the appeal. They emphasize that most of the conclusions of fact focus on the methods introduced by the state to increase state protection, but that there was little evidence about their "operational adequacy".

[24] The appellants rely on the conclusion of the Judge that it might be an error not to conduct an "operational adequacy" analysis. They maintain that the question is dispositive of the case and raises issues that are unresolved and transcending.

(3) Analysis

[25] In my view, the first question does not meet the applicable principles for certification because is it neither determinative of the issue, nor of general importance.

[26] It is not determinative of the issue because the Board did consider the adequacy of state protection in its reasons. It weighed the evidence to come to the conclusion that it was adequate:

> [19] While the effectiveness of the protection is a relevant consideration, the preponderance of recent Federal Court decisions has held that the test for a finding of state protection is whether the protection is adequate, rather than effective per se. A claimant must show that they have taken all reasonable steps in the circumstances to seek protection, taking into account the context of the country of origin, the steps taken, and the claimant's interactions with the authorities.
>
> …
>
> [24] While it is true that in many claims, little corroborative evidence is proffered in support of the claim. In this particular case, documentary evidence was submitted to support the foregoing incidents. However, there is insufficient evidence to lead the panel to conclude that the police did not act in accordance with the laws in pursuing an investigation. In the case of the July 27, 2009 incident pertaining to the principal claimant's wife, an investigation was, in fact, carried out and, in the absence of witnesses or identity, the perpetrator could not apprehended (sic). However, this clearly demonstrates that the police were acting in a responsible manner. In the other two cases, the principal claimant did not follow up. The police took a report, but there was never any follow-up on the part of the principal claimant with that officer, or anyone else in authority.
>
> [25] The claimants also provided corroborative evidence and the principal claimant alleged that this document was from the Roma Minority Self-Government. However, when further questioned, the claimants acknowledged

> that they paid a fee to this organization "Public Benefit Organization for Information and Protection of the Interests of Minorities" and that this Organization holds cultural events twice per week to ensure that the Roma culture does not disappear. While the foregoing provided information with respect to the claimant's involvement in the community, it provided no probative value with respect to their ability to obtain state protection.
>
> [26] Given the foregoing, the Board concludes that the claimants have not provided "clear and convincing" evidence of the state's inability to protect them. The onus is on them to do so and they have, therefore, not rebutted the presumption of state protection.
>
> [My emphasis]

[27] After considering all the written documentation filed into evidence, the Board also made the following additional findings:

> [62] The documentary evidence relating to government efforts to protect the Roma is mixed. However, in the particular circumstances of this claim, 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 sought help from people higher in authority, or with other mechanisms, such as the Minorities Ombudsman's Office or the Independent Police Complaints Board (IOPCB).
>
> [63] The Board recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the objective evidence regarding current country conditions suggest 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 the problems, and that the police and government officials are both willing and able to protect the victims.
>
> [My emphasis]

[28] In fact, the Judge, in his reasons, acknowledged that the Board's analysis was adequate and had applied the law correctly (Judge's Reasons at paragraph 67):

> [67] While the emphasis has been on the extent of the protections created by the state on a going-forward basis, the Board has not minced words in portraying

> the gravity of the violence, or the social and economic discrimination the Roma suffer in Hungary. The Board has obviously balanced those considerations with all the evidence on state protection. I am satisfied that the Board has correctly stated the law on state protection and has applied it to the totality of the evidence on this issue with the conclusion that for these applicants, state protection was adequate. I see no reviewable error in the Board's conclusions in this regard.

[29] The Board weighed the evidence concerning the adequacy of state protection and concluded that the appellants had failed to produce convincing evidence to rebut the presumption applicable, which is in line with the authorities on the subject (*Ward* at page 724; *Hinzman* at paragraphs 56 and 57, and *Flores Carillo* at paragraphs 24 and 26).

[30] A reading of the Judge's decision leads to the conclusion that the first question certified arises from his Reasons, where he reviews a certain line of Federal Court decisions and infers that they might be interpreted as imposing an onus on the Board to demonstrate in its reasons the "operational adequacy" of recent measures adopted by Hungary to protect the Roma citizens. The Judge wrote:

> [48] By and large, the decisions setting aside Board conclusions of adequate state protection are based upon the failure of the Board's reasons to demonstrate "the extent to which government action translates into operational adequacy" (see *Buri v Canada (Citizenship and Immigration)*, 2014 FC 45 at para 62, 237 ACWS (3d) 188; *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5, 211 ACWS (3d) 946 [*Hercegi*]; *Stark v Canada (Citizenship and Immigration)*, 2013 FC 829 at paras 10-11, 234 ACWS (3d) 1012; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 at paras 36-37, 231 ACWS (3d) 777 [*Beri*]); *EYMV v Canada (Citizenship and Immigration)*, 2011 FC 1364, [2011] FCJ No 1663 (QL) [*EYMV*]).
>
> [49] These views are well articulated in *Beri* at paragraph 44 as follows:
>
> > [44] In my view, the RPD's Decision as regards to state protection is more descriptive in nature than it is analytical. That is, it describes state efforts intended to address discrimination, persecution and protection of the Roma but undertakes no real

> analysis of the operational adequacy or success of those efforts. As stated by Justice Mosley in *EYMV v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364, [2011] FCJ No 1663 (QL) [*EYMV*]:
>
>> [16] The Board 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 (*Jaroslav v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 634, [2011] F.C.J. No. 816 at para 75). Any efforts must have "actually translated into adequate state protection" at the operational level (*Beharry v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 111 at para 9.

[Emphasis added]

[50] If other evidence has not established to the Court's satisfaction that there has been a failure of state protection, in my view, these reasons tend effectively to shift the onus away from the applicant having to establish inadequate state protection such that it becomes incumbent on the RPD, if it wishes to avoid committing a reviewable error, to demonstrate that the measures taken by the Government of Hungary have been translated into "operational adequacy" of state protection for Roma citizens.

[51] What I have described as the reversing of presumptions from the claimants to the Board also occurs when the Board is judged as having acknowledged an increasing number of incidents of violence against Roma citizens or, to similar effect, by the fact that the Hungarian government undertakes measures to protect them. This is described in *Horvath v Canada (Minister of Citizenship and Immigration)*, 2013 FC 95, 224 ACWS (3d) 750 [*Horvath (Ferenc)*]. The Court in *Horvath (Ferenc)* found that by the Board noting "some problems have worsened" and this "raises the Dunsmuir… value of justification that is, whether the Board has reasonably justified its finding of state protection given its acknowledgement of submissions indicating violence was increasing" (*Horvath (Ferenc)* at paras 44-45, emphasis added).

…

[72] Nevertheless, if a question affecting the determination of this judicial review application on the issue of state protection entails the Board being required to demonstrate in its reasons the "operational adequacy" of the recent measures to protect Roma citizens; I do not believe that the Board has met that requirement, because it quite properly never set out to do so.

[31] With respect, the inference that the onus shifts on the Board to demonstrate "operational adequacy" of protection measures is wrong. The cases cited by the Judge do not stand for that principle. Simply put, these cases determined that the Board's decisions could not stand because they ignored relevant evidence or because the syllogism was flawed, which were legitimate grounds to intervene.

[32] For example, in *Hercegi v. Canada (Citizenship and Immigration)*, 2012 FC 250, [2012] F.C.J. No. 273 (QL), it was determined that the Board failed to turn its mind to the question of state protection:

> [5] The reasons do not address the issue of state protection properly. They do not show whether, and if so, what, the Member considered as to provisions made by Hungary to provide adequate state protection now to its citizens. 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 <u>that is relevant</u>. In the present case, the evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens.
>
> [My emphasis]

[33] In *Majlat v. Canada (Citizenship and Immigration)*, 2014 FC 965, [2014] F.C.J. No. 1023 (QL) the Federal Court found that the analysis did not only focus on mere speculation but was based on failures by the applicants to seek protection of the state and dismissed the judicial review:

> [36] However, despite the use of language that speaks to efforts made by the Hungarian state, the RPD did not focus its state protection analysis in this case only on the mere fact that efforts had been made. Rather, when the decision is read carefully, it is apparent that it turns on the fact that the applicants failed to make a complaint to the police in 2010, failed to follow up on the 2009 complaint and did not make any complaints about the alleged sub-standard medical treatment. The RPD held that in light of these failures the applicants had not rebutted the presumption of adequate state protection because the documentary evidence, while mixed, does not establish that the Hungarian state would have

> been unable to address their complaints. This is made clear from the following passages in the decision:
>
> […]
>
> [37] Thus, unlike the cases of *Orgona*, *Garcia*, *Bors*, and *Kovacs*, the RPD here did not assess only whether the Hungarian state was making efforts to correct the plight of the Roma. Rather, it reviewed both those efforts and the adequacy of those efforts and accordingly did not apply the wrong test. Thus, this argument likewise fails.
>
> [My emphasis]

[34] In reality, the certified question arises from an incorrect interpretation of current Federal Court jurisprudence. It becomes obvious, when considering that at paragraph 46 of his Reasons, the Judge referenced a dozen decisions concerning the adequacy of state protection in Hungary. Even though the cases turn essentially on the same issue that is the adequacy of state protection no judge has determined that the matter raised a question that could be certified pursuant to section 74(*d*) of IRPA.

[35] As stated, that first question is somewhat theoretical and, in my view, is more in the nature of a reference, which is prohibited (*Lai*; *Zazai*; *Varela*). Each case involving Hungarian Roma citizens will turn on its own facts.

[36] It is also not of general importance because the law on this issue is well settled (*Ward* at page 722; *Hinzman* at paragraphs 42 to 46; *Kadenko* at paragraph 5; *Flores Carrillo* at paragraphs 16 to 30).

B. *The Second Certified Question: Whether refugee protection claimants are required to complain to policing oversight agencies in a democratic state as a requirement of assessing state protection, when no risk of harm arises from doing so?*

(1) Respondent's position

[37] The respondent argues that the second question also fails to meet the test for certification as it does not, in the case, arise from the facts because the Board found that the appellants had failed to follow up on their complaints to the police with an oversight agency.

[38] In addition, the respondent states that it is settled law that the appellants had the burden of establishing the inadequacy of state protection and that convincing evidence is required to rebut the presumption of adequate state protection where oversight agencies exist (*Kadenko; Hinzman; Flores Carillo*).

(2) Appellants' position

[39] The appellants adopt the Judge's view that some cases involving Hungarian Roma citizens were rejected on failures to complain to the police and to oversight agencies.

[40] The appellants question whether the legal principles are as well settled as the respondent claims because of the divergence among judges of the Federal Court. They argue that Hungarian Roma citizens' cases are *sui generis* and might need a different legal approach. They also underline the fact that none of the cases cited by the respondent concern Hungarian Roma

refugees. Moreover, the appellants take the position that the question does not rise from the Judge's Reasons, but rather from the case itself.

[41] Even if they accept that the legal principles were settled, it would remain that the law is applied differently depending on the judge of the Federal Court.

[42] Hence, the appellants consider that this second question meets the criteria of being of general importance.

(3) Analysis

[43] As I turn to the Board's decision, while it mentioned the existence and availability of oversight agencies in Hungary, it did not draw an adverse conclusion against the appellants based on their failure to file a complaint with the oversight agencies, but on their omission to follow-up with the police. The requirement of going to an oversight agency in a specific country is heavily fact driven. In my view, the second question also fails to meet the criteria for certification, as it is not of general application.

[44] In its reasons, the Board mentions that it might be required to go to oversight agencies. However, it is clear that it found that the police's response to the complaints was adequate in the circumstances:

> [24] While it is true that in many claims, little corroborative evidence is proffered in support of the claim. In this particular case, documentary evidence was submitted to support the foregoing incidents. However, there is insufficient evidence to lead the panel to conclude that the police did not act in accordance with the laws in pursuing an investigation. In the case of the July 27, 2009

incident pertaining to the principal claimant's wife, an investigation was, in fact, carried out and, in the absence of witnesses or identity, the perpetrator could not (sic) apprehended. However, this clearly demonstrates that the police were acting in a responsible manner. In the other two cases, the principle claimant did not follow up. The police took a report, but there was never any follow-up on the part of the principal claimant with that officer, or anyone else in authority.

…

[26] Giving the foregoing, the Board concludes that the claimants have not provided "clear and convincing" evidence of the state's inability to protect them. The onus is on them to do so and they have, therefore, not rebutted the presumption of state protection.

…

[62] The documentary evidence relating to government efforts to protect the Roma is mixed. However, in the particular circumstances of this claim, 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 sought help from people higher in authority, or with other mechanisms, such as the Minorities Ombudsman's Office or the Independent Police Complaints Board (IOPCB).

[63] The Board recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the objective evidence regarding current country conditions suggest 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 the problems, and that the police and government officials are both willing and able to protect the victims.

[64] The Federal Court of Appeal has made reference to protection being "adequate." It is also clear that "no government that makes any claim to democratic values of protection of human rights can guarantee the protection of all of its citizens at all times." Effectiveness of protection should not be set too high. Consequently, as long as the government is taking serious steps to provide or increase protection for individuals then the individual must seek state protection.

[65] I find that the government of Hungary is taking important steps to ensure state protection is available to their citizens including those of Roma ethnicity and that the claimants did not take reasonable steps to avail themselves of that protection. I acknowledge counsel's submission as supported by the country documents that the protection is not perfect and there are many areas that require improvement including in regard to the corruption of some police. However, I

> still find that in this case state protection would be available and, although in need of improvement, is adequate.
>
> [66] Just because the police did not apprehend the culprits, or that the claimants complaint was not pursued with the diligence that the claimants would have preferred does not mean that state protection in their home country is not adequate. There may be many factors that could contribute to this, including lack of physical evidence, lack of suspects (which was identified in the letter sent to the principal claimant), higher priorities for the police, and lack of witnesses. The Federal Court has stated that the Court should not impose on other states a standard of "effective" protection that police forces in our own country, regrettably, sometimes only aspire to. It is open to the panel to determine if the state was unable to protect them, not in the absolute sense, but rather to a degree that was reasonable having regard to the circumstances of the claimants.
>
> [67] There is no evidence of a complete breakdown of the state apparatus. In fact the evidence is that the state is making a serious effort to ensure state protection is available to the Roma. There is no evidence of past personal experience that would lead the claimants to believe that state protection would not be adequate or reasonably be available to them.
>
> [68] The claimants have not met their burden of presenting clear and convincing proof of the state's inability to protect them. I find that state protection is available to these claimants and this finding is fatal to their claims under both section 96 and section 97 of the Act.

[45] Given that the Board concluded that there was no misconduct by the police on the ground, the reasons pertaining to the Minorities Ombudsman's Office or the Independent Police Complaints Board are *obiter dicta*. However, the Judge makes this an essential point of his analysis. He concluded with the following:

> [105] Yet, by my interpretation of the jurisprudence cited above, because oversight agencies are said to serve no function of protection and there is no evidence that the complainant's safety will be improved from other random acts of violence, the need to complain to the oversight agencies is not relevant to state protection. Thus, by this jurisprudence, the Board committed a reviewable error by insisting that the failure to follow up on alleged policing inadequacies with either the police or any oversight agency was a ground to reject the application.
>
> [106] In my view, these principles do not properly state the requirements of state protection. Moreover, they result in the circumstances where all citizens of

> Canada and Hungary lose by this rule, except the refugee claimant making a false claim of having been the victim of an incident of persecution.

[46] The question does not arise in this case as there is a finding of fact that the police's response was adequate.

[47] In my view the question as formulated is too fact specific to comply with the requirements of section 74 of IRPA.

[48] In *Lai*, the Federal Court judge had certified the following question: whether section 37 of IRPA required "evidence of a specific foreign offence and an equivalency analysis and finding of dual criminality between a foreign offence and an offence punishable under an Act of Parliament by way of indictment". This Court found that the analysis of the specific elements of foreign and domestic offences could never be the basis for certifying a question for this Court to answer. Likewise, the requirement to complain to policing oversight agencies in a democratic country in any given case is too specific and multifactorial to be certifiable.

[49] Even more similar to the present case was the decision of the Federal Court in *Bhuiyan v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 906 (F.C.) (QL), 66 F.T.R. 30. MacKay J. was asked to certify questions with regards to the test to apply to assess changes in a country conditions that warrant the rejection of a refugee claim. It was ruled that such questions could not be certified because any change in country conditions must be assessed in relation to its significance for the particular claim before the Board. In the same way, the Board needs to review the specific evidence adduced in a case before it determines if there was a

requirement to go to an oversight agency. It is fact specific. It could be warranted in one case, but not in another. There is no legal question for this Court to answer. Hence, like in *Kunkel*, it is not to say that the question is not important, but rather it does not transcend, nor is it of general importance. It should not have been certified by the Judge.

V. Conclusion

[50] Since both questions ought not to have been certified, the certified questions should not be answered because they do not arise on the record.

[51] Consequently, I propose that this appeal be dismissed.

"A.F. Scott"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-147-15

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE ANNIS DATED FEBRUARY 16, 2015, DOCKET NO. IMM-3582-13

STYLE OF CAUSE:	ZSOLT JOZSEF MUDRAK, PATRICK ZOLTAN FEKE, ZSOLT MUDRAK, RENATA FUTO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND CANADIAN ASSOCIATION OF REFUGEE LAWYERS AND CANADIAN COUNCIL FOR REFUGEES
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 23, 2016
REASONS FOR JUDGMENT BY:	SCOTT J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.
DATED:	JUNE 14, 2016

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