



RPD File No. / N° de dossier de la SPR : TB3-05923  
TB3-05924  
TB2-01023

*Private Proceeding / Huis clos*

## Reasons and Decision – Motifs et Décision

<b>Claimant(s)</b>	XXXX XXXX XXXXXXXXXX XXXX XXXX XXXXXXXXXX XXXX	<b>Demandeur(e)(s) d'asile</b>
<b>Date(s) of Hearing</b>	November 15, 2018 December 13, 2018	<b>Date(s) de l'audience</b>
<b>Place of Hearing</b>	Toronto, Ontario	<b>Lieu de l'audience</b>
<b>Date of Decision and reasons</b>	January 4, 2019	<b>Date de la décision et des motifs</b>
<b>Panel</b>	H. Ross	<b>Tribunal</b>
<b>Counsel for the Claimant(s)</b>	Maureen Silcoff Barrister & Solicitor	<b>Conseil(s) du (de la/des) demandeur(e)(s) d'asile</b>
<b>Designated Representative(s)</b>	N/A	<b>Représentant(e)(s) désigné(e)(s)</b>
<b>Counsel for the Minister</b>	Samantha Tena-Russell	<b>Conseil du (de la) ministre</b>

## REASONS FOR DECISION

[1] The claimants, XXXX XXXX, (principal claimant), XXXX XXXX XXXX, and XXXX XXXX XXXX seek protection in Canada pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA).<sup>1</sup> They claim to have a well-founded fear of persecution in their native Hungary, by reason of their Roma ethnicity.

### ALLEGATIONS

[2] The claimants have set out their allegations, in greater detail, in the narrative of their Personal Information Forms, (PIF), as amended.<sup>2</sup> The principal claimant alleges that, like her parents, she was subjected to discrimination at primary school. Fellow students ridiculed her, while her teachers were not interested in her. So much so, she was unable to complete her primary education. Her adult life has been marked by further discrimination. Notably, the claimant was attacked by Hungarian nationalists, who kicked her in the stomach, causing her to miscarry the 17 weeks old foetus she was carrying.

[3] The adult male claimant alleges, that he endured years of persecution in Hungary because of his ethnicity. “Guardists” abused him, and he received several anonymous death threats. He was held back at school and had difficulty obtaining work. He also alleged, that the police did not provide them with state protection, when they tried to make a complaint.

### ISSUES

[4] The central issue in the claim is credibility. With regard to the adult male claimant, delay in claiming is also a relevant consideration.

#### Identity

[5] Copies of the claimants Hungarian passports, and the principal claimant’s national identity card, were among the documents provided to the Board by CBSA. Also on file, are letters from

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<sup>1</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended, sections 96 and 97(1).

<sup>2</sup> Exhibits 2 & 4.

the Roma Community Centre on Dundas Street West, Toronto, that attest to the Roma identity of the claimants. Based on these documents, as well as the oral testimony of the principal claimant and her spouse, the panel is satisfied as to the claimants' personal identity and citizenship.

### **Credibility and Well Founded Fear**

#### *The Principal Claimant*

[6] At the start of the hearing, the principal claimant swore to the truth of the content of the PIFs, as amended.<sup>3</sup> When asked, she denied wanting to make any further amendment to the PIFs, neither were there any documents that the claimants wanted to rely on, that had not been put before the panel. The entire family were relying on the narratives of the principal, and adult male claimants, i.e. the parents. The Minister participated in the hearing, by filing documents, and making written submissions in relation to the issue of credibility.

[7] In *RKL v. Canada (Minister of Citizenship and Immigration)* 2003 FTC 116, the Federal Court opined, that credibility forms the crux of the Board's determination of refugee protection claims. The Court put the issue this way:

The determination of an applicant's credibility is the heartland of the Board's jurisdiction. This Court has found that the Board has well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility and the subjective fear of persecution of an applicant:  
see *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1800 at para. 38 (QL) (T.D.); and *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 1998 CanLII 8667 (FC), 157 F.T.R. 35 at para. 14.<sup>4</sup>

[8] In *Maldonado*,<sup>5</sup> Federal Court of Appeal, (FCA), set out the principle, that when a claimant swears to the truth of certain facts, this creates a presumption that the facts are true,

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<sup>3</sup> Exhibits 2, 3, 4 & 10.

<sup>4</sup> *Lubana, Rajwant Kaur v. M.C.I.* (F.C.T.D., no. IMM-2936-02), Martineau, February 3, 2003.

<sup>5</sup> *Maldonado, Pedro Enrique Juarez v. M.C.I.* (F.C.A., no. A-450-79), Heald, Ryan, MacKay, November 19, 1979. **Reported:** *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.); 31 N.R. 34 (F.C.A.).

unless there is valid reason to doubt their truthfulness. In other words, a claimant's sworn testimony gives rise to a rebuttable presumption of truthfulness.

[9] The panel also considered and applied Guideline 4, which addressed the difficulties that women claimants, fearing gender-related persecution, may have in presenting their cases.<sup>6</sup> As well, the panel considered the UNHCR handbook with respect to the difficulties that claimants, generally, may have in substantiating claims. Nonetheless, the panel found that the principal claimant's evidence, and oral testimony, was fraught with serious credibility concerns that it was unable to resolve in her favour, even after it took these guiding principles into consideration.

[10] The first concerns, arose from the contradiction between statements that the principal claimant is reported as having made at the Port of Entry (POE).<sup>7</sup> As stated above, in her PIF narrative, the principal claimant claimed to have a well-founded fear of persecution in Hungary, by reason of her Roma ethnicity. She also described an incident when she was kicked in the stomach, causing her to miscarry. She also claimed to have been raped by members of the Hungarian Guard, all of which led to her becoming depressed.

*Concerns arising from Statements made at the Port of Entry*

[11] The principal claimant was interviewed twice. She was interviewed immediately upon arrival in Canada, and interviewed again after she was detained. The principal claimant's responses to the questions at Boxes 42 of her claim for refugee protection are recorded as, "I am not afraid of anyone, I just want to let you know that there are no resources to live there." The claimant reiterates this statement at Box 43 of the claim, where she is recorded as stating,

Because in my country nothing exists, there is no food, there are no jobs, there are no jobs, I cannot work. How can I feed my family? I don't have shelter, I don't have a house and I don't have food. That is why I am here. I cannot support my family at all.

[12] These statements stand in stark contradiction to her later statements, in her PIF, and in her oral testimony, that claim that a well-founded fear of persecution, based on racist incidents, in

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<sup>6</sup> Chairperson's Guideline 4: *Women Refugee Claimants Fearing Gender-Related Persecution*.

<sup>7</sup> Exhibit 1.

which Hungarian nationalists attacked, assaulted, and battered her with dire consequences to her physical well-being and mental health.<sup>8</sup>

[13] In her submissions, the Minister's representative phrased the issue in the following terms, "why would the principal claimant tell the officer who interviewed her that despite being Roma she had no have any fear of returning to her country?"<sup>9</sup> The Minister's representative pointed out, that the principal claimant had also told the officer that she was ready to return to Hungary. The Minister's representative took the position that the latter allegations in her PIF, were significantly contradictory of the statements the principal claimant made at the POE; and argued that these contradictory statements, called into question the overall credibility of the principal claimant.

[14] The panel put the contradictions squarely to the principal claimant. She denied making the statements. She said she did not remember saying that she had no fear of returning to, or that she was willing to return to Hungary. She testified that while she remembered being interviewed, she had only a hazy memory about the interview. She remembered that she was asked what she feared in Hungary, and she remembered responding that she had been attacked, lost her child, and was very scared. She stated that she told the interviewing officer that her partner was in Toronto. She described her emotional state during the interview as "very fearful and very stressed". The principal claimant alleged that her emotional state had been negatively influenced by the officer, who had treated her very badly. Asked to explain in what way the officer treated her badly, the principal claimant testified that the officer told her that she would be sent back to Hungary on the next plane. The principal claimant also told the panel, that at the POE she was following the instructions of the agent who brought her to Canada. The agent had advised her to not state the true basis of her claim, until after she had gained entry into Canada, and spoken to a lawyer.

[15] On considering the principal claimant's testimony, the panel concluded, that she had been less than straightforward when recounting her recollection of what had occurred at the POE. Both times that the principal claimant was interviewed, her responses were recorded, and the officer interviewing her made contemporaneous notes and observations regarding her and the interview. These responses, as translated by the interpreter, do not reflect the statements the principal

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<sup>8</sup> Exhibits 1 & 2.

<sup>9</sup> Exhibits 8 & 9.

claimant said she made. That is, the officer's notes do not mention that the claimant said she had been attacked, or had lost a child as a result; nor do they say that her partner was in Toronto. As indicated earlier, her responses at Boxes 42 and 43 indicate a purely economic motivation for the principal claimant's decision to come to Canada.

[16] With respect to her spouse, the POE notes do not mention him. They mention a XXXX XXXX. The principal claimant told the officer that Mr. XXXX had invited her to visit him in Toronto, and would host her during the visit.<sup>10</sup> In fact, the principal claimant sought permission to enter Canada to visit with Mr. XXXX. The officer noted, that when Mr. XXXX was telephoned, he denied ever extending such an invitation to the principal claimant.<sup>11</sup> Mr. XXXX told the officer, that he was willing to put the principal claimant up for one night only.

[17] The panel accepts, that during the initial interview, the principal claimant would have experienced some degree of fear and apprehension, after all, she was in a strange country being interviewed by a person in authority, and she could have no reference point for the likely outcome of the interview. Nonetheless, for the following reasons, the panel finds that there are valid reasons to doubt, and to reject, this aspect of the principal claimant's testimony.

[18] Firstly, the first time that an attack on the principal claimant is mentioned is when she actually makes her claim for refugee protection.<sup>12</sup> The principal claimant made a claim for Convention refugee protection two days after she arrived in Canada, and, according to her, after a female guard told her "she did not have to cry as she was in a safe place." This guard encouraged her to call a lawyer. The panel does not accept that an agent would have counselled the claimant to put forward an entirely economic reason for coming to Canada, while at the same time advising her to talk to a lawyer. However, this is not the only, or primary, reason why the panel doubts, and rejects, the principal claimant's testimony.

[19] The panel also doubts, and rejects, her claim that she does not remember telling the officer about Mr. XXXX, who she testified was the brother of her pastor because this testimony does not explain how the officer came to have his name and telephone number. In the panel's view, the

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<sup>10</sup> Exhibit 9, at p. 1.

<sup>11</sup> Ibid, at p. 2.

<sup>12</sup> Exhibit 1 & 9.

only way the officer could come by this information, is if the principal claimant had provided it. Thus, the panel finds, on a balance of probabilities, that on arriving in Canada, and on being interviewed, the principal claimant did name Mr. XXXX as the person she had come to visit, and did request entry into Canada for the purpose of visiting with him. The panel also finds, that she did provide the officer with Mr. XXXX telephone number. Therefore, it finds her response, that she did not remember this particular sequence of events, to be disingenuous and misleading.

[20] As well, the panel does not accept that the principal claimant has as poor recall, of the events at the POE, as she claims to have, because her responses demonstrated significant recall of many of the core components. The principal claimant was able to recall how many officers were present at the initial interview, and what their respective roles were – one officer interviewed her, the other photographed her. She remembered well, talking about her spouse and the fact that he was already in Canada, as well as recounting the alleged assaults, and her fear of the Hungarian Guards. She also testified, that the officer had stressed the need for her to answer the questions truthfully, and she recalled being told that she appeared fearful.

[21] The panel finds, that the level of detail about what the principal claimant claims she recalled is incompatible with a hazy memory of the interview. The panel finds that the principal claimant's memory appeared to fail only with respect to those areas that were potentially detrimental.

[22] In particular, the panel found, that given that the principal claimant's spouse had preceded her some three months earlier, and given that the plan was to have the family reunite in Canada, it is reasonable to expect that the claimant would have told the officer that she, and the minors, were coming to reunite with her spouse. That the officer telephoned Mr. XXXX to verify her story of an invitation to visit with him, is, in the panel's view, indicative of the fact that the principal claimant did not mention her spouse at the POE as she claimed.

[23] The principal claimant also volunteered, that the officer had given her an express opportunity to be truthful. She spontaneously testified, that the immigration officer had not only underscored to her that she should make truthful statements; he had also put it to her, that she appeared to be under duress, and encouraged her to "come clean" and to tell the truth. Her testimony in this regard was: "At that moment the officer did notice that I was lying and he told

me that I know you are under a threat, and now I have all of the documents supporting that I was under a threat.”

[24] While it is not clear to the panel, that the threat the officer perceived the principal claimant to be under, and the threat the claimant is referring to, is the same, (the officer seemed to have been concerned with the possibility of human trafficking); and, also, while the principal claimant may have been reluctant to deviate from the agent’s “script”, the panel finds that she had been given ample opportunity to be truthful about why she was coming to Canada, but had opted not to do so, even where she could have no fear of reprisal from the agent. Furthermore, while the panel does not expect that the claimant would have set out her claim in great detail, the panel is not persuaded that having been given an opening by the immigration officer, she would not have indicated that she was fleeing physical violence by nationalists, as she later claimed.

[25] With regard to the principal claimant’s allegation, that the initial interviewing officer had treated her badly, and had told her she would be sent back to Hungary on the next plane. The panel finds that, if made, this statement ought to be examined in the context of the principal claimant’s statement that she feared nothing in Hungary, and was willing to return. Furthermore, the hearing was the first time, in the five-year history of the file, that the principal claimant had levelled such an accusation, despite being represented by counsel throughout. The panel finds that, in these circumstances, and given the seriousness of the accusation, it was reasonable to expect that she would have brought the accusation forward much earlier, given her later reliance on her mental health status. As a result, the panel concluded, that the accusation against the visa officer was, on a balance of probabilities, no more than a last minute addition designed to cover her inability to offer a satisfactory explanation, for the inconsistent statements that she made at the POE.

[26] Accordingly, the panel accepts the officer’s statements regarding the initial interview, and finds as fact, that during the initial interview, the principal claimant did say that while she was Roma, she did not have any fear of returning to Hungary, and was willing to do so. In doing so, the panel is mindful of the Federal Court’s caution, citing Hathaway, that,

...in evaluating the applicant’s first encounters with Canadian immigration authorities or referring to the applicant’s Port of Entry Statements, the Board should also be mindful of the fact that most refugees have lived experiences in



their country of origin which give them good reason to distrust persons in authority.<sup>13</sup>

[27] The panel understands the caution to mean, that the Board ought not to place undue emphasis on a claimant's behaviour during their first contact with Canadians. However, the panel is of the view, that where, as here, a claimant's behaviour at the POE, namely her utterances, stand in clear contradistinction to their later statements and where, the claimant is unable to provide a satisfactory explanation for the contradictions and/or omissions, then the Board is entitled to make a negative credibility finding, as the panel is doing in this case.

[28] The Federal Court, Appeal Division, has stated that,

A person's first story is usually the most genuine and, therefore, the one to be most believed. That being said, although the failure to report a fact can be a cause for concern, it should not always be so. That, again depends on all the circumstances: see *Fajardo v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 915 at para. 5 (QL) (C.A.); *Owusu-Ansah, supra*; and *Sheikh v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15200 (FC), [2000] F.C.J. No. 568 (QL) (T.D.).

[29] The panel finds that the principal claimant's initial statement at the POE, to the effect that, she did not have a well-founded fear of persecution in Hungary, that she had come to Canada for entirely economic reasons were, on a balance of probabilities, genuine. The panel also finds, that her statements at the POE call into question her later allegations in her PIF, and her oral testimony.

### **The Medical Evidence**

[30] The claimant submitted a number of medical documents to support her allegations, that she suffered several traumatic experiences in Hungary, and that these experiences have led to the development of mental health issues. In 2013, Dr. XXXX, from the Centre for Addiction and Mental Health (CAMH), diagnosed the principal claimant as suffering from Post-Traumatic Stress Disorder (PTSD) and Major Depressive disorder. It is not clear on what basis the diagnosis was made. The physician states his impression that the principal claimant "presents with classic symptoms of PTSD, as well as Major Depressive disorder".

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<sup>13</sup> Hathaway, Professor James C, *The Law of Refugee Status*, (Toronto, Butterworth, 1991) at p. 84-85.

[31] The panel asked the principal claimant how she came to consult with Dr. XXXX. She responded, that she was referred to him by her family doctor, Dr. XXXX, who states that “it will be safer and better for the wellbeing of my patient (the principal claimant) if he (sic) remains in the country.” The principal claimant met with Dr. XXXX only once, when she returned to CAMH on June 28, 2017, she did not see him. However, in 2013, both he and her counsel referred her to the Canadian Centre for Victims of Torture (CCVT). While the principal claimant did not disclose to Dr. XXXX that she had been raped in Hungary, he did give her information for the Women’s Health Centre. She has visited the Centre three or four times since Dr. XXXX gave her the information in 2013. It appears, that the principal claimant did not seek the assistance of the CCVT until 2017, three years after she was first referred to Dr. XXXX. When asked, she testified that she had been receiving care from her family doctor. The 2017 letter from CAMH states, that the principal claimant reported that she ‘is very depressed, cries every day and feels discouraged and hopeless’.<sup>14</sup> It is clear from this self-report, that the principal claimant did not make a concerted effort to utilise the tools that were made available to her. She states that she was seeing her family doctor, and receiving treatment prescribed by him.

[32] With the possible exception of Dr. XXXX, the medical personnel saw the principal claimant on two occasions only. Much of what is contained in the reports, was information that the principal claimant provided, all of which, in the panel’s view, calls into question the sufficiency of the medical reports to establish the credibility of her assertions regarding the attacks, and their effect on her mental health. With respect to Dr. XXXX letter, the panel found, that he had crossed that intangible line between providing medical care and advocacy, when in respect to the principal claimant he wrote, “it will be safer and better for the wellbeing of my patient if he [sic] remains in the country”.<sup>15</sup> For these reasons, the panel gave less weight to the medical documents than it might otherwise have done.

### **The Hungarian Medical Documents**

[33] The principal claimant testified, that she had been receiving counselling since 2009. She was treated by a Dr. XXXX XXXX. She testified that she went to Dr. XXXX, because she had

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<sup>14</sup> Exhibit 10, at p. 47.

<sup>15</sup> Exhibit 10, at p. 50.

been unable to reconcile her problems by herself, and was suffering from insomnia and flashbacks.<sup>16</sup> The medical report lists a number of conditions for which the principal claimant had been receiving treatment, but does not state how the claimant came to be receiving the treatment, that is, was she referred to Dr. XXXX, and, if so, by whom. Nor is it clear from his letter, what branch of medicine Dr. XXXX practices. Interestingly, Dr. XXXX recommended that the principal claimant move, as a way of dealing with her issues. He confirmed that she had taken his suggestion and moved to Canada.

[34] The panel asked the principal claimant what Dr. XXXX meant, when he suggested that she move. She responded, that he told her to come to Canada, because he had heard that Canada was a safe country where nobody is attacked. If true, the panel confesses itself perplexed by Dr. XXXX recommendation, that the principal claimant come to Canada as a treatment for her psychological issues, instead of treating them himself. However, the panel does not interpret his statement in this manner. The panel infers that by advising the principal claimant to “move and change location”, Dr. XXXX intended that she move within Hungary. In the absence of a clear indication of Dr. XXXX area of practice, as well as in the absence of information regarding the number of times he saw the principal claimant, or what tests or treatments were done or recommended, the panel is not persuaded that it could place significant reliance on Dr. XXXX letter.

[35] The panel notes, that in his letter Dr. XXXX stated, that the principal claimant received treatment for PTSD in Hungary.<sup>17</sup> This information came from the principal claimant herself. Accordingly, the panel finds Dr. XXXX medical note, to be of limited probative value in its assessment of the credibility of her claim, that she developed mental health issues because of the racist attacks she experienced in Hungary.

[36] Regarding the principal claimant’s psychological assessment, Counsel conceded that there had been no objective testing done on the principal claimant, however, she submitted that the principal claimant had been undergoing psychiatric treatment prior to coming to Canada. Counsel

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<sup>16</sup> Exhibit 10, at p. 52.

<sup>17</sup> Exhibit 10, at p. 42.

cited Exhibit 10, p. 52, as proof that the principal claimant had received psychiatric treatment in Hungary. Dr. XXXX letter, certified that the claimant had been receiving treatment for;

...anxiety, restlessness, adjustment disorder, disorder in finding her identity, in addition to being decompensated psychically as a result of being raped by Hungarian skinhead boys in August 2009 and received psychiatric treatment until she was in Hungary, March 2012.

[37] However, for the reasons set out earlier, the panel gave little weight to his report.

[38] Counsel also submitted, that the presence of Canadian psychological and medical reports lends credence to the principal claimant's claims regarding her experiences.<sup>18</sup> In the absence of objective testing, and limited opportunity to observe the principal claimant in a clinical setting, the panel is not persuaded of counsel's submissions. The panel accepts that the principal claimant has been receiving ongoing care from her General Practitioner for the past five years, however, the panel is of the view that this care alone is not necessarily proof that she had the experiences in Hungary she claimed.

### **The Miscarriage**

[39] The principal claimant alleged, that she suffered a miscarriage after an unprovoked attack by Hungarian Nationalists, during which, she was kicked in the stomach. She was four and a half months pregnant when the attack occurred. The principal claimant submitted two medical reports respecting the miscarriage. One report is dated September 29, 1998.<sup>19</sup> This report shows that the principal claimant was admitted to the gynecology department of the XXXX XXXX XXXX on that date. However, it does not show the date she was actually released; nor does the report show the date on which it was written. It does state, that a copy had been forwarded to the relevant authorities.

[40] In response to her counsel, the principal claimant testified that she went to the police station to file a complaint about the incident, but was rebuffed. No report was taken. The panel relies on its specialised knowledge, obtained as a result of adjudicating similar claims, that medical personnel usually inform the police of violent incidents, and the police usually attend at

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<sup>18</sup> Exhibit 10, at p. 42-50.

<sup>19</sup> Exhibit 10, p. 58.

the hospital, to speak to the victims. The claimant testified, that she spent about three or four days in hospital. The panel expects that the police would have visited the principal claimant during these three or four days. Thus, she would not have had to go to the police station to make a complaint. The absence of a date of release, or a date when the report was written, makes it difficult for the panel to assess the credibility, of this aspect, of the principal claimant's testimony. Nonetheless, based on the panel's specialised knowledge, the panel finds that it is more likely, than not, that the police would have gone to the hospital to speak with the principal claimant, and not the other way around.

[41] The second medical report, shows that the principal claimant returned to the neurology department on October 22, 1998.<sup>20</sup> This report indicates, that she had an early spontaneous abortion. It also indicates, that the principal claimant told the staff that she had been attacked, and had suffered a miscarriage as a result. This report does state a date of release, and appears to be in proper form.

[42] The panel asked the principal claimant to clarify why the first medical report did not mention that she had a miscarriage. She agreed, that it had not been a miscarriage, but claimed that the baby had been injured during the attack, necessitating that she be induced, and that the baby was big which required dilation (of her cervix) and taking the baby. She added, that the Hungarian doctors did not write down exactly what had happened.

[43] On considering the principal claimant's explanation, the panel concluded, that it was possible that the medical procedure did occur as she described. However, the panel was not satisfied that it was probably so, because the first report does not mention that she had been transported to hospital by ambulance in an unconscious condition as she claimed, which the panel finds that it was reasonable to expect it would have. Given this omission from the report, and her testimony that the police did not attend the hospital to speak with the principal claimant during the three or four days she was hospitalised, the panel also finds that there is insufficient, credible evidence before it, to allow it to conclude that she had suffered a beating at the hands of Hungarian nationalists that led to a miscarriage. Nonetheless, despite the panel's reservations, it

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<sup>20</sup> Exhibit 10, p. 55.

does not find that the whole of the principal claimant's credibility is undermined by its concerns regarding the alleged miscarriage.

## The Rape

[44] The principal claimant alleged, that on the evening of August 25, 2009, a number of Hungarian Guards attacked and beat her. One of the attackers raped her. Her ordeal ended, when several people heard her cries, and came to her aid. The attack occurred very close to an apartment building that she was going to.

[45] The principal claimant submitted a number of letters, in support of her allegations. The letters were written by XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX; and an XXXX XXXX XXXX The principal claimant testified that she knew all of the letter writers. It later turned out, that XXXX XXXX, and XXXX XXXX are the same person, namely the mother of the adult male claimant. While XXXX XXXX, and XXXX XXXX, also appear to be the same person. Thus, there were not as many people writing in support of the incident as it appears.

[46] XXXX XXXX XXXX lived near to the principal claimant's sister. She knew the claimant before the alleged rape. In her letter, Ms. XXXX refers to "a gypsy girl being attacked" and not to the principal claimant by name. In response to the panel, the principal claimant testified that she did not know why Ms. XXXX did not name her in the note. The panel found her response not to be plausible, given that she testified that they were well acquainted, and the panel finds that it is reasonable to expect that Ms. XXXX would likely have recognised the claimant's voice.

[47] In her letter, XXXX XXXX XXXX the principal claimant's sister-in-law, said she heard screams coming from outside of her building. When she looked out, she saw that five men were attacking "a gypsy girl". She went to the aid of the screaming woman, at which time, she saw that the victim was the principal claimant, and that the principal claimant told her that the attack was unprovoked. The panel asked the principal claimant if she told her sister-in-law that she had been raped. She replied that she had not. The panel also asked the principal claimant how long it took for someone to come to her aid, to which she replied 15-20 minutes. She also told the hearing that

the alleged rape took place in some bushes that were “not too far” from the apartment building where her sister-in-law lived.

[48] The panel had concerns about a number of aspects of the principal claimant’s testimony. Specifically, the panel did not find it plausible that her sister-in-law would not have recognised the principal claimant voice, which would have lent more impetus to her desire to come to the principal claimant’s assistance. Further, as the principal claimant testified that the alleged attack occurred so close to the building, the panel finds that it is not plausible that it would take 15-20 minutes for someone to come to her aid.

[49] When she was asked, the principal claimant testified that the incident occurred in August, at about four or five in the afternoon. She described the weather conditions as dusky, because the day had been rainy and cloudy. This testimony, inadvertently, undermines XXXX XXXX’s statement; that she looked out of her window, and saw five men attacking the principal claimant. As the principal claimant described her attackers as being clad in black, and the time of day as being dusky and therefore somewhat dark, the panel finds that it calls into question what XXXX XXXX saw, and therefore, the reliability of her eye witness evidence.

[50] In response to her counsel, the principal claimant stated, that she was going to visit her brother who lived in the building outside of which the attack occurred. August 25 is Hungary’s National Day and her brother was holding a small party. Her partner was already at her brother’s home, while her son and his grandmother were elsewhere. Alerted by her screams, the principal claimant’s partner and her brother ran downstairs; it was they who took her up to the apartment. They found her on the ground in a fetal position, and unable to stand. She testified, that she did not tell her partner that she had been raped. This was evidence that was not in the principal claimant’s PIF, and for the reasons set out below, the panel found the evidence was not credible.

[51] The principal claimant’s counsel asked her about XXXX XXXX letter. Counsel pointed out, that XXXX XXXX appeared to intimate that she and some others witnessed persons assaulting the principal claimant. When her counsel asked the principal claimant to explain how it would take 15-20 minutes for someone to go to her aid, when the incident occurred so close to the building, and XXXX XXXX witnessed the assault; the principal claimant was non-responsive. She said she “did not know, she could not remember the time, she was just screaming”. When her

counsel tried to elicit a further or better response from the principal claimant, she replied that her attackers had prevented her from screaming ... “I was not able to scream at that time they were in there. They had my mouth shut”.

[52] The panel found that this aspect of the principal claimant’s testimony was not plausible, because not only was it internally inconsistent, it conflicted with her written statement that she had been screaming. The testimony also conflicted with the statements of the letter writers; that they heard her screams and saw her attackers. Moreover, given the principal claimant’s statement that the attackers left as help was arriving, the panel finds that her testimony that they kept her mouth shut undermines the statements made in her narrative, and in the letters of XXXX XXXX, and XXXX XXXX XXXX; that they were alerted to the incident by screams.

[53] In her letter, XXXX XXXX, said she saw four men, as opposed to the five that XXXX XXXX claims she saw attacking the principal claimant. The panel places no significance on this discrepancy, as it is not material to the claim whether there were four or there were five attackers. However, the panel does find it significant, that neither woman mentioned the presence of the principal claimant’s partner, which, in the view of the panel, it was reasonable to expect that they would do, had he been present, and had he played the role the principal claimant testified he did.

[54] Furthermore, in light of the proximity of the scene of the alleged rape to the apartment building that the principal claimant described, it is not plausible that some fifteen to twenty minutes would elapse before help would arrive. The panel finds that this is a further instance where the claimant has demonstrated a lack of straightforwardness.

[55] At the second sitting, the principal claimant sought to excuse the discrepancies in her oral testimony as being due to stress and headache, and not taking her medications. However, she did reaffirm the distance of the alleged crime scene from the apartment building, as well as the time frame within which help arrived.

[56] The panel finds that her explanation was not satisfactory, because it does not accept that the entirely new version of the alleged event the principal claimant presented at the first sitting of the hearing, could be explained by stress and headache. The panel finds, on a balance of



probabilities, that the inconsistent and contradictory evidence regarding the alleged rape, was the result of the principal claimant's want of straightforwardness.

[57] The panel finds, that the testimony of the adult male claimant regarding the incident was also not plausible. He corroborated the principal claimant's testimony, that he was one of the people who assisted her. The panel relies on its previous credibility finding regarding his presence at the scene, to doubt, and to reject this aspect of the adult male claimant's testimony. Furthermore, with specific reference to his alleged attendance at the scene, the panel finds that it is not plausible that the principal claimant's spouse would have gone to her attendance, found her in the fetal position, and not come to know, if not immediately, that she had been raped. The panel finds that this testimony; that he did not notice that she had been sexually assaulted, not to be consistent with what one might reasonably expect in the circumstances.

[58] Counsel for the claimants, submitted that the credibility assessment, regarding the principal claimant, should be situated within the parameters of Guideline 4. The panel concurs. The panel finds, that the principal claimant was not disadvantaged in any way in presenting her claim. At the start of the hearing, she acknowledged that she had put all of the evidence, including documentary evidence, upon which she wanted to rely before the panel. She did not need to make any further amendments to her PIF. While at times she broke down during the hearing, the principal claimant was afforded every opportunity to compose herself. Further, when testifying about the sexual assault, her son was excluded from the hearing room at her request.

[59] Counsel submitted, that there was no reason to doubt the veracity of either adult claimant's evidence. She stated, that both claimants were forthright in their testimony, admitting when they could not understand or did not know something. Counsel described the principal claimant as being appropriately emotional, when discussing her sexual assault. Clearly, in light of the panel's credibility findings, the panel does not come to the same conclusion as Counsel.

[60] Counsel for the claimants also submitted, that the principal claimant was specific about when people came to her aid. She submitted, that there was corroborative evidence before the panel that supported the principal claimant's experiences, namely, the letters from witnesses. Reliance was placed on the fact that the writers of these letters had included copies of their

[61] Thus, on the basis of its credibility finding, that the testimony was inconsistent, contradictory and implausible, the panel finds that the credibility of the principal claimant's allegation, that she was raped by Hungarian Guards on August 25, 2009, is seriously undermined. Accordingly, the panel finds that there is valid reason, to doubt, and to reject the principal claimant's allegation, that on August 25, 2009, members of the Hungarian Guard attacked her outside of the building where her brother and sister-in-law lived. The panel also doubts, and rejects, the principal claimant's allegation that a member, or members, of the Hungarian Guard raped her during the attack.

[62] In response to her counsel, the principal claimant stated, that because she is ethnically Roma, she suffered racial discrimination in Hungary. She recounts difficulties at school; being followed in stores, and living in fear. She also described discrimination in employment. Specifically, for a period of about three months, the principal claimant was employed as XXXX help. She testified that during these three months, she was not allowed to enter the area where food was prepared. She claimed that this was because she was Roma. On further examination, the claimant admitted that she had been hired as a XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX The panel finds that the principal claimant's description of her duties, places a different light on her employment situation. She was hired to clean, not to cook. Therefore, her complaint is not well founded.

[63] Asked by her counsel to describe what her life was like between 1998 (after the “alleged miscarriage”) and 2009, the principal claimant replied that she lived in fear. She was hesitant to go out by herself. When she went out, she faced racism. For example, Hungarians avoided sitting next to her on the bus.

[64] The panel has no doubt, that the principal claimant has experienced the type of discrimination, and likely, harassment that the documentary evidence indicates many Roma are subjected to. She, herself, described the discrimination she received as being of the type that Roma generally face. The panel is not persuaded, that the principal claimant has presented sufficient credible evidence to establish that the discriminatory incidents she experienced, had risen to the level of persecution.

### **The Adult Male Claimant**

[65] The Adult Male Claimant accepted and adopted the testimony of the principal claimant. He added his own experiences, namely, that while he was living in Hungary, he received a number of threatening letters. In August 2010, five men dressed in black beat him up; and in September or October 2011, several men in a car harassed and beat him. The adult male claimant testified that the letters were particularly disturbing, because the writer threatened him with physical harm. The letters did not stop after he left Hungary, instead, they were sent to his mother's home. In reply to his counsel, the adult male claimant testified that he received the first letter some time in 2011. He left Hungary on XXXX XXXX XXXX 2011. By the time he left, he had received between six to ten letters at the home he shared with his family. While a sister and her two children remained in the home, the letters were no longer sent there, instead they were sent to his mother's home, which was about an hour's travel from the place where he used to live. The panel found the adult male claimant's testimony, about the letters, to be convoluted and implausible, and not in accord with what might reasonably be expected in the circumstances.

[66] First, the adult male claimant testified that he began to receive the threatening letters not long before he left Hungary. He testified that all of the Roma living in his neighbourhood received similar letters. Noting, that many of the letters were addressed to the adult male claimant personally. The panel asked him, whether he knew any of the persons who were writing the letters, which he denied.<sup>21</sup> When the panel observed that he was directly addressed in the letter at page 97 of Exhibit 10,<sup>22</sup> the adult male claimant responded that this letter "came from Guardists who were sending the letters to his mother". He went on to explain that the letter contains the

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<sup>21</sup> Exhibit 10, at p. 97, 99, 101, 103 & 105.

<sup>22</sup> Exhibit 10, p. 97.

salutation, “Hi XXXX” because where he lived was called “Gypsy Row” but “Hungarians” lived there too.” He stated that the Hungarians likely knew him, his wife, and their son, and also likely knew his name.

[67] The panel assessed the plausibility of the adult male claimant’s testimony and explanation about the letters. For the following reasons, the panel finds, that the testimony is not plausible. The adult male claimant testified, that he last lived with his mother sometime before 2011. He lived an hour away with his family, his sister, and her family. He testified that his mother began to receive letters addressed to him, after he had come to Canada, and has continued to receive them for five years. As the claimant was already in Canada, when his mother began to receive letters, the panel finds that it is not plausible that the letter-writer(s) would address him by name. The panel infers, that if letter-writer(s) knew him well enough to know his name, then they also likely knew that he had left Hungary, therefore, it is unlikely, that they would have begun to send letters addressed to him at his mother’s home. The panel concludes that, on a balance of probabilities, the adult male claimant and his mother did not receive harassing letters, and that the letters were produced for the sole purpose of bolstering his claim for refugee protection.

[68] The adult male claimant described two violent incidents that he alleged took place in August 2010, and in the fall of 2011. In the first incident, he was walking home when he saw four or five people in black. Hoping to avoid them, he crossed the street, but they too crossed the street. One attacker stomped on his hand, damaging a finger. The assailants uttered racial slurs as they beat him. The adult male claimant testified that he did not report the incident to the police, because the doctor who attended to him advised him not to. He testified that when he told the doctor what had happened to him, the doctor told him that the police would not believe him. So the adult male claimant went home without filing a police report.

[69] The panel considered his testimony, in light of its specialised knowledge gleaned from hearing claims against Hungary. The panel is aware that in instances of physical assaults on patients, medical personnel are required to notify the police. The reporting is not usually left to the patient. Whether the police respond (it appears that it is usual for them to do so) or take further action, is a different matter. In light of its understanding of the practice attendant upon circumstances that the claimant described, the panel concluded, that while it is possible that the doctor might have attempted to deter the adult male claimant from filing a police report, it is not probable that he did. The panel finds that the credibility of the adult male claimant is, therefore, undermined by his claim that the doctor told him not to file a police report.

[70] The second time he was attacked, the adult male claimant testified, that he did go to the police, however, they laughed at him and refused to take a report. This time, his attackers had urinated on him. Counsel for the claimants described the adult male claimant as being appropriately emotional, when recounting the experience. He testified, that the cavalier reaction of the police to his experience caused him such distress, that he cried for two days. It was the turning point for him, and the impetus for the decision to come to Canada. The panel accepts that, if true, this would be a clear incident of discrimination, as the police would have treated the adult male claimant differently because of his ethnicity. This, in the panel's view, is likely the single credible incident of the incidents alleged by the adult male claimant.

[71] The panel is aware, that a single incident may well give rise to persecution. However, the panel is not persuaded that the police refusing to take the adult male claimant's statement, while discriminatory, raises the act of discrimination to one of persecution. The adult male claimant lived in Budapest, and there were other avenues of redress available to him, such as the Independent Police Complaints Board, the Parliamentary Commissioners' Office, the Equal Treatment Authority, the Roma Police Association, the Complaints Office at the National Police Headquarters; all of which bodies are mandated to investigate complaints against the police that he seemed not to have considered.

### **The Son**

[72] Both the principal and adult male claimant testified that their son, XXXX, had difficulty in school. The claimants presented a psychological assessment of the son's intellectual ability. The

report indicates, that XXXX had serious learning deficits, and when compared to his peers, demonstrated an “intelligence level of the mild mental retardation zone.”<sup>23</sup> The claimants intimated that XXXX was misdiagnosed due to his ethnicity. The principal claimant asserted, that he was “a very smart boy, he learnt all his lesson and he was never allowed to answer the questions.” She testified he was held back.

[73] The claimants may well be correct in their assertions. However, it does appear from the report, that there was a comprehensive testing of XXXX abilities across a spectrum of tasks. The assessment reveals that XXXX functioned adequately at some tasks, and less so in many cognitive areas. There also appears to be the complicating factor of age, as he appeared to have been older, and bigger, than the students who were in his class.

[74] Notwithstanding the views of the claimants, without a comparator assessment, the panel is not prepared to find that the Hungarian assessment demonstrates the inherent racism of Hungarians towards Roma children, and XXXX in particular.

### **Other Incidents**

[75] The claimants allege, that racists went to the home of their sister in Hungary. The racists kicked out the sister, and her family, and vandalised the building. They painted a swastika on the wall. The claimants tendered a police report,<sup>24</sup> that states the home was empty and locked at the time of the supposed event. This report contradicts the claim that the sister and her family were living at the home when they were forced out. Given that a report was actually taken, the panel finds that it was reasonable to expect that it would reflect the eviction of the sister, and her family, as opposed to stating that the house was empty and locked at the time of the offence. In the circumstances, the panel is not persuaded that the claimants have presented sufficient credible evidence that Hungarian Nationalists invaded the sister’s home, evicted her and her family, and vandalised it.

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<sup>23</sup> Exhibit 10, at p. 134.

<sup>24</sup> Exhibit 10, at p. 67-68.

## STATE PROTECTION

### Counsel's Submissions

[76] Counsel for the claimants submitted that state protection was not, and would not, be available to them, should they be returned to Hungary. He submitted, that from their evidence and testimony, the claimants did make effort to engage the state, however, on those occasions, when the adult male claimant did seek the assistance of the police, namely, with respect to the letters, and with respect to the incident when he was urinated on, that protection was denied him.

[77] Counsel for the claimants submitted, that the documentary evidence clearly supports a finding of an absence of state protection. She submitted, that the current Amnesty International Report clearly shows that there is a move in Hungary towards what counsel termed an “illiberal democracy”. Counsel also submitted, that the United States of America Department of State (DOS) Report,<sup>25</sup> refers to impunity for Human Rights abuses, as well as discusses concerns about the Roma communities. Section 6 of the DOS report notes that “Roma suffer discrimination in all forms of life.” Counsel for the claimant also submitted, that it,

...was important to note that in Item 2.5 the UN General Assembly<sup>26</sup> report documents ongoing problems based on Roma ethnicity. Paragraph 2 as well as paragraph 78 of the report talks about Roma facing discrimination and falling victims to human rights violations, while Item 10.2<sup>27</sup> talks about police response to complaints lodged by Roma citizens.

[78] Counsel submitted, that hate crimes and hate speech are prevalent in Hungary, and the response by the police to violence against Roma is feeble. Counsel concluded, that the statements in the documentary evidence corroborate the claimant's claim; that should they return to Hungary at this time, they are likely to be met with similar types of violence as when they left. Counsel for the claimant submits that per *Katinszki*,<sup>28</sup> the claimants ought not to be expected to have recourse to any other body but the police for state protection.

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<sup>25</sup> Exhibit 5, National Documentation Package (NDP) for Hungary (August 31, 2018), item 2.1.

<sup>26</sup> Ibid, NDP for Hungary, Item 2.5.

<sup>27</sup> Ibid, NDP for Hungary, Item 10.2.

<sup>28</sup> *Katinszki, Pirovska v. M.C.I.* (F.C., no. IMM-2520-12), de Montigny, November 15, 2012, 2012 FC 1326.

[79] In *Katinszki*, the Federal Court took issue with the Board's finding, that state protection was available to the claimants in Budapest. It found, that the organisations that the Board referred to as being able to provide that state protection were not, in fact, mandated to provide protection, but rather functioned as oversight bodies:

The Board also points to various organizations that can provide protection to the Applicants and again seems to assume that these organizations would be in a better position to provide protection in Budapest since their head offices are located there. The problem with this assertion is that there is no evidence on the record that these organizations would be better able to "protect" the Applicants in Budapest than in the rest of the country. More importantly, the mandate of each of the organizations referred to by the Board (the Independent Police Complaints Board, the Parliamentary Commissioners' Office, the Equal Treatment Authority, the Roma Police Association, the Complaints Office at the National Police Headquarters) is not to provide protection but to make recommendations and, at best, to investigate police inaction after the fact.

[80] Counsel for the claimants also submitted, that as a Roma woman, the principal claimant has an additional barrier when seeking redress against gender-related violence, because according to the documentary evidence, the police tend not to take domestic violence complaints as seriously as they should. Counsel for the claimants submitted that the police would treat any attempt, by the principal claimant to obtain police protection, in a similar manner.

[81] Although pertinent, the panel finds that the submissions of Counsel for the claimant pre-supposes a finding of general credibility in their favour, which finding, the panel has not made. In fact, overall, the panel has found the principal claimant not to be credible in respect of the alleged rape, and thus, her need for psychiatric or psychological counselling, based on that rape, while she was in Hungary. The panel, also, did not find that she had credibly explained the significant divergence, between her statements at the Port of Entry, and her later allegations in her PIF. While the panel found that her credibility regarding the miscarriage itself had not been significantly undermined, the panel was not certain as to how the principal claimant came to miscarry.

[82] Similarly, the panel did not find that the adult male claimant provided credible and trustworthy evidence, in respect of the letters and the incident of August 2010. While the panel did find his testimony regarding the incident of fall 2011 to be credible, the panel was not satisfied that the incident rose to the level of persecution. However humiliating it was to the adult



male claimant, it appeared to have been a random attack. Therefore, the panel is not persuaded of Counsel's view, that the claimants have successfully displaced the presumption that state protection would be available to them in Hungary,

[83] Further, the panel finds, that not every Roma in Hungary has experienced what amounts to persecution. In this regard, the panel finds persuasive the words of Harrington J. in *Varga*:<sup>29</sup>

Each case turns on the particular history of the claimant, the record, the adequacy of the analysis by the Tribunal and, indeed, the appreciation of that evidence by various judges of this Court (*Banya v Canada* (Minister of Citizenship and Immigration), 2011 FC 313, [2011] FCJ No 393 (QL), at para 4.)

[84] In this context, the panel undertook an analysis of the operational adequacy of state protection that would be available to these claimants, should they return to Hungary. It is notable, to raise another aspect of the relevance of *Balogh*<sup>30</sup> in this case. For the purposes of s. 96 of the IRPA, personal targeting or past persecution is not required in order to establish a risk. Rather, persecution can be established by examining the situation of similarly situated individuals.<sup>31</sup> The panel finds that the *Balogh* decision is consistent with these principles. As explained by Justice LeBlanc at paragraph 19 of this decision:<sup>32</sup>

Moreover, while the documentary evidence of general country conditions of Roma in Hungary raises human rights concerns, the mere fact of being of Roma ethnicity in Hungary is not, in and of itself, sufficient to establish that an applicant faces more than a mere possibility of persecution upon return (*Csonka v Canada* (Citizenship and Immigration), 2012 FC 1056, at paras 67-70 [*Csonka*]; *Ahmad v Canada* (Minister of Citizenship and Immigration), 2004 FC 808, at para 22 [*Ahmad*]). Both subjective fear and objective fear are components in respect of a valid claim for refugee status (*Csonka*, at para 3). The applicant has a burden of establishing a link between the general documentary evidence and the applicant's specific circumstances (*Prophète 4 v Canada* (Citizenship & Immigration), 2008 FC 331, at para 17; *Jarada v Canada* (Minister of Citizenship and Immigration), 2005 FC 409, at para 28; *Ahmad*, at para 22).

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<sup>29</sup> *Varga, Mario Gyula v. M.C.I.* (F.C., no. IMM-1823-13), Harrington, May 27, 2014; 2014 FC 510.

<sup>30</sup> *Balogh, Tibor v. M.C.I.* (F.C., no. IMM-4331-15), LeBlanc, April 18, 2016, 2016 FC 426.

<sup>31</sup> *Salibian, Vahe v. M.E.I.* (F.C.A., no. A-479-89), Hugessen, MacGuigan, Décary, May 24, 1990. **Reported:** *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.); 11 Imm. L.R. (2d) 165 (F.C.A.), at para. 17; *Kang, Hardip Kaur v. M.C.I.* (F.C., no. IMM-775-05), Martineau, August 18, 2005, 2005 FC 1128, at para. 10; *Fi, Saleh Omar Osama v. M.C.I.* (F.C., no. IMM-2091-06), Martineau, September 19, 2006, 2006 FC 1125, at para. 14.

<sup>32</sup> *Balogh, supra*, footnote 6, at para. 19.

[85] Thus, in the panel's reading of jurisprudence relating to refugee claims based on Hungarian Roma ethnicity, the panel finds that it does not support a blanket conclusion, that the general country conditions are such that all Roma in Hungary face discrimination amounting to persecution. Rather, and as conducted in this case, the panel has considered the particular claimants' circumstances, in combination with the general documentary evidence, to determine whether these claimants face a risk of persecution should they return to Hungary in 2018, or in the near future.

[86] Refugee protection is meant to be a form of surrogate protection, to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protection of their home state. The onus is on the refugee claimant to approach the state for protection, in situations where state protection might be reasonably forthcoming.<sup>33</sup> In the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim, at least, where the state is a functioning democracy with a willingness and the apparatus necessary, to provide a measure of protection to its citizens.<sup>34</sup>

[87] The refugee claimant's burden of proof, is directly proportional to the level of democracy in the state in question; the more democratic the state's institutions, the more the refugee claimant must have done to exhaust all courses of action open to them.<sup>35</sup> In a functioning democracy, a refugee claimant will have a heavy burden, when attempting to show that they should not have been required to exhaust all of the recourses available to them domestically, before claiming refugee status.<sup>36</sup>

[88] A refugee 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

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<sup>33</sup> *Ward, Patrick Francis v. M.C.I.* (F.C.T.D., no. IMM-504-96), Heald, December 19, 1996. **Reported:** *Ward v. Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 102 (F.C.T.D.); *Ward, Patrick Francis v. M.C.I.* (F.C.T.D., no. IMM-15-97), Joyal, January 24, 1997, footnote 9.

<sup>34</sup> *Camacho, Jane Egge Sonia v. M.C.I.* (F.C., no. IMM-4300-06), Barnes, August 10, 2007, 2007 FC 830, footnote 12, para. 10.

<sup>35</sup> *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996. **Reported:** *Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4<sup>th</sup>) 532 (F.C.A.).

<sup>36</sup> *Hinzman, Jeremy v. M.C.I.* and *Hughey, Brandon David v. M.C.I.* (F.C.A., nos. A-182-06; A-185-06), Décary, Sexton, Evans, April 30, 2007, 2007 FCA 171, para. 57.

steps taken, and the refugee claimant's interactions with the authorities.<sup>37</sup> Local failures by authorities to provide protection do not mean that the state as a whole fails to protect its citizens, unless the failures form part of a broader pattern of the state's inability, or refusal, to provide protection.<sup>38</sup> No government is expected to guarantee perfect protection to all of its citizens at all times, and the fact that a state is not always successful in protecting its citizens is not enough to justify a claim, especially, where a state is in effective control of its territory, has military, police, and civil authorities in place, and is making serious efforts to protect its citizens.<sup>39</sup> Less than perfect protection is not a basis to determine that a state is either unwilling, or unable, to offer reasonable protection.<sup>40</sup>

[89] The panel is required to determine the state protection provided, at the present time that is relevant.<sup>41</sup> The panel's analysis of the protection available to Roma in Hungary today, is that, such protection is operationally adequate based on its analysis that follows. The panel notes, that regard must be given to what is actually happening, and not what the state is endeavouring to put in place.<sup>42</sup> In this case, the panel finds, the government's efforts to have "actually translated into adequate state protection" at the operational level.<sup>43</sup>

[90] The panel acknowledges, that the Roma minority population in Hungary experience discrimination in many aspects of their daily lives, and at times, violence and abuse at the hands of some racist elements in Hungary, including, the lack of action on the part of some police officers, who also demonstrate anti-Roma sentiments. However, with the formal dissolution of the Hungarian Guard in 2013, and with the right-wing Jobbik Party re-casting itself as a more inclusive but still nationalist party, it has attempted to distance itself from the right-wing platform in the pre-2014 elections:

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<sup>37</sup> *Peralta, Gloria Del Carmen v. M.C.I.* (F.C.T.D., no. IMM-5451-01), Heneghan, September 20, 2002, 2002 FCT 989.

<sup>38</sup> *Zhuravlyev, Anatoliy v. M.C.I.* (F.C.T.D., no. IMM-3603-99), Pelletier, April 14, 2000. **Reported:** *Zhuravlyev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3 (T.D.).

<sup>39</sup> *Villafranca: M.E.I. v. Villafranca, Ignacio* (F.C.A., no. A-69-90), Marceau, Hugessen, Décary, December 18, 1992. **Reported:** *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.), footnote 11.

<sup>40</sup> *Milev, Dane v. M.C.I.* (F.C.T.D., no. IMM-1125-95), MacKay, June 28, 1996, at para. 19.

<sup>41</sup> *Hercegi, Jozsef v. M.C.I.* (F.C., no. IMM-4225-11), Hughes, February 22, 2012, 2012 FC 250, at para. 5.

<sup>42</sup> *Garcia Bautista, Claudia Jacqueline v. M.C.I.* (F.C., no. IMM-5647-08), Beaudry, February 8, 2010, 2010 FC 126, para. 10.

<sup>43</sup> *Beharry, Estdai v. M.C.I.* (F.C., no. IMM-3470-10), Mactavish, February 1, 2011, 2011 FC 111, at para. 9.

Gabor Vona, Jobbik's 37-year-old leader...declared [in late 2013] a new direction for his party – towards the political centre, and away from the extreme right which won it its ugly reputation. "We are a people's party now," Mr. Vona told me. "Naturally we have kept our basic values, but now we are trying to represent the whole of society, with all the different views which people hold....I will not accept any crude or extreme views in the future. I want this to be party [sic] which everyone can calmly and honourably vote for."<sup>44</sup>

[91] The BBC report<sup>45</sup> referenced Jobbik's role in the 2000s in contributing "to a serious worsening of relations with the Hungarian Roma minority" but now, "...Jobbik's programme calls for an end to positive discrimination for minorities." The Jobbik Party does not target Roma, the Guardists have been disbanded, and the latter no longer poses a harassing threat to Roma. A member of Political Capital, a prominent "think tank" in Budapest, interviewed for the BBC article, opined:

Mr. Vona wants to move the party toward the centre and push out the extremist elements. ...if he manages to tone down the anti-Gypsy and anti-Semitic rhetoric, that has to be welcomed."<sup>46</sup>

[92] The panel also notes from its reading of the documentary materials, including human rights monitoring groups, the customary annual reports that the Board references and the diverse media sources, that there are no current reports of right-wing and nationalist marches or gatherings in Hungary that are targeting, harassing, and threatening Roma. While discriminatory attitudes persist, among some groups and people in Hungary today, there is no documented evidence before the panel to suggest, or to establish, that other nationalist or right-wing groups have been targeting Roma today as they were in the years leading up to the claimants' departure, or that these groups are supported by the State.

[93] 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 Romas, 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

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<sup>44</sup> Exhibit 7, Hungarian Disclosure Package (June 25, 2018), item 16.

<sup>45</sup> Exhibit 7, Hungarian Disclosure Package (June 25, 2018), item 16.

<sup>46</sup> Ibid.

the view, in canvassing the documentary evidence, that, as a whole, the issue of corruption and deficiencies are being addressed by the state of Hungary.

[94] The panel has also considered the documentary evidence submitted by Counsel for the claimants. The general tenor of Counsel's documentary evidence is that Hungary, under Viktor Orban, has branched out on a path of its own, particularly, as it relates to migrants. That the Hungarian government is resisting calls from the European Union, and the United Nations, to accommodate migrants and asylum seekers is not in question. The Human Rights Watch report makes that crystal clear.<sup>47</sup> Counsel for the claimant urges that the Hungarian stance against migrants, bodes ill for Roma. This is a facile conclusion to make, and not necessarily correct, as Hungary's position appears to be that integrating any new populations is the issue, as it may prove difficult.<sup>48</sup> Perhaps morally wrong, but the question is whether this position leads, *ipso facto*, to a denial of state protection for these claimants.

[95] In *Jarada*<sup>49</sup>, Justice Yves de Montigny held that,

[T]he assessment of the applicant's potential risk of being persecuted if he were sent back to his country must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean there is a risk to a given individual.

[96] In *Jean*, Justice Shore also addressed the need for personalized risk,<sup>50</sup> stating at paragraphs 33:

An applicant must establish that there is a personalized risk based on his or her personal circumstances, which was not done in this case: the applicants did not show that their particular situation would cause a personalized risk, and the documentary evidence does not support their allegations.

[97] While Justice Shore was addressing risk from criminality, the panel is of the view that the principle he stated is equally applicable to the claimants' case.

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<sup>47</sup> Exhibit 10, at p. 157-160.

<sup>48</sup> Ibid, at p. 160.

<sup>49</sup> *Jarada, Alaa v. M.C.I.* (F.C., no. IMM-4638-04), de Montigny, March 24, 2005, 2005 FC 409.

<sup>50</sup> *Jean, Léonie Laurore v. M.C.I.* (F.C., no. IMM-5860-09), Shore, June 22, 2010, 2010 FC 674.

## Difficulty of assessing State Protection

[98] The panel, in assessing the issue of state protection, is guided by the jurisprudence from the Supreme Court of Canada, the Federal Court of Appeal, and the Federal Court. The courts have established a number of principles relating to state protection, and the panel will apply those principles to the claim at hand.

[99] The presumption of state protection was articulated by the Supreme Court of Canada in *Ward*. The thrust of that decision being that,

- a) Nations should be presumed capable of protecting their citizens.
- b) Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.<sup>51</sup>
- c) Unless the authorities concede that they are incapable of protecting a claimant, he or she must show by means of clear and convincing evidence that the state is incapable of providing protection.
- d) Without some evidence of a state's inability to protect its citizens, the claim fails.

[100] The panel has considered the country conditions documents<sup>52</sup> dealing with Hungary's ability to offer state protection. The panel finds, that Hungary is a democracy in effective control of its territory, and has in place a functioning security force to uphold the laws and constitution of the country. Therefore, the onus was on the claimants to provide "clear and convincing" evidence of Hungary's inability to protect them.<sup>53</sup> Less than perfect protection, is not a basis to determine that a state is either unwilling, or unable, to offer reasonable protection.<sup>54</sup>

[101] As Russell, J., noted in *Molnar*<sup>55</sup> the acknowledged widespread discrimination, against persons who are ethnically Roma, makes a state protection analysis difficult. Perhaps, as a result,

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<sup>51</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85, para. 724 & 725.

<sup>52</sup> Exhibit 6, NDP for Hungary (August 31, 2017), Item 2.1 and Item 10.7; Exhibit 7, NDP for Hungary (October 31, 2011).

<sup>53</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

<sup>54</sup> *Milev, Dane v. M.C.I.* (F.C.T.D., no. IMM-1125-95), MacKay, June 28, 1996.

<sup>55</sup> *Molnar, Viktor v. Canada (Citizenship and Immigration)*, 2012 FC 530.

the Courts have been divided as to how to deal with the question of state protection in Hungary.

Thus, in *Mudrak*, the Federal Court stated:

It is well recognized that there is a division in the ranks of judges of the Federal Court on the issue of state protection, particularly as it applies to claimants from the Hungarian Roma community.”<sup>56</sup>

[102] The court went on to highlight this division, by quoting decisions from the Federal Court, which provided divergent opinions on state protection for members of the Roma community. In the panel’s view, the following decisions best illustrate the divided legal mind-set of the Federal Court on this issue.

[103] The first is that of *Moczso*,<sup>57</sup> where the claimants,

...an extended family from Hungary... sought refugee protection in Canada based on their experiences of discrimination and persecution as members of the Roma community. In particular, they allege that their home was attacked by a group that pushed a concrete wall onto its roof. Later, someone threw bricks at the house.<sup>58</sup>

[104] In allowing the appeal, the Court disagreed with the Board’s conclusion, that the applicants had not made reasonable efforts to seek state protection. The Court stated:

The Board failed to take account of evidence showing that two of the applicants had approached the police on separate occasions to complain about bricks being thrown at their house. The police did not make a report; they simply said there was nothing they could do.<sup>59</sup>

[105] The Court also concluded, that state protection was unavailable to the applicants:

...the Board concentrated on evidence relating to improvements not yet realized to the exclusion of the documentary evidence showing that Hungarian police often discriminate against and fail to investigate crimes of violence against the Roma.<sup>60</sup>

[106] In *Csaba Racz* the Federal Court came to a different and opposing position,<sup>61</sup> observing that in the claim, the claimants:

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<sup>56</sup> *Mudrak, Zsolt Jozsef v. M.C.I.* (F.C., no. IMM-3582-13), Annis, February 18, 2015, 2015 FC 188, at para. 46.

<sup>57</sup> *Moczso, Dezso v. M.C.I.* (F.C., no. IMM-8488-12), O’Reilly, July 2, 2013, 2013 FC 734.

<sup>58</sup> *Ibid*, at para. 1.

<sup>59</sup> *Ibid*, at para. 9.

<sup>60</sup> *Ibid*, at para. 11.

...were at home when stones were thrown through their windows. Denes Csaba Racz, the father in the applicant family, ran out of the house to see what had happened but he was immediately kicked in his stomach and assaulted. By the time Timea Raczne Marodi, the mother in the applicant family, went outside, her husband was on the ground and his attackers were fleeing in a car. They were shouting that “this is not over” and that the applicants would die. Mr. Racz called the police. When they arrived, he showed them the broken windows and where he was kicked and punched. The police asked if he saw the perpetrators, and Mr. Racz replied that he did not because he was kicked very suddenly. Ms. Marodi did not get the license plate. The police said that there was not much they could do, but that they would patrol the area more often. They left without taking a report. They patrolled one more time that night but no additional patrols were made. The applicants also asked the Mayor of their village to help them but he said the police would take care of things.<sup>62</sup>

[107] In dismissing the appeal, the Federal Court stated:

I agree with the submission of the respondent that the Board’s examination must focus on whether these persons, on clear and convincing evidence, have established that there is not adequate state protection at the operational level. I am unable to find, based on their submissions in this application, that the Board’s decision that they did not establish the inadequacy of state protection is unreasonable. In fact, although not perfect, the response of the police to the applicants’ complaints, given the specific circumstances of the assaults taken to the police, appears to have been adequate and in keeping with what Canadian police forces would be likely to do.<sup>63</sup>

[108] Although the Court in *Mudrak*<sup>64</sup> certified two questions, pursuant to paragraph 74(d) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (IRPA).

[109] The Federal Court of Appeal determined that the questions should not have been certified in the first place. The questions were:

- 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?

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<sup>61</sup> *Csaba Racz, Denes v. M.C.I.* (F.C., no. IMM-9511-12), Zinn, June 24, 2013, 2013 FC 702.

<sup>62</sup> *Csaba Racz, Denes v. M.C.I.* (F.C., no. IMM-9511-12), Zinn, June 24, 2013, 2013 FC 702, at para. 3.

<sup>63</sup> *Ibid.*, at para. 13.

<sup>64</sup> *Mudrak, Zsolt Jozsef v. M.C.I.* (F.C., no. IMM-3582-13), Annis, February 18, 2015, 2015 FC 188.



[110] More recently, in *Poczodi*,<sup>65</sup> the Federal Court reiterated some of the principles set out above, reiterating that while “democracy alone does not ensure effective state protection, it is a relevant factor”. Relying on *Sow v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11<sup>66</sup> and *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA),<sup>67</sup> the Federal Court noted, that the onus on a claimant to seek state protection varies, and is commensurate with the state’s ability and willingness to provide protection. However, in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004, 440 FTR 106, the Chief Justice explained at para 33, that a claimant cannot simply rely on their own belief that state protection will not be forthcoming without testing it:

In this regard, doubting the effectiveness of state protection without reasonably testing it, or simply asserting a subjective reluctance to engage the state, does not rebut the presumption of state protection . . . In the absence of a compelling or persuasive explanation, a failure to take reasonable steps to exhaust all courses of action reasonably available in the home state, prior to seeking refugee protection abroad, typically will provide a reasonable basis for a conclusion by the RPD that an applicant for protection did not displace the presumption of state protection with clear and convincing evidence.

[Internal citations omitted]<sup>68</sup>

[111] It is in the context of these divergent views on state protection that the panel must attempt to decide the question of whether the claimants have displaced the presumption of state protection. In the instant case, the panel finds, on a balance of probabilities that the claimants have not credibly established that they have met their evidentiary burden, with regard to their attempts to obtain state protection. The principal claimant claimed that she went to the police to report the beating, after which she miscarried, but was rebuffed. She claimed that her mother tried to report the August 25, 2009 incident, but she too was rebuffed. Given the panel’s finding, concerning that first police report and its credibility findings regarding the rape, the panel finds

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<sup>65</sup> *Poczodi, Zsolt v. Minister of Immigration, Refugees and Citizenship* (F.C., no. IMM-769-17), Kane, October 26, 2017, 2017 FC 956, at para. 39.

<sup>66</sup> *Sow v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 646, at para 11.

<sup>67</sup> *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (QL) 143 DLR (4th) 532 (FCA), at para. 5.

<sup>68</sup> *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004, 440 FTR 106, para. 33.

that there is little credible and trustworthy evidence before it to support a conclusion that the principal claimant made attempts to obtain state protection, but was unsuccessful.

[112] While the panel accepts that the adult male claimant did likely seek to obtain state protection after the second attack, it is also clear, that he did nothing further about enforcing his rights. He did not complain to any of the bodies set up for that purpose. He simply decided to come to Canada, which he did.

[113] Thus, in the case of the principal claimant, it is not clear to the panel that she made any attempt to obtain state protection. Accordingly, she does not meet the stipulation set out in *Ruszo*,<sup>69</sup> namely, that a claimant must take reasonable steps to exhaust all courses of action reasonably available in the home state, prior to seeking refugee protection abroad.

[114] With respect to the adult male claimant, the question is whether the refusal of the police to investigate the incident, when he was urinated on, constitutes a failure of state protection, such that it can be said, that he could have no prospect of obtaining state protection in the future.

[115] In *Mudrak*,<sup>70</sup> Mr. Justice Annis states that:

More substantively, suggesting that police oversight agencies have no role in demonstrating adequate state protection is like saying senior policing management has no role in policing due to their oversight function, or saying that policing is a short-term operational exercise. Similarly, denying oversight agencies an important role in police protection would suggest that the police complaints process, and thereafter the courts in Canada, have no responsibility in ensuring adequate policing. This is surely an unsustainable proposition. It is no counter-argument that Canadian police are more responsive to complaints about their conduct, which in some recent instances at least, might be challenged. The point is that the evidence in the Hungarian Roma persecution claims indicates that the oversight agencies are diligent in their investigations and in reporting their findings to the police. The transparency and accompanying public criticism of the state protection apparatus is an important ingredient to reforms and improvement in protection services accorded to Roma citizens.

The requirement to access police oversight agencies is particularly important where the persecution is in the form of random incidents, such as is normally the case for members of the Roma community. Adequate state protection against random crime

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<sup>69</sup> *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004, 440 FTR 106.

<sup>70</sup> *Mudrak, Zsolt Jozsef v. M.C.I.* (F.C., no. IMM-3582-13), Annis, February 18, 2015, 2015 FC 188, paras. 81-83.

must operate at a community level over a longer time frame, because responding to any particular victim cannot assure that future random attacks from other assailants will not occur. To the extent that random criminal conduct can be prevented by means other than increased patrols, effective policing can have a deterrent effect by arresting and successfully prosecuting wrongdoers accompanied by the declaratory publicity attached to successful convictions.

Thus, looking ahead, no crime prevention process can be effective if victims of crime do not report incidents to the police and proactively cooperate in their investigations, including complaining if not satisfied with the efforts of the police. If the rhetorical question is whether all members of the Roma community will be better protected from a rule requiring they follow up instances of inadequate policing with oversight agencies, I would argue, yes it would.

[116] Taking the statements of Annis, J into consideration, the RPD concludes that, as stated above, the burden is on the claimants to provide clear and convincing evidence that the state is either unwilling, or unable, to provide them with adequate protection. It is not for the RPD to provide that proof, rather, it is the claimant who bears the legal burden of rebutting the presumption that state protection exists by adducing clear and convincing evidence which satisfies the panel, on a balance of probabilities.<sup>71</sup>

[117] The panel concludes, after careful consideration of all of the evidence, that the claimants have not rebutted the presumption of state protection. Indeed, the principal claimant has not reliably established that she made any effort to obtain it, and the adult male claimant has not taken advantage of the existing police oversight agencies to further his complaint. It was open to him, to take his complaint to one of the existing bodies, he did not.

[118] The panel is further guided by the recent decision *X (Re)* 2017 CANLII 144421 (CA CISR), in which, it was determined that state protection was available to the claimants. Further guidance is taken from the recent Federal Court decision of *Venter*, in which Justice Boswell found, that the RPD reasonably considered the legislative measures taken by the Hungarian government and their operational effectiveness:

The RPD reasonably concluded that the Applicants had not provided sufficient evidence either to rebut the presumption of adequate state protection in Budapest

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<sup>71</sup>*Nadeem, Choudhry Muhammad v. M.C.I.* (F.C.T.D., no. IMM-6320-00), McKeown, November 15, 2001; 2001 FCT 1263.

or to show that relocating to Budapest would be unreasonable in view of the Applicants' particular situation and circumstances.<sup>72</sup>

## CONCLUSION

[119] The claimants claimed Convention refugee status in Canada, based on a well-founded fear of persecution in Hungary because of their Roma ethnicity. The principal and adult male claimants testified to incidents of discrimination, starting with school, and extending through their employment and public life in Hungary. They also detailed several violent incidents that, they claim, led to their making the decision to leave Hungary and to come to Canada. Their son, XXXX, relies on the claims of his parents, although they claim that he suffered severe discrimination while he was attending school in Hungary. They claim that their attempts to obtain state protection were refused, and they allege that, if returned to Hungary, they would be unable to access state protection should they require it. They also alleged, that under the present Hungarian government, the situation for Roma has worsened.

[120] The panel finds, that it is not in dispute that Roma face discrimination in Hungary. However, what was at issue in these claims, was whether the claimants could credibly establish their allegations of persecution, and a lack of state protection. For the reasons set out above, the panel finds that the claimants have not met their onus to establish the basis of their claims by means of clear and convincing evidence. The panel also finds, that the claimants have not established that state protection is, or will not be, available to them in Hungary.

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<sup>72</sup> *Venter, Zsolt et al v. M.C.I.*, (F.C., no. IMM-5015-17), Boswell, June 28, 2018; 2018 FC 674.

[121] Accordingly, the panel finds that XXXX XXXX XXXX XXXX XXXX and XXXX XXXX XXXX are not Convention refugees as defined in section 96 of the *Immigration and Refugee Protection Act*. The panel also finds, that they are not persons in need of protection as defined in section 97(1) of the *Immigration and Refugee Protection Act*.

(signed)

**“ H. Ross”**

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**H. Ross**

**January 4, 2019**

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**Date**