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TB2-00874

Private Proceeding / Huis clos

Reasons and Decision – Motifs et Décision

2018 CanLII 97030 (CA IRB)

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| Claimant(s) | XXXX XXXX XXXXXXXXX XXXX | Demandeur(e)(s) d'asile |
| Date(s) of Hearing | December 15, 2017 | Date(s) de l'audience |
| Place of Hearing | Toronto, Ontario | Lieu de l'audience |
| Date of Decision and reasons | January 3, 2018 | Date de la décision et des motifs |
| Panel | H. Ross | Tribunal |
| Counsel for the Claimant(s) | Meera Budovitch Barrister and Solicitor | Conseil(s) du (de la/des) demandeur(e)(s) d'asile |
| Designated Representative(s) | | Représentant(e)(s) désigné(e)(s) |
| Counsel for the Minister | N/A | Conseil du (de la) ministre |

REASONS FOR DECISION

[1] XXXX XXXX (the female claimant) and XXXX XXXX (the male claimant), collectively the claimants, seek protection in Canada pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act* (IRPA).¹

[2] The claims were heard jointly pursuant to Rule 55 of the Refugee Protection Division Rules as the claimants are mother and son.

ALLEGATIONS

[3] Originally, the file include the claim of XXXX XXXX, who has since died. Nonetheless, the claimants continue to rely on the allegations he made in his Personal Information Form (PIF) as amended by the narrative of XXXX XXXX.² Briefly, the claimants allege that they are Roma persons who, because of their ethnicity have been subject to lifelong discrimination and harassment in Hungary. They recount incidents of discriminatory conduct directed towards them while they were at school, in the employment sphere and in their public life.

[4] In his PIF, which has been adopted by the surviving claimants, XXXX XXXX alleged that he suffered discriminatory treatment at school at the hands of abusive teachers and in employment. He stated that he found it difficult to obtain jobs once prospective employers realised he was Roma and when he did find work, he was not allowed to perform tasks that required skill. This discrimination pervaded his entire life and included shopkeepers who refused to sell to him and doctors who thought that there were too many children being born to the Roma. He also recounted incidents of discrimination and physical abuse directed towards his son, XXXX XXXX and the stone wall he encountered when he tried to complain to the teachers.

[5] The female claimant identified herself as a citizen of Hungary who is ethnically Roma. She stated that she was easily recognised as such by her manner of dress and speech as well as the way she carried herself. Both she and the male claimant testified that they did not want to return

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

² Item 7.

to Hungary because anti-Roma racism was pervasive throughout the country and because they had been physically attacked by skinheads and members of the Hungarian Guards on several occasions and feared a repeat of the same.

[6] The female claimant recounted a number of incidents where either she or her late husband was beaten up. One such incident took place in November 2011 and involved the male claimant. At the time he was a minor and the female claimant was taking him to school. She testified that they had almost reached the school when a group of people who were standing on their path began to shout at and abuse them. The female claimant stated that she was so scared that she started to run and fell. When the male claimant tried to help her, a man from the group pushed him. When the female claimant intervened, the man beat her. The members of the group then got on the street car and left.

[7] Other incidents included attacks on the female claimant's late husband in 2005 as he was waiting for a bus; an attack in January 2009 when he and the female claimant were going to the store; and another attack in June 2010 when he was followed by four men. However, the triggering event occurred in November 2011 when the claimants were attacked as the female claimant accompanied the male claimant to school.

[8] She also referred to an attempt that her late husband had made to report the incident at the bus stop. She indicated that instead of taking his report promptly, he was made to wait five hours. Eventually, he left the police station because it had become apparent to him that none was going to take a report. After this incident the claimants realised that it was futile to try to make police reports.

[9] The female claimant also recounted an incident where the police stopped her husband as he was going to work one evening. She related that the police told her late husband that soon there would be more Roma in Hungary than Hungarians and beat him with their truncheons. She stated that actions bolstered their negative view of the police.

[10] In other cases, the Guardists and skinheads who attacked the claimants would warn them against making a police report or seeking medical attention. They threatened the claimants with more severe attacks if they did either of these things, warning the claimants that they knew where

the claimants lived. She, on the other hand, had never seen these persons before and did not recognise any of them.

[11] The female claimant also stated that not only did she experience discrimination and harassment, she also experienced name calling and physical violence. The examples she provided included being enrolled at an all-Roma school, being segregated from non-Roma school children, being left unattended and being verbally abused while she was in labour, and being sterilised without her consent. The female claimant also alleged that the Miskolc authorities arbitrarily refused to renew the lease of the family home in the “Numbered Streets” area of Miskolc, despite the rents and utilities being fully paid.

[12] As well, the claimants state that their neighbourhood was the scene of demonstrations by the Hungarian Guard and that they have personally suffered attacks on account of their ethnicity. In some instances, the claimants required medical attention. The claimants state that their complaints to the police did not result in any arrests and that, in fact, the police took no action. However, it was an incident in November 2011 that brought them to the realisation that they could no longer live in Hungary. Accordingly, they fear continued discrimination, harassment and other persecutory acts as well as an absence of state protection, should they be returned to Hungary.

DETERMINATION

[13] The panel determines that the claimants are not Convention refugees, neither are they persons in need of protection. The panel’s reasons are set out below.

ISSUES

[14] The determinative issues are: the claimant’s identity as citizens of Hungary, nexus to the definition of Convention Refugee, credibility, whether what the claimants fear was discrimination as opposed to persecution, and state protection and internal flight alternative. At the start of the hearing, the panel informed the claimants that on the basis of their documentary evidence it was

satisfied as to their personal identities and ethnic profiles. This meant that only the three remaining issues had to be addressed during the hearing.

ANALYSIS

Identity

[15] The Canada Border Services Agency (“CBSA”)/Citizenship and Immigration Canada (“CIC”),³ provided the Board with a package of documents that included certified true copies of the claimants’ Hungarian passports. The claimants also submitted translated copies of birth certificates as well as of the marriage certificate for XXXX and XXXX XXXX all of which had been issued by the Hungarian authorities. In addition, the claimants’ oral testimony fixed them as persons who were born and lived in Hungary until their arrival in Canada in 2012. Accordingly, the panel is satisfied that the claimants have established their identities as citizens of Hungary.

The Claimant’s Roma Ethnicity

[16] The claimants submitted declarations of Roma ethnicity that had been issued by the Roma Ethnicity Self Government of Miskolc. While these declarations are not official certificates, having been issued at the request of the claimants and on nothing more than their declaration that they are Roma, the panel finds them persuasive of their ethnicity. The panel also finds that the claimants effectively established their Roma identities through their testimony about where they lived and their experiences in Hungary.

ANALYSIS

[17] Given the clinical assessments made in regard to the female claimant, indicating that she suffers from XXXX XXXX XXXX XXXX XXXX as well as XXXX XXXX XXXX XXXX,⁴ the panel reversed the order of questioning allowing counsel to question the claimants first.

Credibility

³ Exhibit 1.

⁴ Exhibit 6, Disclosure of November 7, 2017, p. 26.

[18] Both claimants testified at the hearing. The female claimant's oral testimony was consistent with the PIF narratives, as amended, and with the statements made on arrival in Canada. The panel notes that she told her psychologist that she reads and rereads the PIF narrative constantly, although she states she is unable to remember what it contains. Notwithstanding this claim, the panel finds it more likely than not that the female claimant would be very conversant with the contents of her narrative, especially as she was able to author or cause a lengthy amendment to be authored on her behalf, which amendment supplemented the original narrative. Therefore, the panel places less reliance on the consistency between her testimony and the PIF narrative as an indication of the female claimant's overall credibility as it might otherwise have done. The panel found that there were several instances in female claimant's testimony that gave rise to credibility concerns that, for the reasons set out below, have not been resolved in the claimants' favour.

[19] First, the female claimant maintained that she was denied access to a post-elementary education. The panel put its specialised knowledge to her that contrary to her assertion, Roma children did have access to post-elementary education but were generally steered toward vocational only schools. The female claimant maintained that this was not done when she attended school, which is in clear contradiction of the documentary evidence as well as the statements of other claimants who attended school in the same time period as the claimant, all of which contributed to the panel's specialised knowledge. The panel inferred that this aspect of the female claimant's testimony was untruthful and that it had been provided with the intention of painting a harsher picture of her experiences. The testimony, was for that reason, unreliable.

[20] The panel also did not find the female claimant's account of discrimination in employment to be credible because of inconsistencies in her evidence that the panel finds were not satisfactorily explained. It was her evidence that she has been unable to find employment despite her best efforts, which included being the first to a job interview and being passed over because of her Roma ethnicity. The female claimant testified that she worked until 1995, when her husband had a heart attack and after 1995 she found it difficult to find work. She feared that anti-Roma racism would make it unlikely that she would be able to find work in Hungary if returned.

[21] The panel would have found the female claimant's testimony more compelling but for the fact that her evidence does not support her allegations. The evidence revealed that she began to

work outside the home in 1983, when she was eighteen years old. She continued to work until 1995 when her husband fell ill, and she became his paid caregiver. When the panel enquired into her work experience, the female claimant demurred, responding that between working at the factory and caring for her ill husband she had only worked a total of those twelve years. This did not, however, clarify her work history beyond that fact.

[22] The female claimant sought to give the impression that her husband never returned to the work force. The panel rejects this aspect of her testimony as untrustworthy because she later testified that her husband did, in fact, return to work after a few months, although he was doing lighter work. Therefore, the panel inferred that the female claimant did not spend as much time taking care of her husband as she would like the panel to believe. Accordingly, and after taking the whole of the evidence into consideration, including the female claimant's statements in her PIF, the panel finds, on balance of probabilities, that the female claimant likely withdrew from the active workforce to take full-time care of her growing family (six children) as opposed to not being able to find work as she testified.

[23] The panel also found that the female claimant was not straightforward in her testimony regarding the attempts to obtain police protection. Initially she testified that her late husband had gone to the police only once. Later on, when responding to her counsel, she changed this testimony to indicate that both she and her late husband had gone to the police many times, but had never received help⁵ as the police were racist.

[24] At the time, the female claimant indicated that she and her late husband had made many unsuccessful attempts to obtain police protection she was responding to counsel's questions asking about the absence of medical and police reports in relation to the several attacks by Guardists and skinheads. She explained that while an attempt had been made to obtain her

⁵ The female claimant gave this answer in response to the following series of question from her Counsel:
Counsel: I understood that there were no medical or police certificates coming from Hungary?
FC: Yes, no they did not release anything
Counsel: My understanding is that every time you went to the police you did not get assistance?
FC: Yes that is right
Counsel: How many times would you say you went to the police?
FC: Went many times, so did my husband but they never helped with anything.

medical record as well as copies of the police reports but that the hospital and the police refused to release them to her daughter despite the authorisation to do being impressed with the seal of the Hungarian consulate.⁶

[25] The panel would have accepted the explanations, but for the circumstances that surrounding the claimants' arrival in Canada. It was their evidence that the decision to leave Hungary and come to Canada was made several months before the claimants left Hungary. As well, they knew they would make refugee claims once in Canada as they had discussed this with their relatives who had preceded them, and who had themselves made claims for refugee protection. Accordingly, the panel inferred that the claimants were aware even before they left Hungary that medical and police reports would have been helpful to their claims. The panel finds that it was reasonable to expect that they would have taken steps to obtain such reports if they were in fact in existence, prior to them leaving Hungary. Given the female claimant's previous lack of straightforwardness, the panel finds that it could not be certain of the trustworthiness of her explanations. The panel finds that while there would have been official medical records for the female claimant who has given birth several times and therefore would have had a medical history, it was more likely than not, that there are no police reports because she and her late husband had never actually gone to police and her testimony that they had done so "many times" was not truthful.

[26] With regard to her medical history, the female claimant alleged that after she had given birth to her sixth child, she was sterilised without either her knowledge or her consent. She recounted the circumstances surrounding the birth, which she maintained had been motivated by anti-Roma racism. The panel accepts that if she had been treated as she described and sterilised without her consent solely because she was Roma, these actions by a Hungarian doctor were clearly racist and or persecutory.

[27] Unfortunately, the only evidence of this sterilisation came from the female claimant, the narrative of her late husband referring to the insertion of an intra uterine device only. In the panel's view the female claimant could have provided objective evidence of such sterilisation. The panel finds support for its view in the fact that the claimants have submitted medical and

⁶ Exhibit 6, pp, 43-47.

psychological reports from Canadian doctors in support of their claims. Furthermore, the panel finds that had the female claimant been sterilised as she stated, her late husband would have been clear on that fact and that a translation error would likely not have accounted for his statement that an IUD had been placed without her consent.

[28] The female claimant also described an incident where her youngest son, XXXX, the other claimant was set upon by a group of five or six boys. During the incident XXXX sustained injuries to his XXXX XXXX. The claimants exhibited photographs of the resulting scar. The panel has no reason to doubt the circumstances in which the claimants state that the injury was obtained, however, the panel finds that the injury was likely not so serious as the claimants indicate, because according to Dr. XXXX, the claimants related that XXXX was not seen at a hospital until after the school day had ended.⁷ When he did go to a hospital, he apparently received no medical treatment. The panel infers that if the injuries were as severe as had been described, on a balance of probabilities, XXXX would have received some type of treatment at the hospital and in a timelier manner.

[29] The female claimant stated that the incident with XXXX was reported to both the school and the police as well as the Roma Minority Self-Government in Miskolc. The former declined to act, while the latter told her that she would simply have to accept such events as part of being Roma while indicating there was nothing they could do about it.

[30] The incident is alleged to have occurred in 2011. The documentary evidence is replete with similar stories. The panel accepts that if the incident occurred in the manner that the claimants alleged it occurred then this would be a clear incident of discrimination. The issue, however, is whether the discriminatory incidents taken together amount to persecution. For the reasons set out in this decision the panel is not persuaded that they do.

Documentation

⁷ Exhibit 8, p.19.

[31] The panel is cognizant that supporting documentation is not always required and that a claimant's sworn testimony can be sufficient to support the claim, however, the panel finds that the absence of such documentation in circumstances where it is reasonable to expect that the documentation would be provided, namely, the female claimant's sterilisation without her consent, causes the panel to question whether the sterilisation did take place, and, if it had taken place, whether it was without the female claimant's knowledge and consent as she claimed.

The Eviction

[32] The claimants tendered a copy of an eviction notice that they stated they received from the City of Miskolc, where they lived. The female claimant stated that the family received the notice only after the home was taken away. She testified that it was demolished, and she did not know why. While the documentary evidence speaks to the unfair manner in which the City of Miskolc appears to have carried out these evictions, certain facts about this particular case may distinguish it from the rest. First, the claimants never owned the home, rather they leased it from the city. That lease apparently expired on August 15, 2016 and the eviction is dated 24th October 2016. This contradicts the the female claimant's assertion that the eviction notice was served on them prior to the expiry of the lease term.

[33] As well, the panel does not accept that the female claimant could not know why the city refused to renew the lease as the documentary evidence is replete with articles that indicate the evictions and demolitions were to make way for a new stadium. The panel infers that the claimant would have been aware that this was the reason why Miskolc had expropriated homes in XXXX XXXX XXXX and that it was disingenuous of the female claimant to feign ignorance given the widespread publicity the city's action had engendered.

Evidence of the Male Claimant

[34] The male claimant also gave oral testimony at the hearing. When asked, he testified that he was reluctant to return to Hungary because he was afraid of being attacked by members of the Hungarian Guard and the racist persons. He testified that he had been attacked by such persons in the past. Asked why he was afraid of future assaults, he replied that he had been assaulted in school by a teacher who hit him with a ruler because she was racist and who encouraged the non-Roma students to beat him, which they did. This teacher encouraged a beating after he was "a

minute late getting to class after he had gone to the washroom.” When his parents complained about the beatings, no action was taken, not by the police or the school or the Roma Minority Self Government although his parents took him to the hospital after one such beating.

[35] The male claimant testified that despite the harassment and the sense of exclusion he felt, he liked school. He compared his present school experience with that of Hungary, finding it favourable. He recounted several instances where he received a lower grade of education than the Hungarian students. In Canada, he has completed high school and hopes to continue on to university as his grades were good. His educational goal is to become a heart specialist. He states that it was unlikely he would be able to realise these dreams were he to return to Hungary.

[36] He also discussed the November 2011 event providing an account that was consistent with that of the female claimant.

[37] In answer to the panel, the male claimant admitted that while he had graduated in the summer of 2017, he had taken no steps to enrol in university because it was too expensive to do so. In fact, he had not even spoken with the school’s guidance counsellor.

[38] The panel asked for a copy of his high school certificate to be attached to counsel’s written submissions. It did not receive the certificate. Counsel explained that the male claimant would have to wait until the start of the new school term before he could obtain it. This explanation lacks the ring of truth because the male claimant testified that he had already graduated, therefore, it is reasonable to expect that he would have the certificate in his possession. Accordingly, the panel is unable to assess the credibility of his testimony regarding his progress in the Canadian school system as opposed to the retardation he felt in the Hungarian system.

[39] The panel considered the male claimant’s testimony and concluded that it was testimony that was largely supportive of the claim. However, it was more in the nature of additional, if somewhat exaggerated, testimony. The panel accepts, as the documentary evidence makes abundantly clear, that Roma school children are often the victims of institutional bias that sees them segregated into Roma only classes and the recipients of a substandard education. Thus, the panel is prepared to find that at his former school in Hungary, the male claimant has, on a balance of probabilities, been discriminated against by teachers and fellow students. However, the panel

is not persuaded that the evidence that was before it could credibly lead to a finding that he was persecuted.

Discrimination versus Prosecution

[40] The female claimant testified that anti-Roma racism and discrimination was evident from the moment she began school. She described having to endure segregated classes, substandard education and severe difficulties obtaining and maintaining employment in Hungary by reason of her Roma ethnicity. She traced these inequities to the fall of Communism. She stated that her late husband was a victim of discrimination in employment and that her daughter, too, continues to suffer such discrimination by reason only that she is Roma. She described racism as being “very big” in Hungary.

[41] The panel has canvassed the documentary evidence and the panel is satisfied that, in Hungary, Roma, in general, face severe discrimination. The United States, Department of State Report for 2016 states that:

The most significant human rights problem remained the government’s handling of migrants and asylum seekers seeking to transit the country, which was marked by several reports of physical abuse and xenophobic rhetoric. International organizations and human rights nongovernmental organizations (NGOs) continued to voice criticism of the systematic erosion of the rule of law; potential violations of international humanitarian law; weakening of checks and balances, democratic institutions, and transparency; and intimidation of independent societal voices since 2010.

Other human rights problems included prison overcrowding and substandard physical conditions, physical abuse of prisoners and detainees by prison and detention staff, prisoner-on-prisoner violence, a politically determined process for government registration of religious groups, government corruption, growing media concentration that restricted editorial independence, and governmental pressure on civil society. There were reports of domestic violence against women and children, sexual harassment of women, anti-Semitism, abuse and inhuman treatment of institutionalized children and persons with mental and physical disabilities, social exclusion and discrimination against Roma, and trafficking in persons.⁸

[42] Persecution is not a defined term in the IRPA, however, Canadian courts have addressed the question in a number of decisions.⁹ In *Ward*, the Supreme Court of Canada stated that for

⁸ Exhibit 4, National Documentation Package (NDP) for Hungary (August 31, 2017), item 2.1.

⁹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

treatment to amount to persecution, it must be “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”.¹⁰ I am prepared to accept that the claimants may have suffered some mistreatment by society, such as name calling and such further incidents they allege, including the physical assault described by the male claimant. However, I am not prepared to find that this treatment on its own amounted to persecution in light of the isolated nature of these events and the claimants’ failure to seek state protection in response to this treatment.

[43] The commonly accepted definitions speak to a course or persistent course of harassing conduct directed at an individual or group.¹¹ The claimants’ remaining complaints relate to discrimination in housing, education and employment.

[44] As well, it is clear from the case law that it is possible to view acts of discrimination along a continuum, however, it is impossible to say with certainty at what point discrimination will have risen to the level of persecution. In the panel’s view, that determination is not only case specific, it depends on the existence of credible evidence to support the claims being made.

[45] In the instant case, the panel is not persuaded that there was sufficient credible evidence for it to conclude that the discrimination the claimants experienced had risen to the level of persecution. Even if it has, the claimants had an obligation to seek state protection, which the panel concludes from the evidence, they did not do.

State Protection

[46] For treatment to amount to persecution, it must be “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”.¹² The panel is prepared to accept that the claimants may have suffered some mistreatment in Hungarian society, such as name calling and such further incidents they allege, including the incident in November 2011. However, the panel is not prepared to find that this treatment on its own amounted to persecution

¹⁰ *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, 1993 CanLII 105 (SCC).

¹¹ *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugessen, Stone (concurring), July 4, 1984.

Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.).

¹² *Ward*, *supra*, footnote 9.

in light of the lack of credible evidence surrounding the claimants' allegations and their failure to seek state protection.

[47] Ultimately, refugee protection is granted on a forward-looking basis and in light of the adequacy of state protection. As set out below, the panel finds that the claimants have failed to rebut the presumption of adequate state protection in Hungary.

Presumption of State Protection not rebutted in the alternative

[48] In assessing the issue of state protection in Hungary, the panel is guided by the jurisprudence of the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court. In their decisions, the courts have established a number of principles relating to state protection, which the panel will apply those principles to the appeal at hand.

[49] The notion of a rebuttable presumption of state protection was articulated by the Supreme Court of Canada, (SCC), in *Ward* where the SCC stated that, absent confirmation of a state's inability to protect a claimant must provide "clear and convincing" evidence that it cannot do so. Further, the SCC also made clear that:

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.¹³

[50] *Ward* has established that the onus is on the claimants to produce clear and convincing evidence that the state cannot provide protection. International protection comes into play only when a refugee claimant has no other recourse available. Having canvassed the country conditions documents,¹⁴ 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. Where a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact that the state's efforts are not always successful will not rebut the presumption of state protection.¹⁵ A claimant cannot rebut the

¹³ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85, at paras. 724 and 725.

¹⁴ Exhibit 4, NDP for Hungary (August 31, 2017) and Exhibit 5, NDP for Hungary (May 4, 2012).

¹⁵ *M.E.I. v. Villafranca, Ignacio* (F.C.A., no. A-69-90), Hugessen, Marceau, Décary, December 18, 1992. **Reported:** *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.), at 133.

presumption of state protection in a functioning democracy by asserting only a subjective reluctance to engage the state.¹⁶ Doubting the effectiveness of the protection offered by the state when one has not really tested it does not rebut the existence of a presumption of state protection.¹⁷ Accordingly, the onus was on the claimants to provide clear and convincing confirmation of Hungary's inability to protect them.

[51] In a functioning democracy, a claimant will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status.¹⁸ The documentary evidence¹⁹ before the panel indicates that Hungary is a functioning democracy, although there are significant concerns about the state of human rights in Hungary. Nonetheless, in countries such as Hungary, the claimant must do more than merely show that he went to see members of the police force and that those efforts were unsuccessful. A claimant must show that he has 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.²⁰ 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.²¹ 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.²² Less than perfect protection is not a basis to determine that a state is either unwilling or unable to offer reasonable protection.²³

¹⁶ *Camacho, Jane Egre Sonia v. M.C.I.* (F.C., no. IMM-4300-06), Barnes, August 10, 2007; 2007 FC 830.

¹⁷ *Rio Ramirez, Leticia Lizet Del v. M.C.I.* (F.C., no. IMM-1301-08), Lagacé, October 31, 2008, 2008 FC 1214.

¹⁸ *Hinzman, Jeremy v. M.C.I.* (F.C., no. IMM-2168-05), Mactavish, March 31, 2006, 2006 FC 420; **Reported:** *Hinzman v. Canada (Minister of Citizenship and Immigration)* [2007], 1 F.C.R. 561 (F.C.); *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, at para. 46.

¹⁹ Exhibit 5, NDP for Hungary (May 4, 2012), item 2.1.

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

²¹ *Zhuravljev, Anatoliy v. M.C.I.* (F.C.T.D., no. IMM-3603-99), Pelletier, April 14, 2000. **Reported:** *Zhuravljev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3 (T.D.).

²² *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.).

²³ *Milev, Dane v. M.C.I.* (F.C.T.D., no. IMM-1125-95), MacKay, June 28, 1996.

[52] While these are the general principles of the law in Canada regarding state protection as enunciated by the Canadian Courts, recent decisions by the Federal Court have questioned whether state protection is available to members of the Roma community if they were to return to Hungary, and have thrown some uncertainty as to the way this Board is to conduct a state protection analysis with respect to Roma citizens of Hungary. The Federal Court is divided as to how best this analysis should take place. The Court itself acknowledged this diverse opinion in the *Mudrak* decision where the 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.²⁴

Although the Court in *Mudrak* certified two questions, the Federal Court of Appeal has yet to render a decision on the certified questions.

[53] 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. The following decisions best illustrate the divided legal mind set of the Federal Court on this issue.

[54] The first decision is that of *Moczso*.²⁵ In that particular claim, the applicants are an extended family from Hungary. In 2010, they 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.²⁶

[55] In allowing the appeal, the Court did not agree 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.²⁷

²⁴ *Mudrak, Zsolt Jozsef v. M.C.I.* (F.C., no. IMM-3582-13), Annis, February 18, 2015, 2015 FC 188, at para. 46.

²⁵ *Moczso, Dezso v. M.C.I.* (F.C., no. IMM-8488-12), O'Reilly, July 2, 2013, 2013 FC 734.

²⁶ *Ibid.*, at para. 1.

²⁷ *Ibid.*, at para. 9.

[56] 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.²⁸

[57] An opposing legal view, however, was provided by the Federal Court in the *Csaba Racz* decision.²⁹ In that the particular claim, the applicants:

...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.³⁰

[58] 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.³¹

²⁸ Ibid., at para. 11.

²⁹ *Csaba Racz, Denes v. M.C.I.* (F.C., no. IMM-9511-12), Zinn, June 24, 2013, 2013 FC 702.

³⁰ Ibid., at para. 3.

³¹ Ibid., at para. 13.

[59] More recently in *Poczodi*³² 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, and *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)), 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:

[33] 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]

[42] In the instant case, the panel has found, 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. It is not clear to the panel that any attempt to obtain state protection was, in fact, made. Accordingly, they do not meet the stipulation set out in *Ruszo* 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.

³² *Poczodi, Zolt v. Minister of Immigration, Refugees and Citizenship* (F.C., no. IMM-769-17), Kane, October 26, 2017, 2017 FC 956, at para. 39.

[60] Given the particular concerns regarding credibility as discussed above, and having canvassed the documentation from the Board and the claimants, the panel finds that, on a balance of probabilities, that the claimants have not rebutted the presumption of state protection.

[61] Counsel, in her submissions, suggests that there is a general climate of insecurity for Roma due to persecution by the state itself. Therefore, the claimant is discharged from personally having to request protection. The panel disagrees with counsel's submissions. The panel finds that there is insufficient credible evidence to establish, on a balance of probabilities, that the claimants would risk their lives seeking what may turn out to be inadequate protection, merely to demonstrate that inadequacy.³³ The objective evidence indicates that while discrimination against Roma, even by some parts of the state exists in Hungary, there are state institutions that offer adequate protection to Roma who complain.

The panel would be remiss if it did not acknowledge and consider that there is information in the documentation, both the Board's own documentation and the documentation submitted by the claimants, to indicate that there is widespread reporting of incidents of intolerance, discrimination and persecution of Romani individuals in Hungary and that Violent attacks against Roma continued, generating strong public concern and intense disputes as to the existence and scale of racially motivated crimes. Human rights NGOs complained that law enforcement authorities, prosecutors, and courts were reluctant to recognize racial motivation for many crimes.³⁴

[62] According to multiple sources, the Hungarian Guard, and other far-right organizations held demonstrations across the country with the goal of inciting 'prejudice' against the Roma. The groups organized the demonstrations under the guise of protecting Hungary against what they termed the "Gypsy Terror" or "Gypsy criminality". However, a fair reading of the documentary evidence also indicates that the central government is motivated and willing to implement measures to protect the Roma, for example by its outlawing of the Hungarian Guard, but these measures are not always implemented effectively at the local or municipal level.

³³ *Chaves, Alejandro Jose Martinez v. M.C.I.* (F.C., no. IMM-603-04), Tremblay-Lamer, February 8, 2005, 2005 FC 193, at para. 16.

³⁴ Exhibit 5, NDP for Hungary (May 4, 2012), item 2.1.

[63] The panel recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Hungary for Roma who are victims of crime, police abuse, discrimination or persecution, that Hungary is making serious efforts to address these problems, and that the police and government officials are both willing and able to protect victims.

[64] The evidence indicates that police do still commit abuses against people, including the Roma, but there is also evidence that indicates it is reasonable to expect authorities to act in these cases, and that the police are capable of protecting Roma.

[65] There is also recourse to the Equal Treatment Authority. Since 2005, it has provided individuals with a direct avenue of redress for violations of the prohibition of discrimination in a variety of public and private law relationships. In the first year, there were nearly 500 complaints lodged and the number has risen steadily ever since. There are also other remedies such as seeking compensation through the courts, or turning to one of the Parliamentary Commissioners where public authorities are concerned. There is also the Roma Police Officers' Association in Hungary, and Roma are able to file a complaint to the association. The complaints mostly concern discrimination in employment, discriminatory treatment and discrimination by law enforcement authorities or police officers.³⁵

[66] There are government institutions in place that enforce human rights legislation in response to violations caused by public as well as private actors. The most important of those is the Equal Treatment Authority (“ETA”), which is an independent administrative body that protects, enforces, and promotes equality and the right to equal treatment with respect to direct/indirect discrimination, segregation, harassment, and victimization.³⁶ The ETA has the power to issue legally binding and enforceable decisions as well as non-binding opinions.³⁷

[67] There is evidence that the ETA solicits a large number of complaints and acts on them. In 2010, the ETA received 1,300 complaints and started investigations into 377 of them.

³⁵ Exhibit 5, NDP for Hungary (May 4, 2012), item 10.1.

³⁶ Exhibit 4, NDP for Hungary (August 31, 2017), item 10.5.

³⁷ Ibid.

Discrimination was determined to have taken place in 40 cases. Most of the cases were complaints of employment-related discrimination, but there were also instances of racism in the public service.³⁸

[68] The ETA has used its powers to protect the human rights of Roma in response to discriminatory state action in housing. On July 15, 2015, the ETA established that the Municipality of Miskolc subjected residents of a segregated area to the threat of homelessness or having to move to other segregated areas and, by doing so, discriminated against them because of their social status, financial situation, and Romani origin. The panel finds that the actions of the ETA establish, on a balance of probabilities, that it is willing and able to provide adequate state protection to Roma.

[69] In April, the Curia (Hungarian court) annulled the local decree on the grounds that it discriminated against persons with social needs.³⁹ The panel find that the actions of the Curia and the responses by the affected municipalities establish, on a balance of probabilities, that when sought, state protection against discrimination in housing, will be forthcoming and adequate.

[70] The panel notes that, unlike the other nine cities, Miskolc has responded by seeking review of adverse judicial and ETA decisions against it and resorting to other discriminatory conduct.⁴⁰ While such conduct is distasteful, on the whole it constitutes a local failure of state protection, as opposed to a widespread national climate of insecurity and inadequate protection as suggested by counsel. The Board documentation on the issue of housing evictions in Miskolc indicates that it was highly localized to the “Numbered Streets”.⁴¹ Notwithstanding this documentation and the female claimant’s testimony that the family would have no home to return to, the panel is satisfied that this argument lacks merit because the claimants would have had to find alternative housing had they remained in Hungary.

[71] There is evidence that the Hungarian justice system will enforce the human rights of Roma when faced by inappropriate police actions. On January 12, the Curia convicted three individuals charged with the racially motivated murders of six Roma in 2008 and 2009. The Curia upheld a

³⁸ Ibid.

³⁹ Exhibit 4, NDP for Hungary (August 31, 2017), item 2.1.

⁴⁰ Ibid.

⁴¹ Exhibit 4, NDP for Hungary (August 31, 2017), item 13.7. .

lower court's sentence of life imprisonment with no possibility of parole in the case of premeditated murder and other charges. In May 2015 the Budapest Metropolitan Court of Appeals sentenced the fourth defendant, who had cooperated with police during the investigation, to 13 years' imprisonment as an accomplice to the murders.⁴² In the panel's view, such court decisions indicate that the Hungarian state, while not perfect, will enforce the law when Roma human rights are violated. Finally, in *Kotai* the Federal Court pronounced on the availability of state protection and the onus of claimants to seek state protection, namely:

The country conditions do not suggest that the situation is so bleak that all Roma, regardless of their particular circumstances, should not be expected to make reasonable efforts to seek state protection before seeking refugee protection in another country.⁴³

[72] With respect to the claimant's fears regarding the education system and the opportunities that may be available to the male claimant. In the education sphere, the panel notes that the Hungarian government implemented the following programs:

... provided scholarships for socially disadvantaged students, including 5,668 elementary and secondary school children and 858 vocational school students who declared themselves to be Roma. It also provided scholarships for socially disadvantaged higher education students, including 132 Roma. There were 178 "Tanoda" afterschool centers around the country providing tutoring and extracurricular activities for disadvantaged, mostly Romani children. During the year the Tanoda network assisted approximately 5,000 disadvantaged students. There were eight Romani special colleges across the country sponsored by the government using EU funds, five of which were operated by Christian denominations and three managed by universities. The special colleges provided housing and tutoring for approximately 235 Romani students enrolled in higher educational institutions.⁴⁴

[73] Even accepting that some non-Roma persons may take an unfair advantage of these programmes by falsely declaring themselves to be Roma, in my view, these programmes constitute operational action to improve the position of Roma in society. Educational scholarships and student housing for Roma, in panel's view, constitute adequate operational measures to counter private and public discrimination suffered by the claimants in education, healthcare and housing.

⁴² Exhibit 15, NDP for Hungary (31 August 2017), item 2.1, section 6 (6), para. 2.

⁴³ *Kotai, Roland v. M.C.I.* (F.C., no. IMM-6803-12), Kane, June 20, 2013, 2013 FC 693, at para. 41.

⁴⁴ Exhibit 4, NDP for Hungary (August 31, 2017), item 13.5.

[74] The panel is of the view that the implementation of the programmes listed above establishes, on a balance of probabilities, that effective state protection exists and is forthcoming in response to discrimination cumulatively amounting to persecution and consequent poverty and marginalization suffered by Roma.

CONCLUSION

[75] The claimants allege that they have been at the receiving end of anti-Roma racism and discrimination starting from the time they begin school and carrying over to the employment, housing and social spheres of life in Hungary. There is no dispute that anti-Roma racism is widespread in Hungary. The claimants have cited the positive outcomes of the claims of several family members. Significantly, several have re-availed back to Hungary. However, the Federal Court has repeatedly stated that each claim must be decided on its own merits. In the instant case, even if the claimants have been subjected to severe discrimination in Hungary, the panel finds that the claimants have not rebutted the presumption of state protection.

[76] Accordingly, the panel finds that the claimants, XXXX XXXXXXXXXX and XXXX XXXXXXXXXX, are neither Convention refugees nor persons in need of protection within the meaning of sections 96 and 97(1) of the *Immigration and Refugee Protection Act*.

“Hazelyn Ross”

H. Ross

January 3, 2018

Date