Federal Court Cour fédérale

Date: 20120907

Docket: IMM-1144-12

Citation: 2012 FC 1056

Ottawa, Ontario, September 7, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ZOLTAN CSONKA,
ZOLTANNE CSONKA,
SZABINA CSONKA,
ZOLTAN CSONKA,
ALEXANDRA KATALIN CSONKA,

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In assessing whether state protection is available to a refugee claimant, the undersigned has stressed that "evidence of improvement and progress made by the state is not proof that the current measures amount to effective protection" (*Kovacs v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1003 at para 64); furthermore, in asking if state protection is available, the

Board must "conduct an individualized analysis taking into account the Applicant's circumstances" (*Horvath v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1350 at para 57).

[2] Although the general documentary evidence suggests it is possible for a Roma to face persecution in Hungary, this is not the case in respect of these Applicants before this Court. Given their particular circumstances, this possibility of persecution does not reach the threshold required in *Ponniah v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 359 (QL/Lexis) (FCA)).

[3] Both subjective fear and objective fear are components in respect of a valid claim for refugee status. Objective fear should not be assessed in the abstract. In deciding if it exists, "objective evidence must be linked to the applicants' specific circumstances" (*Sahiti v Canada (Minister of Citizenship and Immigration)*, 2005 FC 364 at para 20). Evidence of systemic or generalized human rights violations is insufficient to show "the specific and individualized fear of persecution of [a particular] applicant" (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at para 22).

II. Introduction

[4] The Applicants seek refugee protection because they fear persecution in their country of origin arising from their Roma ethnicity. The Refugee Protection Division of the Immigration and Refugee Board [Board] denied their claim, finding that the Applicants (i) did not have a well-founded fear of persecution; (ii) failed to rebut the presumption of state protection; and, (iii) lacked credibility.

III. Judicial Procedure

[5] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of a decision of the Board, dated December 14, 2011, rejecting the Applicants' refugee protection claim.

IV. Background

[6] The principal Applicant, Mr. Zoltan Csonka, born in 1967; his wife, Mrs. Zoltanne Csonka, born in 1972; their daughter Szabina, born in 1997; their second daughter, Alexandra Katalin, born in 1991; and, a son, Zoltan, born in 1989; are citizens of Hungary.

[7] The principal Applicant alleges he has been subject to anti-Roma discrimination since birth.

[8] He could only frequent schools attended by other Roma, where he was bullied and spat upon by classmates. He was forced to leave school before graduating after a brawl with another student over discriminatory insults.

[9] As a result, the principal Applicant states that he could only support himself through occasional labor. He studied the metalworking trade and worked for Roma employers for 40 hours/week until they declared bankruptcy. He also worked in construction.

[10] The principal Applicant served in the Hungarian military from 1987 to 1989 and 2002 to 2004. Due to his commander's anti-Roma prejudice, his first period of service was difficult and he was denied leave for six months. Although he himself did not complain, the commander granted

leave subsequent to other Roma soldiers having threatened to report the situation to superiors. During his second period, he could not return home for a year.

[11] His children have been discriminated against in school and harassed in the streets. When he complained to police, they did not assist. His wife was unable to obtain employment, was spat upon, and was not attended to while shopping. Doctors would not assist the family when members fell ill.

[12] In the Summer of 2005, a policeman stopped the principal Applicant while he was cycling. Calling him a "gypsy", the officer beat him and fractured his hand.

[13] He could not use his hand for two months. Unable to work, he received a disability payment from the government. He paid a specialist to operate on his hand after a failed restoration attempt by a family physician; his hand is, nevertheless, permanently scarred.

[14] The principal Applicant did not report the assault but spoke to a local Roma association. He did not ask the association to intervene as he did not believe it would assist him.

[15] In May 2007, four members of a racist group, the Hungarian Guard, allegedly stabbed the principal Applicant. He was hospitalized. At the hearing, he demonstrated to the Board his scar at the centre of his chest.

[16] Inconsistencies were noted between the principal Applicant's testimony and his Personal Information Form [PIF] as to his assault. The principal Applicant testified that the police did not

visit him in the hospital; nor did he report the situation to the police upon his release. In his PIF, however, he stated that the police wrote an inaccurate report and were "investigating against unknown perpetrators."

[17] With his wife and youngest daughter, the principal Applicant came to Canada in September of 2009; his older children arrived in November of 2009. He delayed his departure for two years after the attack he allegedly had suffered in order to save money and allow his son to finish school.

[18] The Board heard the claim in November 2011; and, issued its decision on December 14, 2011. The principal Applicant applied for judicial review, serving his Notice of Application on the Minister of Citizenship and Immigration [Respondent] on February 6, 2012, 11 days after the prescribed limitation period in paragraph 72(2)(*b*) of the *IRPA*.

V. Decision under Review

[19] The Board denied the Applicants' claim under sections 96 and 97 of the *IRPA*. It found that the Applicants: (i) did not have a well-founded fear of persecution; (ii) could not rebut the presumption of state protection; and, (iii) lacked credibility.

[20] The Board found that the two-year delay between the principal Applicant's assault in May of 2007 and his departure in 2009 was inconsistent with a subjective fear of persecution.

[21] In its view, the discrimination confronting the principal Applicant also did not reach the level of persecution. His experiences of discrimination did not independently or cumulatively demonstrate that he, or his family, were "deprived of all hope and recourse" (at para 33).

[22] Citing *Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796, 182 NR 398 (CA) (QL/Lexis) and the United Nations High Commission for Refugees Handbook, the Board reasoned that discrimination must be serious to constitute persecution. Assessing if the threshold is met requires an examination of the interest harmed and the extent to which it is compromised. An interest is seriously compromised if a key denial of a core human right is evident. The Board inferred that persecutory discrimination must "lead to consequences of substantial prejudicial nature" and that "sustained or systemic denial of the right to earn one's living is a form of persecution" (at para 32).

[23] The Board noted that the evidence demonstrates Hungarian Roma face educational, employment, housing, economic, and health barriers. It pointed, however, to several state initiatives, including a Decade of the Roma Inclusion Program Strategic Plan, vocational training, employment programs, and educational measures. From these, the Board inferred that "Hungary is providing concrete solutions" for the Roma (at para 24).

[24] The Board held that the principal Applicant's particular circumstances did not, independently or cumulatively, amount to a well-founded fear of persecution. He worked at a trade in a position commensurate with his education and training. Though he did not think non-Roma employers would hire him, his well-paid military service suggested otherwise. Treatment of his

hand by a specialist and his government-funded hospital stay after the May 2007 attack demonstrate that the principal Applicant had had access to health care.

[25] The Board did not find his children faced educational disadvantages which amounted to persecution. While his son stated in his PIF that he only had had an eighth-grade education, he later testified he completed four additional years of schooling as the only Roma student at a school with "a very high standard"; thus, he did not suffer the documented educational segregation faced by Roma. The Board's conclusion in this regard was notwithstanding the principal Applicant's son's testimony that professors neglected him. Nor did the Board find that his eldest daughter had been denied an excursion to Poland with classmates due to her ethnicity; rather, the Board concluded that she may have been excluded due to her tardy registration.

[26] The Board found the Applicants' failure to rebut the presumption of state protection was dispositive. Citing *Canada (Minister of Citizenship and Immigration) v Carrillo*, 2008 FCA 94, [2008] 4 FCR 636, the Board stated that the Applicants had the burden of adducing clear and convincing evidence showing that state protection is inadequate or non-existent on a balance of probabilities.

[27] The Board stressed that the principal Applicant failed to seek state protection. In respect of the 2005 attack, the principal Applicant failed to report the attack independently or through a Roma entity. As for the 2007 attack, the Board reasoned that attacks by unidentified perpetrators are "difficult to investigate and [in such circumstances] even the most effective and well-resourced and highly motivated police forces would have difficulty providing protection" (at para 34). Citing

Smirnov v Canada (Secretary of State), [1995] 1 FC 780 (TD), the Board observed that the Court could not impose a standard of protection Canadian police themselves could not reach.

[28] The Board found that Hungary was making serious efforts to provide "adequate, although not always perfect, protection" to Roma (at para 48). While it accepted that Roma are disadvantaged, it reasoned that the state's concrete actions were sufficient to demonstrate state protection. Evidence of anti-Roma violence was neutralized by initiatives to protect Roma (special police forces and greater police presence in Roma areas) and an account of an investigation of an attack that led to four suspects being charged.

[29] Other legal and institutional measures included integration programs, the Inter-ministerial Committee on Roma Affairs, programs serving victims of discrimination and promoting a uniform anti-discrimination law, and special offices for Roma affairs. The Board also observed that the Equal Treatment Authority, an independent government organization that investigates and takes action in discrimination complaints, "could have come to the assistance of the claimant" (at para 40). As other possible avenues of recourse, the Board identified the Parliamentary Commissioner for Civil Rights, the Independent Police Complaints Commission, the Central Office of Justice, and the Roma Anti-Discrimination Network Service (which provides free legal aid to Roma and has increased its legal staff from 23 in 2001 to between 30 and 44 in 2009).

[30] The Board regarded these initiatives as effective. It observed that, when laws are "violated charges and prosecution follow and it appears that the police are being held accountable for their actions if they fail to take Roma complaints seriously or become agents of persecution of Roma

citizens [or] themselves. Investigations, charges and convictions have been noted even when the accused are police officers" (at para 48).

[31] According to the Board, the 2005 assault reflected the hatred of a particular police officer but was not representative of the entire police force in Hungary. Since the principal Applicant failed to report the assault, the assault did not demonstrate in a collective manner "that the claimant's experience [was] part of a broader pattern of state inability or refusal to extend protection" (at para 35).

[32] Although the Board acknowledged that anti-Roma prejudice does permeate the Hungarian police, it referred to recent changes. The Independent Police Complaints Commission's recent efforts to sensitize police to human rights and minorities, and promoting the recruitment of Roma police officers were cited as efforts by which to combat this pattern. It also observed that officers in the police force found guilty of wrongdoing can be reprimanded, dismissed, or prosecuted. If they are convicted of committing criminal acts while on duty, they are automatically dismissed under recent legislation.

[33] Finally, Hungary's membership in the European Union [EU] and the level of respect the government gave to citizens' rights generally was considered as having established an adequate level of state protection. European organizations monitor the situation of the Roma and, as an EU member, Hungary is expected to take their recommendations seriously. The central importance of human rights to the EU suggested that Hungary's recent ameliorative efforts would result in permanent change.

[34] The Board also found that the Applicants were not persons in need of protection under subsection 97(1) of the *IRPA*. Although the Board did not give extensive reasons for this conclusion, it stated that their removal "would not subject them personally to the dangers and risks stipulated in paragraphs 97(1)(a) and (b) of the Act" (at para 49).

[35] Finally, yet, significantly, the Board found the Applicant lacked credibility. Despite hospitalization, the principal Applicant could not present medical reports for the attacks. Moreover, his testimony that he did not visit the police was inconsistent with his PIF, wherein he described a police report in respect of the May 2007 assault on his person as inaccurate. He explained that the hospital had reported the incident under its obligation to report crime; however, that had only made his situation worse. Asked to explain his PIF statement that "they put totally different things on the paper compare[d] to the truth" (Tribunal Record at p 161), he alleged that hospital staff described him as the victim of an accident. If, however, the hospital had had to report the incident, it would not have described him as a victim of a mere accident. These inconsistencies and lack of corroborating evidence impugned his credibility as to the May 2007 assault.

VI. Issues

[36] (1) May the Applicants be granted an extension of time?

(2) Is it reasonable to find that the Applicants did not have a well-founded fear of persecution?

(3) Is it reasonable to find that the Applicants had adequate state protection?

(4) Is the Board's negative credibility finding reasonable?

VII. Relevant Legislative Provisions

[37] The following legislative provisions of the *IRPA* are relevant:

Application for judicial review	**Demande d'autorisation**
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	**72.** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
Marginal note: Application	**Note marginale : Application**
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(*a*) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	*a*) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;
(*b*) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;	*b*) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;

(*c*) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;

(*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

…

[...]

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards,

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

and	internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VIII. Position of the Parties

[38] The Applicants submit that the Board's finding that the situation of Hungarian Roma has changed since 2005 was incorrect. While the Board described measures taken by Hungary's government to address the problems facing Roma, documentary evidence shows that the Roma remain victims of racist violence and basic human rights violations.

[39] To demonstrate that the present situation of Hungarian Roma has declined because of the economic crisis and rise of the extreme right, the Applicants point to the following evidence on record: (i) a September 10, 2009 well-documented account describing anti-Roma violence and the recent ascent of far-right anti-Roma political groups; (ii) an August 12, 2009, article detailing the disproportionate effect of the economic crisis on Roma, recent violence, a statement by the president of Hungary that "the situation is tense to the point of explosion" and urging compassion

for Roma, a Ministry of Labor statement that employers do not hire Roma, and advances by far-right anti-Roma political parties.

[40] The Applicants submit that state protection of Roma is inadequate and ineffective. The Applicants argue that, despite recent government effort, Hungary's legislative framework and political will is insufficient to protect Roma and cites the following: (i) a 2009 Amnesty International Report describing the striking down of hate speech laws by Hungary's Constitutional Court; and, (ii) a February 2, 2009 report includes statements that Hungary has not adopted concrete measures to assist the Roma by the director of the European Roma Right Centre and Hungary's Ombudsman on Minority Affairs.

[41] The Applicants submit that a state's willingness to improve a human rights problem does not, in itself, establish adequate and effective state protection. To meet this test, willingness to change must be implemented in practice. Citing this Court's decision in *Kovacs*, above, the Applicants state that "evidence of improvement and progress made by the state is not proof that the current measures amount to effective protection" (at para 68) [Emphasis in the original]. The Applicants also cite *Streanga v Canada (Minister of Citizenship and Immigration)*, 2007 FC 792, for the proposition that "[e]vidence of improvement and progress by the state is not evidence that the current response amounts to adequate, effective protection" (at para 19) [Emphasis in the original).

[42] According to the Applicants, steps taken by the Hungarian government under EU pressure represent neither a change in circumstances for the Roma nor effective state protection. Relying on

James Hathaway's The Law of Refugee Status, the Applicants contend that a change in circumstances must be substantial, effective, and permanent.

[43] The Respondent argues that the application should be dismissed because the Applicants failed to file their Notice of Application within the prescribed time period. The Respondent observes that Justice Danièle Tremblay-Lamer, in granting leave, did not consider the question of delay.

[44] Citing *McBean v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1149, the Respondent argues that this Court has jurisdiction to consider whether to grant an extension of time when the motion judge granting leave has not considered the issue. The Respondent also argues, citing *Canada (Attorney General) v Larkman*, 2012 FCA 204, that "unexplained periods of delay, even short ones, can justify the refusal of an extension of time" and stresses the "need for finality and certainty underl[ying] the thirty day deadline" (at para 86- 87).

[45] The Respondent also submits that the Applicants' conduct is inconsistent with a subjective fear of persecution. The Respondent argues that it was reasonable to conclude the delay between the 2007 assault and the Applicants' departure for Canada did not support a finding of subjective fear.

[46] According to the Respondent, the Applicants' explanation for the delay is inconsistent with subjective fear. If the Applicants had had a subjective fear, the Respondent submits, they could have immediately sought asylum in a neighboring European state rather than delay their departure by which to save funds to begin a new life in North America.

[47] The Respondent also contends that the Applicants have failed to rebut the presumption of state protection, arguing that Hungary's status as a democracy with effective judicial and administrative institutions shows the presumption cannot be rebutted. The Respondent cites *Chagoya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 721 for the proposition that the presumption is stronger if a country of origin is a democracy with universally-recognized strong and independent state institutions; such countries, however, can be distinguished from emerging democracies with flagrant state or police corruption. According to the Respondent, the documentary evidence shows Hungary is a democratic state that respects human rights and has effective judicial and administrative institutions, including institutions specifically devoted to Roma.

[48] The Respondent contends that state protection is effective; and, cites documentary evidence showing that anti-Roma attacks have been investigated and resulted in charges and Roma complaints regarding police mistreatment have resulted in recent indictments. The Respondent also refers to evidence that police officers have reported anti-Roma posting on an internal website for the national police; the reports, the Respondent notes, were investigated and the responsible officers were sent to tolerance training. The dissolution of the extreme nationalist Hungarian Guard by the Supreme Court in Hungary in December 2009 confirms, according to the Respondent, the effectiveness of recent measures.

[49] Citing *Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 502, the Respondent also submits that it was reasonable for the Board to cite the various state organizations that could have assisted the Applicants in Hungary.

[50] The Respondent also pointed to the principal Applicant's failure to seek police protection after his assaults in 2005 and 2007 and of his son to complain about being barred from entering a disco. Citing *Chagoya*, above, the Respondent argues that failing to complain to police can show that an applicant has failed to rebut the presumption of state protection.

[51] Although a police officer was an aggressor in the present case, the Respondent argues that this factor did not relieve the principal Applicant of this obligation to seek assistance from other state authorities. The Respondent cites *Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 136 for the proposition that "an applicant may claim state protection without necessarily turning to the police" (at para 22).

[52] The Respondent also cites several recent decisions where this Court considered it not unreasonable to find that a Hungarian Roma claimant did not have a well-founded fear of persecution and that that claimant had adequate and effective state protection. These include *Jantyik v Canada (Minister of Citizenship and Immigration)*, 2012 FC 798, *Molnar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 530, and *Mattee v Canada (Minister of Citizenship and Immigration)*, 2012 FC 761.

[53] The Respondent argues that the negative credibility findings were also reasonable. The Respondent claims that the Board was reasonable to require additional documentation on the 2007 attack. The Respondent notes that Rule 7 of the *Refuge Protection Division Rules*, 2002-228, requires claimants to "provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not

provided and what steps were taken to obtain them." The Respondent cites *Encinas v Canada (Minister of Citizenship and Immigration)*, 2006 FC 61 for the proposition that a claimant's credibility can be impugned if the Board does not have "at its disposal the evidence that it would have liked to receive" (at para 21).

[54] Given that each assault resulted in medical treatment, the principal Applicant should have been able to produce documentation. His explanation that he didn't bring documentation because he did not expect to be before a tribunal was inconsistent with his testimony that he was aware of the refugee process before his departure from Hungary.

[55] The Respondent also submits that the Board was reasonable to find that the principal Applicant's testimony was at times implausible and incoherent. According to the Minister, this problem arises in the inconsistency between the principal Applicant's PIF and his testimony regarding the police investigation. Citing *Kirac v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 362, the Respondent argues that a negative credibility finding is reasonable where there are "a number of implausibilities, inconsistencies and contradictions" in an applicant's testimony and PIF (at para 26).

IX. Analysis

Standard of Review

[56] Whether the Applicants have established a well-founded fear of persecution is a question of mixed fact and law reviewable on a standard of reasonableness. The standard of reasonableness also applies to the Board's finding that state protection exists and to the Board's negative credibility

findings (*Kallai v Canada (Minister of Citizenship and Immigration)*, 2010 FC 729); *Mohmadi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 884).

[57] As the standard of reasonableness does apply, the Court may only intervene if the Board's reasons are not "justified, transparent or intelligible". To satisfy this standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

Extension of Time

[58] A reviewing court has jurisdiction to grant an extension of time, even where leave has already been granted. This Court has the discretion to grant leave if the Court finds it necessary to do so under the circumstances (*Khalife v Canada (Minister of Citizenship and Immigration)*, 2006 FC 221, [2006] 4 FCR 437).

Well-Founded Fear of Persecution

[59] The test for a well-founded fear of persecution has objective and subjective components. The subjective component is in relation to a demonstrative fear of persecution in the mind of an applicant. The objective component is demonstrated by a "valid basis for that fear" (*Rajudeen v Canada (Minister of Employment and Immigration)* (1984), 55 NR 129 (FCA); *Canada (Minister of Employment and Immigration) v Ward*, [1993] 2 SCR 689).

Subjective Fear of Persecution

[60] The Board's negative credibility finding, in and of itself, does reasonably result in its determination that the Applicants lack subjective fear. According to *Han v Canada (Minister of Citizenship and Immigration)*, 2009 FC 978, a negative credibility finding "naturally [leads to a conclusion that a claim] fail[s] based on lack of subjective fear of persecution (unless there is an objective basis for the fear)" (at para 21).

[61] It was reasonable for the Board to find that the principal Applicant lacked credibility on the basis of the inconsistencies in his testimony and PIF and his failure to provide documentary proof of the assaults. This Court has found that a negative credibility finding is not unreasonable where a claimant has failed to provide corroborating evidence (*Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857). It may not always be reasonable to prefer documentary evidence to a refugee claimant's own testimony (*Coitinho v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037). Where, however, a claimant's testimony is inconsistent and itself lacks credibility, it is reasonable to require corroborating evidence.

[62] The delay between the alleged 2007 assault and the departure for Canada also brings the Applicants' credibility into dispute. Although delay cannot, in itself, be decisive in dismissing a claim (*Saez v Canada (Minister of Employment and Immigration)* (1993), 65 FTR 317, [1993] FCJ No 631 (QL/Lexis)), it can be considered with other circumstances to determine if subjective fear exists (*Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, [1993] FCJ No 271 (QL/Lexis) (FCA)). Given the inconsistencies in the testimony and PIF and the failure

to provide corroborating evidence, it is reasonable to find that this delay further impugned the principal Applicant's credibility.

[63] The Board was not unreasonable in deciding that the Applicants lacked a subjective fear of persecution. It has been held, however, that lack of subjective fear is not dispositive if the objective fear test is met. *Yusuf v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 629 (CA) states that claimants who establish objective fear of persecution cannot be unsuccessful because they lack subjective fear:

> [5] … It is true, of course, that the definition of a Convention refugee has always been interpreted as including a subjective and an objective aspect. The value of this dichotomy lies in the fact that a person may often subjectively fear persecution while that fear is not supported by fact, that is, it is objectively groundless. However, the reverse is much more doubtful. I find it hard to see in which circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience. The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent. Moreover, I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.

[64] This reasoning has been followed by this Court recently in *Han*, above.

[65] In *Kanvathipillai v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 881 (FCTD), Justice Denis Pelletier had qualms with the approach in *Yusuf*, above, stating that "there is a rationale for insisting upon a subjective sensation of fear, even if it means that the stout and the stupid might thereby fall outside the definition of refugee." Justice Pelletier reasoned that "the refugee system exists to protect those who are afraid of persecution and for whom there is no state protection ... Individuals leave troubled regions for many reasons but only those who do so out of a

well-founded fear of persecution can claim international protection. Those who leave for other reasons are not entitled … simply because they could or should have been fearful, even if they were not" (at para 22). Justice Tremblay-Lamer, in *Maqdassy v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 182 (FCTD), has also stated that the subjective test "is in itself sufficient for the applicant's claim to fail" (at para 10).

[66] The Applicants' particular circumstances, however, do not satisfy the objective test. Since it was reasonable for the Board to find that neither objective nor subjective fear existed, the rule in *Yusuf*, above, is not dispositive of this claim. Thus, it is not necessary to resolve the tension between *Yusuf* and *Kanvathipillai*, above.

Objective Fear of Persecution

[67] To meet the objective test, there must be a valid basis for the Applicants' fear of persecution (*Rajudeen*, above). This requires them to establish, on a balance of probabilities, that they face more than a "minimal or mere possibility" of persecution. It does not, however, require them to establish a probability of persecution (*Ponniah*, above; *Cordova v Canada (Minister of Citizenship and Immigration)*, 2009 FC 309).

[68] Whether the Applicants' situation rises to the level of persecution depends on whether their basic human rights are threatened "in a fundamental way" (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 70; *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282). In determining this issue, the Board must consider the

cumulative effect of the events of persecution (*Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84).

[69] The documentary evidence on the general country conditions of the Hungarian Roma raises serious human rights concerns. Educational, employment, housing, economic, and health barriers and anti-Roma violence described in the evidence could show that the conditions of certain Roma in Hungary could rise to the level of persecution.

[70] Both subjective fear and objective fear are components in respect of a valid claim for refugee status. Objective fear should not be assessed in the abstract. In deciding if it exists, "objective evidence must be linked to the applicants' specific circumstances" (*Sahiti*, above). Evidence of systemic or generalized human rights violations is insufficient to show "the specific and individualized fear of persecution of [a particular] applicant" (*Ahmad*, above).

[71] It was reasonable to conclude that the Applicants' particular circumstances do not satisfy the objective test. They are sufficiently integrated into Hungarian society to allow one to reasonably conclude that they do not face more than a mere possibility of persecution. The principal Applicant has a trade and has worked in that trade. In addition, the principal Applicant has been employed by the Hungarian army more than once. As the medical treatment for the principal Applicant's alleged assaults shows, he has access to health care. The education of the children was of sufficient quality to induce the Applicants to delay their departure for Canada.

[72] Although the general documentary evidence suggests it is possible for a Roma to face persecution in Hungary, this is not the case in respect of these Applicants before this Court. Given their particular circumstances, this possibility of persecution does not reach the threshold required in *Ponniah*, above.

State Protection

[73] The Board was reasonable in determining that the Applicants did not have a well-founded fear of persecution. Consequently, it is not necessary to assess the reasonableness of the Board's conclusion that there was adequate and effective state protection for the Applicants.

[74] In assessing whether state protection is available to a refugee claimant, the undersigned has stressed that "evidence of improvement and progress made by the state is not proof that the current measures amount to effective protection" (*Kovacs*, above); furthermore, in asking if state protection is available, the Board must "conduct an individualized analysis taking into account the Applicant's circumstances" (*Horvath*, above).

Person in Need of Protection

[75] The Board did not provide extensive reasons as to why the Applicants were not persons in need of protection under subsection 97(1) of the *IRPA*. Nonetheless, it was reasonable for the Board to conclude that the Applicants would not be exposed to danger of torture under paragraph 97(1)(*a*) of the *IRPA*; there is no evidence of such a risk on the record.

[76] It was also reasonable to conclude that removal would not expose the Applicants to a risk to life or cruel and unusual treatment or punishment. To fall within the scope of paragraph 97(1)(*b*) of the *IRPA*, the Applicants must prove on a balance of probabilities that they are more likely than not to face a risk pursuant to paragraph 97(1)(*b*) of the *IRPA* (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1). This test is higher than that of section 96 of the *IRPA*, which only requires a claimant to show more than a mere possibility of risk (*Ponniah*, above). Since the Applicants were unable to demonstrate a well-founded fear of persecution under this less onerous section 96 of the *IRPA* test, it follows that they do not, as per their evidence, meet the higher balance of probabilities test required under section 97 of the *IRPA*.

X. Conclusion

[77] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be dismissed. No question of general importance for certification.

Obiter - in respect of paragraph 68 above

The demarcation line between discrimination and persecution in refugee law is thin.

In cases of this nature, the distinction is made, as is specified by the jurisprudence of higher courts, discussed and cited above.

In a more evolved world, one day, a "kinder and more gentle" norm will, perhaps, prevail in evaporating the distinction between the two; as did the notion of "separate but equal", gradually, evaporate (in certain state jurisdictions); however, international law jurisprudential norms have not, as yet, evolved thereto, (in regard to the fluidity of the demarcation between discrimination and persecution).

Should a child, or, for that matter, an adult be discriminated against anywhere, for the same reason, he or she may have been, or is, persecuted without recourse to refugee status (because it has not attained the level of persecution)?

International norms, in respect of refugee law, have, as yet, not decided that suffering discrimination (without reaching the level defined as persecution) allows for the granting of refugee status. In recognition of the hope that countries of origin should be encouraged to do more to evolve the state of human rights within their own jurisdictions, whether that occurs or not is for the future to envisage.

A judge's mandate is but to interpret the legislation and jurisprudence, generally, and, more particularly of the higher courts. As the trajectory of the law and its interpretation evolves through jurisprudence, as did the notion in constitutional law, as stated by Lord Sankey, that of a "growing

tree", does take place in constitutional law, so it may eventually in refugee law; however, that is not where this branch of international law finds itself presently; thus, the interpretation of the refugee convention in this regard has not attained that stage, which it may, as yet, but as of today, the world is still distant from it. (It must be acknowledged that a continuous amelioration of human rights is the responsibility of refugee-producing countries; otherwise, the onus would solely be on refugee-receiving countries, rather than that of refugee-producing countries, to ameliorate their human rights records, as part of the community of nations, if, in fact, international legislative norms are to lead to an evolution of the human condition.)

Therefore, this Court has no option but to differentiate and to delineate between discrimination and persecution as have the higher courts in their jurisprudence. The higher courts have recognized the state of the civilized world in which the higher courts find themselves, in that, reality and the ideal have not, as yet, met in this regard.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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