Federal Court  Cour fédérale

Date: 20140731

Docket: IMM-2053-13

Citation: 2014 FC 767

Ottawa, Ontario, July 31, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NORBERT BENJAMI TAR (A.K.A. NORBERT BENJAMIN TAR), ZITA SZEKELY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated February 2, 2013 [Decision],

which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are a young couple from Hungary. The male Applicant (Mr. Tar), who is 22 years old, is of Hungarian ethnicity. The female Applicant (Ms. Szekely), who is 21 years old, is of Roma ethnicity. They say the male Applicant's mother and many others in Hungarian society strongly disapprove of their "inter-ethnic" relationship, and that, as a result, they have been subjected to violence, intimidation and threats. They arrived in Canada on September 15, 2011, and applied for refugee protection.

[3] The Applicants met in September 2009, fell in love, and began a relationship. Mr. Tar's mother, who is described as a Jobbik sympathizer (a reference to a radical nationalist political party in Hungary), disowned him, and he moved in with Ms. Szekely's family when he was 18 years old. The Applicants say they have been repeatedly threatened and attacked by extremist right wing groups, including friends of Mr. Tar's mother, and that Mr. Tar has been labelled a "traitor" to the Hungarian race because of his relationship with Ms. Szekely.

[4] The Applicants both relied upon the narrative attached to Mr. Tar's Personal Information Forms [PIF], in which he recounted a series of events between September 2009 and May 2011 as follows.

[5] When the Applicants began their relationship in September 2009, Mr. Tar's mother forbade it, and asked a friend, Peter Wittman, to follow and spy on them and "get rid" of Ms. Szekely. Mr. Tar says he overheard this conversation.

[6] On October 26, 2009, when Mr. Tar was accompanying Mr. Szekely home from school, they were approached at the Keleti Station by Neo-Nazis, who began "pawing" Ms. Szekely and calling her a "stinky Gypsy bitch." Mr. Tar fought with the assailants, and was beaten up by them and bitten by their pit bull. He suffered a split eyebrow and a broken nose. Ms. Szekely was hit in the face, had her clothes torn and suffered a bloody nose. She ran to get help from police officers at the station, but the Applicants say the police refused to help when she confirmed she was Roma. They told her that Neo-Nazis exist only in tales, and it would be better if she just went home as they were not paid to help Gypsies. A bystander called an ambulance and Mr. Tar was taken to a nearby clinic where he was examined and his wounds were bandaged.

[7] Mr. Tar described the district where Ms. Szekely's family lived as being regularly subject to Neo-Nazi attacks and harassment, and said the police in the area have become famous for their racism, brutality, merciless treatment and corrupt behaviour. He said threatening messages were painted on the walls of Ms. Szekely's family's house, and in June 2009 (originally listed as June 2010 but later amended), the cellar / store-room of the house was lit on fire by unknown perpetrators.

[8] The PIF says that, in September 2010, Ms. Szekely was being "daily molested and threatened" by Mr. Tar's mother's "Neo-Nazi contacts," and that Mr. Tar came to realize this

would continue until Ms. Szekely and her family moved or he split up with her. He chose to continue the relationship, and moved in with Ms. Szekely and her family.

[9] In March through May 2011, new Neo-Nazi groups began showing up in the district armed with knives, revolvers, chains and swords. Mr. Tar's mother's friends were also becoming more aggressive, waiting in front of the Applicants' house and making disturbing phone calls to them many times a day. Mr. Tar says his life was threatened.

[10] On May 25, 2011, the Applicants say they were followed onto a tram by Mr. Tar's mother's Neo-Nazi friends, who approached them, pointed a knife at them, cut Mr. Tar's clothes, and held a knife to Ms. Szekely's neck. Another group of 6 to 8 Neo-Nazis who were on the tram joined in the attack, and the family were all beaten. The PIF says the tram driver stopped the tram and called for the police and an ambulance, but when the police arrived, they refused to take down a report. The tram driver was unwilling to be a witness, because he drives the same line every day and feared for his safety. He told the police there was a camera on the tram, but they said they did not have time to watch videos. The police told the Applicants they were lucky they were not arrested for causing a public disturbance, as they must have been making a noise and damaging the tram and that was why the "volunteers" of Jobbik decided to discipline them.

[11] Mr. Tar testified at the refugee hearing that he also went to the police in the district where they lived to complain about this event, and to a human rights organization in Budapest that deals with complaints when the police have failed to act, but that neither would provide any help.

[12] The Applicants say it was after this May 2011 attack that they decided to leave Hungary and seek refuge in Canada. They say they have never received help or support from the police, and fear that if they return to Hungary they may pay with their lives.

[13] Mr. Tar testified that during the four months between the incident on the tram and their departure from Hungary, they rarely left the house, but Peter Wittman and his friends called and threatened them on the phone 10 or 15 times.

DECISION UNDER REVIEW

[14] The RPD's analysis focused on the Applicants' credibility, as well as the issue of state protection. The Board stated that the determinative issue was whether the Applicants' fear was objectively reasonable.

[15] The Board found that there were inconsistencies in the Applicants' evidence, including "when the precipitating incident happened and when it was that they went to police after the streetcar incident." The Board observed:

> The claimant at first testified that he attended the police on the following day, May 26th yet immediately later stated that he went on the same day as the incident.

[16] The Board noted that other amendments had been made to the PIF, but the date of the alleged attack on the tram had not been amended from May 25th to the date testified to by Mr. Tar, May 26th. When asked about this inconsistency, Mr. Tar replied "maybe I made a mistake." The Board went on to find as follows with respect to this incident:

> Given the absence of medical or police reports, I find that I have not been been (sic) provided reliable evidence that this incident actually happened or that it was at the hands of Peter as the claimant testified. The claimant testified that he was unable to provide corroborative evidence because the ambulance driver only bandaged his hand and gave him water and the police would not take his statement. I am not persuaded that the claimant would have been denied a report from the ambulance department had he requested confirmation regarding their assistance. The claimant was asked if he attended the transit authority to acquire copy (sic) of the video which he stated captured the assault against them on tape. The claimant replied that he did not because he knew that the police would not do anything so it would not be of use. I respectfully disagree with the claimant because at minimum it would have provided evidence to support his allegations against persons who his mother was sending to harm him and also evidence upon which he could demonstrate that attending police officers were not providing him with assistance. Consequently, I am unable to find that the claimant has provided reliable evidence that this streetcar incident took place.

[17] The Board observed that this alleged incident took place four months before the Applicants left Hungary. The Applicants had explained that it took time to sell things and airfare was cheaper in September. While noting that "this may have been the case," the Board found that "the claimants did not experience any further incidents at the hands of the claimant's mother." In particular, the Board rejected Mr. Tar's testimony that they received 10 to 15 threatening calls from "Peter or his friends," and found they had provided no evidence that they had requested assistance from anyone with respect to these alleged calls.

[18] The Board noted that the Applicants explained their delay in departure by stating that they kept inside their house except when it was necessary to go out. However, the PIF showed that both Applicants continued to attend school until June 2011. When confronted with this, Ms. Szekely stated that her PIF was wrong and she stopped going to school in May 2010, but the

Board rejected this explanation as the error was only acknowledged when the discrepancy was pointed out to Ms. Szekely.

[19] The Board also observed that the Applicants "were not exactly truthful" in their PIFs, and in particular that Ms. Szekely did not accurately list all of her relatives (some of whom had also come to Canada and filed separate claims) and their places of residence. When asked about this, she replied "I don't know. I can't remember." The RPD decided not to draw an adverse inference from this, finding that the Applicants were following the instructions of a translator who befriended them at the Roma Community Centre.

[20] The Board accepted "that the claimants are a couple of mixed ethnicity which very much displeased the claimant's mother because the female claimant is of one half Roma ethnicity."

[21] With respect to state protection, the Board observed that there is a presumption that countries are capable of protecting their citizens, and since Hungary is a multiparty parliamentary democracy, the presumption is a strong one. The Board reviewed the documentary evidence regarding state protection for Roma in Hungary and found that the evidence was "mixed":

> [22] I find on a balance of probabilities that the state is motivated, willing to implement measures and has operational adequacies in place to protect Romas. However, I accept that there are criticisms that these measures are not always implemented effectively at the local or municipal level. All of this is to say that the documentary evidence relating to government efforts to protect the Roma and to legislate against broader forms of discrimination and persecution is mixed.

[22] With respect to the Applicants' specific circumstances, the Board found that they had not provided clear and convincing evidence that state protection was inadequate:

> In none of the incidents as described by claimants (sic) to forward the proposition that state protection was inadequate, did I find that the claimants made reasonable attempts to seek redress from any higher police of state authority respective to those incidents.

[23] The Board observed that Mr. Tar testified that he did not report the threats and abuses committed by his mother and her friends because he did not want to involve his mother in the process or create problems for his parents with the police. When asked what would have happened had he reported his mother or her Neo-Nazi friends, he replied that there "probably would be a trial or they would be detained." The Board inferred that Mr. Tar thought the state would have taken action if the situation had been reported, and found that it was "unreasonable that the claimant did not report his mother to the police or some state authority if he indeed believed that she wanted to seriously place his life or the life of his common-law spouse at serious risk." The RPD rejected Mr. Tar's evidence that he reported to authorities that Peter was responsible for the threats but the authorities did not care. It found that Mr. Tar provided unreliable evidence regarding whom this was reported to, and did not include this information in his PIF narrative.

[24] The RPD accepted that the Applicants and other Roma have been subject to discrimination, but found that the Applicants had not rebutted the presumption of state protection. The Board observed:

> [24] While I do not doubt that the claimants may have experienced discrimination due to inter-ethnic relationship (sic), I find that the claimant(s) have not provided the requisite clear and

> convincing evidence that, on a balance of probabilities, state protection in Hungary is inadequate…

The Board further observed:

> [26] I can appreciate that the claimant chose to live with the female claimant's Roma family who lived in a Roma community in Budapest and as other Roma communities were subject to harassment and discrimination by right-wing extremists. However having reviewed these two claimant's (sic) situation, I am unable to find they made reasonable or diligent efforts to seek protection.

[25] The Board found that there was no separate *sui generis* statutory provision in the Hungarian criminal code regarding "violence in the family," but that the Applicants would be able to press charges or request restraining orders under more general provisions if they were bothered by Mr. Tar's mother or others on her behalf. It found that if they were to encounter problems with these individuals upon returning to Hungary, they could call the Ministry of National Resources, which operates a 24-hour hotline for victims of abuse and funds 11 shelters for socially disadvantaged persons. It found that, under a 2009 law, there are protections for those who suffer domestic violence or "violence within the family," which would be available to the Applicants.

[26] While applauding "the claimants' refusal to accept that ethnicity prevents them from having a relationship together," the Board found that they had not rebutted the presumption of state protection, and were therefore neither Convention refugees nor persons in need of protection under sections 96 and 97 of the Act.

ISSUES

[27] The Applicants raise the following issues for the Court's consideration:

a. Did the Board breach procedural fairness by denying counsel the opportunity to make submissions regarding Mr. Tar's credibility?

b. Did the Board make unreasonable credibility findings?

c. Did the Board err by concluding that there is adequate state protection for the Applicants in Hungary?

STANDARD OF REVIEW

[28] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[29] Issues of procedural fairness, which arise under issue a. above, are reviewable on a standard of correctness: see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53.

[30] A standard of reasonableness applies in reviewing the Board's conclusions on credibility: see *Stephen v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1054 at para 15; *Aguebor v Canada (Minister of Citizenship and Immigration*, [1993] FCJ No 732, at para 4, 160 NR 315 (FCA); *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at para 2.

[31] The standard of review that applies to the Board's state protection findings depends on the basis of those findings and the alleged errors. This Court has recently affirmed that the issue of whether the proper test for state protection was applied is reviewable on a standard of correctness: *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 22; *Buri v Canada (Minister of Citizenship and Immigration)*, 2014 FC 45 at paras 16-18. By contrast, the issue of whether the Board erred in applying the settled law on state protection to the facts of a particular case is a question of mixed fact and law that is reviewable on a standard of reasonableness. In the present case, the issue is really the Board's conclusions based on the facts of the case and the evidence before it, and these conclusions are reviewable on a standard of reasonableness.

[32] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the

sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[33] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
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,	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) 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	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) 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 that country.	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.
Person in need of protection	**Personne à protéger**
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	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

have a country of nationality, their country of former habitual residence, would subject them personally	a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes 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.
[…]	[…]

ARGUMENT

Applicants

[34] The Applicants argue that the Board erred in three ways. First, it failed to observe procedural fairness by denying counsel the opportunity to make submissions about the credibility of Mr. Tar. Second, it made unreasonable findings on the credibility of both Applicants. And third, with respect to the issue of state protection, the Board failed to assess the nature of Hungary's democracy and erred in concluding that there is adequate state protection for the Applicants in Hungary.

[35] The first argument relates to the discrepancy that arose regarding the date of the attack in the tram. Mr. Tar testified that this occurred on May 26, whereas his PIF stated that it occurred on May 25. The Applicants say that, during submissions at the hearing, counsel for the Applicants attempted to address this discrepancy, but the RPD member interrupted him and told him the Board had no "problem" regarding this discrepancy. This prompted the Applicants' counsel to move on without making further submissions on this issue. However, the Applicants argue, this discrepancy turned out to be a determinative issue in the Decision.

[36] The Applicants note that the rules of natural justice require adequate notice of the case against a claimant and an opportunity to respond: *Canada (Minister of Citizenship and Immigration) v Dhaliwal-Williams*, [1997] FCJ No 567 at para 7, 131 FTR 19. This includes a requirement that claims not be decided based on issues that were not identified as live issues before or at the hearing: *Gomes v Canada (Minister of Citizenship and Immigration)*, 2006 FC

419 at para 14. The Court has held that it is a breach of procedural fairness when a Board member interrupts counsel to state that a position on an issue is accepted, and then later writes a decision rejecting that position without giving notice to the claimants or providing them with an opportunity to be heard on the issue: *Sanabria v Canada (Minister of Citizenship and Immigration)*, 2012 FC 668 at paras 16, 18. At the very least, if the Board had changed its mind on this issue, it should have provided the Applicants or their counsel an opportunity to make further submissions.

[37] The Applicants say the Board also erred in finding that the Applicants were not credible with respect to the 10 to 15 threatening phone calls they say they received from Mr. Tar's mother's extremist friends between the attack on the tram and their departure from Hungary. The Applicants say this testimony was rejected because of a discrepancy in Ms. Szekely's testimony regarding when she stopped going to school. She testified that she stopped in May 2010, but the PIF stated that she stopped going to school in June 2011. In the Applicants' view, this discrepancy had no bearing on whether the threatening phone calls occurred, and in relying upon it to reject their testimony about the calls, the Board seized upon an inconsistency on a peripheral issue. Such a microscopic examination of the evidence on issues that are not central to the claim is an error, they argue: *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444, 99 NR 168 (FCA); *M.M. v Canada (Minister of Employment and Immigration)* (1991), 15 Imm LR (2d) 29, 137 NR 1 (FCA). In addition, the Board failed to make clear and relevant credibility findings: *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228, 15 Imm LR (2d) 199 (FCA).

[38] Finally, the Applicants argue that the Board erred in its state protection analysis, by misapprehending the documentary evidence, mistaking "complaint" mechanisms for state protection, and failing to assess the nature of Hungary's democracy.

[39] The Board found that there is widespread discrimination against the Roma, but cited an Amnesty International report as stating that "complaints to police are not ignored." The report noted that four suspects were arrested and three were charged in relation to nine violent attacks against Roma that were found to have been carried out by the same perpetrators. The Applicants say this was the only documentary evidence of an actual police response cited by the Board before it concluded that the documentary evidence regarding state protection was "mixed." Furthermore, the Amnesty International report cited actually comes to the exact opposite conclusion to that stated by the Board. The Applicants quote that report as follows:

> Amnesty International's research into some of the nine attacks and other reported incidents indicates that the Hungarian authorities failed to identify and respond effectively to violence against Roma in Hungary, including by not investigating possible racial motivation. This report details the shortcomings in the responses of Hungarian criminal justice system in relation to hate crimes. Although there are existing provisions to combat hate crimes they are not being properly implemented, including because the police lack capacity to recognize and investigate hate crimes and lack training to enhance such capacity.
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> [Amnesty International, Violent Attacks Against Roma In Hungary: Time To Investigate Racial Motivation (November 2010), Application Record at p. 328, Applicants' emphasis]

[40] The Applicants say the Board did not cite any other evidence for the proposition that there is an adequate police response for Roma who are the victims of hate crimes. On the contrary, the overwhelming evidence before the Board shows that the widespread and systemic

discrimination and abuse of Roma that exists within society at large also exists within the police force and government institutions: see Responses to Information Requests [RIRs], HUN103826.E (12 October 2011) and HUN104110.E (16 July 2012); Amnesty International, *Annual Report 2012*, Application Record at p. 198 ff.; Amnesty International, *Hungary urged to thoroughly investigate attacks on Roma* (10 November 2010), Application Record at p. 135-137.

[41] The Applicants say the mechanisms related to domestic violence cited by the Board are irrelevant, since they were not attacked by their family members but by racist extremists. One instance of police response to a highly publicized series of attacks against Roma does not indicate an adequate police response to anti-Roma violence generally. The Applicants cite this Court's analysis in *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 [*Orgona*], where the Board had referred to the same arrests cited by the Board in the present case (at paras 12-13):

> [12] … The RPD points to one document that describes a series of nine particularly horrendous attacks against members of the Romani community between January 2008 and August 2009. They were similar in that the perpetrators used Molotov cocktails and firearms. The victims were killed, burned, and seriously injured.
>
> [13] These crimes were investigated and eventually four persons were charged. But that evidence shows nothing of the results or the efforts made to investigate and prosecute those involved in the more numerous "other" attacks on Roma in Hungary. Evidence of the actions taken by police to address notorious, well-publicized, serial killings is of little persuasive value in showing how the police deal with more common criminals. However, on the basis of that particular response to these few horrific organized crimes, the RPD concluded that "there is solid objective evidence of active police investigation and arrest." The situation of these applicants, and most Roma, is not that of the victims in these nine attacks. Therefore, the RPD erred in relying, selectively, on evidence that had little relevance to these applicants and their situation in Hungary.

[Applicants' emphasis]

[42] The Applicants argue that the existence of "complaint" mechanisms does not demonstrate that the police are able to protect Roma from racist attacks. This Court has affirmed that only the police force is mandated to protect a country's citizens, and has criticized the Board's reliance on NGOs and other alternative avenues of protection in other cases: *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at paras 14-15 [*Katinszky*]; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at paras 24-25 [*Zepeda*]. The documentary evidence confirms that the complaint mechanisms cited are not alternatives to police protection for Roma facing violence, as they are limited to making non-binding recommendations and provide no power to impose sanctions if the authorities fail to follow those recommendations: RIRs, HUN103826.E (12 October 2011), Application Record at pp. 221-224.

[43] The Applicants submit that the Board improperly concluded that they failed to exhaust all domestic recourse because it relied on the faulty and simplistic premise that "Hungary is a democracy" with "free and fair elections" and a "relatively independent and impartial judiciary." Recent jurisprudence has clarified that the presumption of state protection in democratic countries "does not stand in isolation," but "is tempered by the fact that the presumption varies with the nature of the democracy in a country": *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at paras 10-12; see also *Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 at para 43; *Capitaine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 98 at paras 21-22; *Zepeda*, above, at para 20. Democracy alone does not ensure state protection; rather, the Board must consider the quality of the institutions charged with providing that protection. The Court has previously described democracy in Hungary as

being at an all-time low (*Katinszky*, above, at para 17), and recent changes have eroded the country's democratic institutions (US Department of State, Country Reports on Human Rights Practices for 2011, Hungary [US DOS Report], Application Record at p. 156). The Applicants say the Board failed to grasp the significance of this evidence.

Respondent

[44] The Respondent argues that the Applicants' claim was denied because they were not credible, and because state protection is available to them in Hungary. In addition, there was no breach of procedural fairness.

[45] On the issue of procedural fairness, the Respondent says the Applicants were warned throughout the hearing that credibility was an issue (see transcript, Certified Tribunal Record (CTR), Vol. 2 at pp. 357, 359), Mr. Tar was directly confronted about the inconsistency in his testimony (transcript, CTR at p. 374), and the Applicants' counsel was given the opportunity to speak to credibility and in fact did so (transcript, CTR at pp. 389, 396).

[46] When the entire context of the discussion is considered, the Respondent argues, the Board's comment that it had "no problem with that" could have been referring to the issue of the discrimination Mr. Tar faced due to his relationship with a half-Roma woman. This is supported by the RPD's statement in its reasons that it accepted that the Applicants were discriminated against because of their mixed-race relationship (see Decision at paras 24, 26, 35).

[47] Furthermore, even if the Board's comment was "unfortunate or unclear," it did not provide a sufficient ground for finding a breach of procedural fairness, for the reasons outlined above: the Applicants were told that credibility was at issue, Mr. Tar was confronted on the discrepancy in question, and the Applicants' counsel had the opportunity to and did in fact make submissions on the issue of credibility. The Respondent likens the current situation to *Hou v Canada (Minister of Citizenship and Immigration)*, 2012 FC 993, where similar "unfortunate" comments by the Board were found not to give rise to a breach of procedural fairness because the relevant issue (there, knowledge) was identified at the outset of the hearing and counsel had the opportunity to make submissions on it (see paras 43-51). The Respondent also cites *Haji v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 682 at paras 13-14, 2003 FCT 528, where the Board accepted that an issue was not *res judicata* and received submissions on its merits, but later ruled that it was *res judicata*. The Court found there was no breach of procedural fairness because there was notice at the hearing that *res judicata* was in play and the applicant's counsel had the opportunity to make submissions on it.

[48] The Respondent submits that the Board's credibility findings are entitled to deference and were reasonable. With respect to the alleged attack on the tram, there was insufficient reliable evidence that this incident actually occurred. First, Mr. Tar was unable to testify clearly as to when the event occurred or when he went to the police. Second, Mr. Tar made no efforts to obtain medical records for the injuries he allegedly sustained or to obtain a copy of the tram video which allegedly captured the assault. The jurisprudence is clear that failing to provide supporting documentation that could reasonably be expected can have an impact on a claimant's credibility: *Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114 at

para 1, 53 ACWS (3d) 158 (FCA); *Benmaran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 755 at para 7. The Board also considered the fact that the Applicants continued to live and go to school for another four months after this alleged incident before leaving Hungary. Given all of these facts, the Respondent says the Board reasonably concluded there was insufficient reliable evidence that the tram incident occurred.

[49] The Board's finding that the alleged threatening phone calls did not occur was also reasonable, the Respondent says. Ms. Szekely's evidence regarding when she left school was inconsistent, but this was not the primary basis for the finding that the threatening calls did not occur. Rather, this conclusion was based on the fact that the Applicants delayed their departure, made no effort to complain to police or otherwise seek state protection, and continued to attend school. The Board did not accept Ms. Szekely's testimony that she stopped attending school in May 2010, because she had made no effort to correct the statement in her PIF until the Board pointed it out.

[50] On the issue of state protection, the Board reasonably found that state protection was available both because the documentary evidence demonstrates this and because the Applicants did not take reasonable steps to access state protection, the Respondent argues.

[51] Where protection "might reasonably have been forthcoming," an applicant's failure to approach the state for protection will defeat their claim. Only in exceptional circumstances will an applicant be exempt from seeking state protection, and there are no exceptional circumstances in this case: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709, 724-25, 752;

Hinzman v Canada (Minister of Citizenship and Immigration), 2007 FCA 171 at paras 41, 43-44; *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119 at para 33; *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paras 18, 30.

[52] The Respondent says the Board acknowledged that the Roma in Hungary face discrimination, but reasonably concluded upon review of the documentary evidence that the police do provide adequate protection. The Board pointed to specific examples of where investigations and prosecutions were conducted and also discussed incidents of violence more generally. It found that complaints are not ignored by police, and crimes against Roma are regularly investigated, prosecuted, and result in convictions or other disciplinary action. While there may be some issues with police corruption (primarily financially motivated) and problems of discrimination, overall Hungary can be relied upon to provide the Applicants with protection should they require it: see Decision at paras 13-34, US DOS Report, CTR at pp. 79-80, 82-83, 103-104; RIRs, HUN103566.E (22 September 2010).

[53] The Respondent says the key issue is that the Applicants failed to take adequate steps to access state protection. They never complained to the police about the alleged abuse from Mr. Tar's mother, or the alleged threats from her Neo-Nazi friends. When asked what he thought would happen if he did report his mother or her Neo-Nazi friends, he stated that there "probably would be a trial or they would be detained." The Board reasonably found on this basis that Mr. Tar believed that if he had approached the police, they would have been forthcoming with assistance. The Board did not accept that Mr. Tar reported the threats to non-police authorities

because Mr. Tar only volunteered this information when specifically asked about other authorities.

[54] With respect to the recent changes to Hungary's constitution, the Respondent argues that the Hungarian government is entitled to change the country's constitution (with a 2/3 majority), and doing so through legislative means is entirely consistent with democracy. That certain changes may not align with Canadian views does not mean Hungary is not a democracy; all robust democracies go through periods of controversial change.

[55] The Respondent says the Applicants merely disagree with the Board's weighing of the evidence, which is not a basis for judicial review. The Court has on numerous recent occasions found that Hungary is a democratic nation entitled to the presumption of state protection, and based on the National Documentation Packages, a finding that state protection exists for Roma people in Hungary is a reasonable conclusion open to the Board: *Horvath v Canada (Minister of Citizenship and Immigration)*, 2012 FC 253; *Olah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 106; *Jantyik v Canada (Minister of Citizenship and Immigration)*, 2012 FC 798; *Molnar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 530; *Matte v Canada (Minister of Citizenship and Immigration)*, 2012 FC 761 [*Matte*]; *Balogh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 216; *Baranyi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1065; *Banya v Canada (Minister of Citizenship and Immigration)*, 2011 FC 313 [*Banya*]; *Sztojka v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1202; *Kallai v Canada (Minister of Citizenship and Immigration)*, 2010 FC 729.

[56] Thus, the Respondent submits, the Applicants have not established that the RPD's state protection analysis was unreasonable, and the judicial review application should be dismissed.

Applicants' Reply

[57] The Applicants reiterate that they were denied an opportunity to explain the inconsistency regarding the date of the incident on the tram: see *Bokhari v Canada (Minister of Citizenship and Immigration)*, 2005 FC 574. Misleading counsel with respect to the Board's intended finding on an issue is a breach of natural justice that requires setting aside the Decision: *Velauthar v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 425, 141 NR 239 (FCA); *Rodriguez v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 77, 52 ACWS (3d) 1307 (TD); *Kaldeen v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1033, 64 ACWS (3d) 1190 (TD); *Butt v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 325, 145 FTR 122 (TD); *Sivamoorthy v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 408, 231 FTR 208; *Okwagbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 792; *Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 353.

[58] While the Respondent argues that the Board's credibility finding regarding the attack on the tram was reasonable regardless of any breach of procedural fairness, because of the absence of corroborative evidence, the Applicants argue that this is precisely why the alleged breach of procedural fairness is fatal to the Decision: the only evidence regarding the May 2011 incident was Mr. Tar's sworn testimony and the PIF. Therefore, the denial of an opportunity to make submissions regarding that testimony is especially prejudicial to the Applicants.

[59] Contrary to the Respondent's position, the Applicants submit that the only basis for the finding that the threatening calls did not occur was the fact that Ms. Szekely stopped attending school in June 2011, rather than May 2010. They argue that this is actually supportive of the Applicants' testimony that they were afraid to go out after the tram incident, and therefore the Board's reasoning lacks intelligibility.

[60] While the Respondent argues that constitutional changes that do not align with Canadian values are not evidence that a country is not a democracy, the Applicants say their point was that the recent changes in Hungary have raised significant concerns regarding the independence and impartiality of state institutions. The changes have been heavily criticized as undemocratic (see BBC News, *Hungary's controversial reforms* (17 January 2012), Applicants' Record at pp. 138-141). They say this Court's rulings have confirmed that conditions have worsened for the Roma in Hungary, and there is no evidence to suggest that police will take action against racist violence targeting the Roma in light of the recent erosion of democratic institutions: *Horvath v Canada (Minister of Citizenship and Immigration)*, 2013 FC 95; *Gulyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 254; *Molnar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 296.

ANALYSIS

[61] The Applicants have raised three principal points that I will consider in turn.

Procedural Fairness – Date Discrepancy

[62] Mr. Tar made a mistake about the date when the tram incident occurred. In his PIF, he said it was the 25th of May, but he testified it was the 26th of May. When counsel for the Applicants attempted to address this discrepancy he was told by the Board member that "I don't have a problem with that." Notwithstanding this statement, the Applicants say that the discrepancy "was a determinative issue for the Member in finding that Mr. Tar is not credible."

[63] The Board refers to the discrepancy in the following way in the Decision:

> [9] The claimant provided an amended narrative which was entered as Exhibit C-6. This amendment made changes to the date of June 2009 at paragraph 7 which initially read as June 2010 and also provided more details regarding injuries sustained when he was protecting the female claimant from skinheads who assaulted them in October 2009. While I accepted the date change as stated by counsel at the outset of the hearing, even though it did not fit within the chronology of incidents detailed in the narrative, it is noteworthy that there was no amendment made to the date of May 25th which was the precipitating incident resulting in the claimants' decision to flee Hungary and which was inconsistent with the date of May 26th as testified by the claimant. When this was pointed out to the claimant he replied, "maybe I made a mistake." Given the absence of medical or police reports, I find that I have not been been (sic) provided reliable evidence that this incident actually happened or that it was at the hands of friends of Peter as the claimant testified. The claimant testified that he was unable to provide corroborative evidence because the ambulance driver only bandaged his hand and gave him water and the police would not take his statement. I am not persuaded that the claimant would have been denied a report from the ambulance department had he requested confirmation regarding their assistance. The claimant was asked if he attended the transit authority to acquire a copy of the video which he stated captured the assault against them on tape. The claimant replied that he did not because he knew that the police would not do anything so it would not be of use. I respectfully disagree with the claimant because at minimum it would have provided evidence to support his allegations against

> persons who his mother was sending to harm him and also evidence upon which he could demonstrate that attending police officers were not providing him with assistance. Consequently, I am unable to find that the claimant has provided reliable evidence that this streetcar incident took place.
>
> (footnote omitted)

[64] Mr. Tar was not afforded the benefit of the presumption of truth (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248, [1980] 2 FC 302 (FCA); *Lin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 108 at para 23) because of the date discrepancy which, as the Applicants say, the Board has clearly indicated to counsel was not a problem. The Board stopped counsel's attempts to address the issue, but then relied on this discrepancy as the basis for rebutting the presumption of truthfulness and requiring corroboration that the event occurred (see *Konya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 975 at paras 16-20, 25). A clear breach of procedural fairness occurred here with regard to an issue that was highly material to the whole claim, ie. the precipitating incident (see *Hodanu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 474 at para 25; *Ratnavelu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 938 at para 4; *Kohan v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 87, 2002 FCT 66 at para 14). Had the breach not occurred, Mr. Tar would have had the benefit of the presumption of truth and the matter could not have been disposed of on the simple basis of no corroborating evidence.

Threatening Calls

[65] The Board concluded that the threatening calls did not occur between May 26, 2011 (the day after the alleged attack on the tram) and September 2011 (the day the Applicants left for Canada) based on the inconsistency in Ms. Szekely's testimony as to when she stopped attending school.

[66] The Applicants say that regardless of whether she stopped attending school in May of 2010 (a year before the tram incident) or June of 2011 (only a few days after the tram incident), neither is inconsistent with their testimony that they received 10 to 15 threatening telephone calls after the tram incident. Nor is either date inconsistent with their testimony that they mostly stayed inside their house waiting for their departure date. The Board did not question the Applicants about the dates they received the threats nor the day they decided to stop leaving the house except when necessary.

[67] The Applicants' argument is that, at this point in the Decision, "the Member seized upon an inconsistency on a peripheral issue, that does not relate to the core elements of the claim."

[68] The RPD deals with this issue in the Decision in the following way:

> [10] The claimant testified that they made the decision to leave for Canada after the streetcar incident however this incident took place 4 months prior to their departure. The claimant testified that it took time to sell things and that airfare was cheaper in September. While this may have been the case, I find that the claimants did not experience any further incident at the hands of the claimant's mother, in particular the 10 to 15 threatening calls made by Peter or his friends who the claimant indicated were

> acting on his mother's instructions to harm him. Nor has there been evidence that the claimant requested assistance from anyone regarding these consistent threatening calls by Peter. The claimant's response with regards to his delay in departure was that they kept inside of their house except for going out only when necessary. However an examination of their Personal Information Forms (PIFs) show that both claimants continued to attend school until June 2011. When her PIF was shown to the female claimant, she responded that her PIF was wrong and that she stopped going to school in May 2010 because she was the only Roma in an all-ethnic Hungarian class at the vocational school she was attending. I reject this explanation as the error was not acknowledged until the discrepant information provided by the claimant in her PIF was pointed out to her.

[69] Clearly the Board is of the view that school attendance until June 2011 undermines the Applicants' testimony that they stayed inside their house until the departure date and only went out when necessary. And if they went out to go to school, then they could not have regarded the threats as serious. This goes to subjective fear.

[70] The phone calls are found not to have happened because;

(a) There was no evidence that Mr. Tar requested assistance regarding the phone calls. In other words, if they had occurred it would have been reasonable for the Applicants to seeks assistance; and

(b) They openly attended school, thus contradicting the obvious implication that they did not seek help because they stayed home to avoid the physical threats contained in the phone calls.

[71] These matters are not peripheral to the finding. The school attendance evidence is directly related to the Applicants' evidence that they continued to receive threats after the tram incident. The material issue was delay in departure following the tram incident. If the Applicants continued to be constantly threatened, why did they delay in their departure? Their explanation

was that they were able to avoid the risks that the threats represented by staying at home. But the evidence was that they didn't stay at home; they both openly went to school for a time after the tram incident. This undermined their testimony that the delay in departure was possible because they stayed inside. This reasoning assumes:

a. They both continued to openly go to school for some time after the tram incident; and

b. They did not seek help to deal with the threats.

[72] The problem with this line of reasoning by the Board is that it only makes sense if the Applicants went to school after or while receiving the threats. There is, however, no evidence as to when the threats occurred after the tram incident, or as to how the timing of the threats correlates with the Applicants ceasing to go to school and staying home until they left Hungary in September. Even if Ms. Szekely did not stop attending school until "June 2011," this may have been only days after the May 25, 2011 incident on the tram, and most or all of the threatening phone calls could have occurred after this. The Board did not ask the Applicants about these timing issues. The Board simply assumes, and speculates, without an evidentiary base that the Applicants continued going to school after receiving the threats. The evidence before the Board is just as consistent with the Applicants ceasing to go to school immediately after receiving the threats, which would strengthen the Applicants' position that they stayed inside their house because of the threats. This issue was complicated by the fact that Ms. Szekely changed her testimony to say that she ceased going to school in May 2010, thus creating a credibility problem and a gap in the evidence as to when the Applicants ceased going to school. But the Board did not really address this problem either in its reasons or its questioning of the

Applicants, so the dates cannot be correlated. In any event, it seems to me that the Board's finding that the phone calls never occurred remains entirely unexplained.

[73] Moreover, there is no general negative credibility finding and we are left to speculate as to how much of the Applicants' testimony was accepted regarding other incidents of violence that they recounted.

[74] These were unreasonable errors on the part of the Board. However, the whole Decision is underwritten by a finding that the Applicants failed to rebut the presumption of adequate state protection. In other words, even if the Applicants' narrative of the threats of discrimination and persecution they had experienced are accepted, the Board felt they had not shown that the Hungarian authorities could not, or would not, afford them adequate protection. So, in the end, everything depends upon whether this was a reasonable finding.

State Protection

[75] As decisions of the RPD and the case law of this Court demonstrate, the issue of whether Hungary can or will provide adequate protection for its Roma citizens is controversial and highly problematic. We have decisions going both ways. Everyone appears to agree that, notwithstanding efforts by the central government in Hungary to improve the lives of Roma people, they continue to suffer widespread discrimination and racist violence at the hands of at least some bigoted and disreputable Hungarians. The cases often focus upon whether government efforts to alleviate this problem have translated into adequate protection at the

operation level. See, for example, *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 and *Orgona*, above; cf..*Matte* and *Banya*, both above.

[76] In assessing this issue, a lot seems to depend upon the evidence and submissions that come before the RPD and, upon review before the Court, the issues of concern that applicants and their counsel choose to raise.

[77] In the present case, I agree with the Applicants that the Board makes material errors regarding the Amnesty International evidence upon which it purports to rely and appears to be blind to the implications of its own evidence which says that the "central government's general failure to maintain strong and effective control mechanisms over rights violations takes its toll on Hungary's largest minority, the Roma" (see Decision at para 21). Contrary to what the Board says, the Amnesty International evidence is clear that "the Hungarian authorities failed to identify and respond effectively to violence against Roma in Hungary…." (Application Record at p. 328). This evidence does not support the Board's "mixed" picture conclusion and amounts to a material and unreasonable error in the Board's analysis.

[78] I also agree with the Applicants that the Board relies too heavily on the fact of Hungary's being a nominal "democracy" instead of looking at what form democracy actually takes in Hungary and whether the assumptions it carries about state protection for minorities such as the Roma can be equated with the international norms that are applicable to refugee law.

[79] The Board's examination of the documentary evidence is, in my view, inadequate and unreasonable for the reasons I set out in *Kina v Canada (Citizenship and Immigration)*, 2014 FC 284.

[80] I also believe the Board committed a reviewable error when it treated the situation as being one of "domestic violence." Clearly, the Applicants alleged they were attacked by Neo-Nazis and right-wing extremist groups. Mr. Tar's mother may have instigated and encouraged this violence against the Applicants, but it did not occur in a domestic context that involved Mr. Tar's mother.

Conclusions

[81] For the reasons stated, I think the Applicants have established sufficient material errors in the Decision to warrant its being returned for reconsideration.

[82] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and set aside and returned for reconsideration by a different Board member;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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