Federal Court Cour fédérale

Date: 20150216

Docket: IMM-3582-13

Citation: 2015 FC 188

Ottawa, Ontario, February 16, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ZSOLT JOZSEF MUDRAK,
PATRIK ZOLTAN FEKE,
ZSOLT MUDRAK,
RENATA FUTO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act], of a decision dated April 29, 2013 of the Refugee Protection Division [the Board] of the Immigration and Refugee Board of Canada

[IRB]. The Board determined that the applicants, Zsolt Jozsef Mudrak, Patrik Zoltan Feke, Zsolt Mudrak and Renata Futo, were not Convention refugees and are not persons in need of protection under sections 96 and 97 of the IRPA.

[2] For the following reasons, the application is dismissed.

II. Background

[3] Zsolt Jozsef Mudrak [the applicant] is the principal claimant in this file. The other claimants are Renata Futo, his common-law partner, and their two sons, Patrik Zoltan Feke and Zsolt Mudrak. The applicants are all citizens of Hungary. The applicant is of Roma and Jewish heritage and he alleges that he and his family began experiencing harassment in Hungary due to their Roma ethnicity in 2007.

[4] On March 16, 2008, the applicant was on his way home from work on the train when a group of four men pushed him off the train and beat him, causing him to lose one of his teeth. The men yelled ethnic slurs at him. The applicant reported the incident to the police, who opened an investigation. Nothing came of the investigation.

[5] On July 9, 2009, the applicant was with a friend in a car when, for unknown reasons, the driver of a jeep chased them at speeds of up to 150 kilometres per hour. The applicant's car was pushed off the road and destroyed. He testified that when the Hungarian Guard arrived at the scene, they yelled ethnic slurs at him. As a result of the attack, the applicant was injured and spent one hour at the hospital, although the hospital staff recommended that he remain for 48

hours of observation. The police came to the hospital and took notes in regard to the applicant's allegations. The applicant alleges that no report was made of the incident.

[6] On July 27, 2009, his common-law partner was walking in the street with her children when a young man and two girls attacked her, causing a wound to her leg. She filed a complaint, but the investigation was halted six months later because the police were unable to find the perpetrators.

[7] On May 8, 2011, the applicants were walking in the street when a group of people began yelling obscenities at them, causing them to run. The perpetrators dispersed when a police car passed by.

[8] On August 17, 2011, the applicants left Hungary and came to Canada to claim refugee status.

III. Impugned Decision

[9] The Board reviewed the incidents involving the applicants and concluded that, while they experienced discrimination, it did not reach the level of persecution. This was decided on the basis that there was insufficient persuasive evidence that the mistreatment suffered or anticipated by the applicants was serious enough or occurred with any degree of repetition to conclude that their basic human rights were denied.

[10] The Board set out the meaning of persecution, stating that it can mean sustained or systematic violation of basic human rights which demonstrates a failure of state protection. The Board noted that the jurisprudence has stated that to be considered persecution; the mistreatment suffered or anticipated must be serious and occur with repetition or affect the exercise of a basic human right.

[11] The Board then assessed whether the applicants would be persecuted simply because they are Roma if they were to return to Hungary, concluding that the determinative issue on this point was state protection.

[12] The Board acknowledged the violence against Roma in Hungary, referring to a report of the United States Department of State 2012 Human Rights Report on Hungary [USDOS 2012 Report] included in the National Documentation Package on Hungary, which in turned referred to a report of the Organization for Security and Cooperation in Europe [OSCE] stating that 12 violent attacks against members of national, ethnic, racial or religious groups occurred in Hungary in 2008.

[13] The Board reiterated the principle that there is a presumption, except in situations where the state is in a complete breakdown, that a state is capable of protecting its citizens. An applicant can rebut this presumption by providing clear and convincing evidence of the state's inability to protect. The onus is on the applicant to approach the state for protection in situations where state protection might be reasonably forthcoming. The Board cited *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 [*Ward*]) for these principles.

[14] The Board noted the following in relation to the applicant's particular case:

1. He reported the March 16, 2008 incident where four individuals attacked him. The police took down a report and commenced an investigation. He has not heard anything regarding this report, and has not inquired about the progress of the investigation.

2. In the case of the July 9, 2009 incident, the police came to the scene of the incident, but the applicant had already been taken to the hospital. The applicant stated there was no police report with respect to the incident, though the police took notes. The Board criticized the applicant for not following up for purposes of filing a complaint or report.

3. In regard to the July 27, 2009 incident, the police conducted an investigation, but the investigation was suspended due to the absence of eyewitnesses and the unknown identity of the perpetrators.

[15] The Board concluded that there was insufficient evidence to conclude that the police did not act in accordance with the law in pursuing an investigation. The fact that the police carried out an investigation of the July 27, 2009 incident demonstrates that the police were acting in a responsible manner. In regards to the other two incidents, the applicant did not follow up with the police, which the panel member concluded he should have done.

[16] The Board stated that this conclusion applied particularly to the applicant's common-law partner, since the police investigated the incident in which she was involved.

[17] In regard to the applicant's children, the Board accepted that they have been psychologically affected by the treatment they have experienced. However, the Board found that no evidence had been proffered in respect to the current situation with the children's education or their psychological state.

[18] The Board also acknowledged the applicant's submissions on corruption in Hungary. It emphasized that despite serious problems with corruption, the new government appointed a commissioner for accountability and anticorruption. The Commissioner's mandate is to uncover wrongdoing by the previous administration, leading to the uncovering of various corruption scandals. The Board concluded that this may have a positive effect on Hungarian society.

[19] The Board then went on to distinguish the state of the law from the actual situation in Hungary. It acknowledged that Hungary has faced criticism for the implementation of the laws enacted to address the discrimination and persecution of minorities and that there is difficulty implementing and enforcing these laws at the local level. The Board pointed out that Hungary is a part of the European Union [EU] and is therefore responsible for upholding various standards to maintain its membership in the EU. As an example, the Board mentioned the European Commission against Racism and Intolerance [ECRI], an independent human rights monitoring body specialized in questions of racism and intolerance. The ECRI published a report on Hungary in which it praised Hungary for its accomplishments, cited issues of concern, and gave recommendations for future action. As a result, the Board concluded that Hungary is taking measures to implement the standards that are mandated as a member of the EU.

[20] The Board stressed the democratic nature of Hungary, the free nature of its elections, its extensive laws prohibiting arbitrary arrest and detention, and the effective control of the security forces by the Prosecutor General's Office and its civilian authorities. It also described the policing structure throughout the country, which operates under the direction of the Ministry of Justice and Law Enforcement.

[21] The Board noted the Independent Police Complaints Board [IPCB], which was established by the Hungarian National Assembly in 2008 to investigate police violations and omissions that substantively concern fundamental rights. The IPCB functions independently from police authorities. No statistics were cited on these investigations, although the police were reported to have rejected the overwhelming majority of complaints found by IPCB. Hungary does not maintain aggregated statistics, so it is not known how many of these complaints related to Roma.

[22] The Board also mentioned the Roma Police Officers' Association [RPOA]. Roma are able to file complaints about discrimination with the RPOA, such as discrimination by law enforcement authorities or police officers. The RPOA's mandate includes: training and education of young Roma and other minorities for employment in the police and military, promoting equal treatment in the law enforcement authorities, providing help to Roma with identity problems, participating in cultural activities, providing and organizing educational events, arranging workshops and working for the protection of human rights.

[23] Other oversight organizations mentioned in the decision included:

1. The Equal Treatment Authority [ETA], which is charged with implementing *Act CXXV on the Equal Treatment and the Promotion of Equal Opportunities*. Act CXXV provides a comprehensive legislative framework on anti-discrimination and has the mandate of encouraging the development of affirmative action programs for minorities. The ETA accepted 1087 complaints in 2009. It ordered employers to stop illegal activities and refrain from further wrongdoing in 51 cases and issued fines in 19 instances.

2. The Parliamentary Commissioner for National and Ethnic Minorities Rights acts as the ombudsman.

[24] The Board also noted Hungarian government initiatives in micro-financing Roma business ventures as positive practices.

[25] In terms of the applicants' well-founded fear of persecution, it does not appear that the Roma are intimidated by the police or do not have means to protest their actions and lay complaints against them. The applicant referred to an incident described in the USDOS 2012, a report on a clash on November 22, 2011 between police and a crowd of 20 Roma persons gathered outside the police station after police detained 12 persons on suspicion of drug abuse. The arrest of some of the protesters resulted in the Hungarian Civil Liberties Union filing a complaint with the IPCB for alleged violations of the arrested demonstrators' basic rights by police through use of excessive force. The investigations remained pending at year's end.

[26] Moreover, the Information Request on the Hungarian Guard describes information obtained from the OSCE report describing a series of events which occurred between 2008 and August 2011, including measures taken by Roma protesting the Hungarian Guard, such as organizing Roma self-defence guards and patrols and working with the Jewish minority to address the high level of intolerance and lack of debate in Hungary about the Hungarian Guard.

[27] In its overview, the USDOS 2012 Report concluded that the Hungarian government generally took steps to prosecute and punish officials, whether in the security services or elsewhere in the government, who committed abuses.

[28] As a result of these initiatives, the Board concluded that the applicant's common-law partner could have reported the incident of violence against her to the ETA and that there is no reason to believe that the ETA would not have investigated the complaint.

[29] The Board went on to conclude that there is evidence of strong public concern over attacks against Roma, which suggests that racism is not rampant in Hungary and that the majority of the public is concerned about racially-motivated violence. Furthermore, the state has put in place a process to deal with corrupt, incompetent police officers, as well as those who might abuse their authority or refuse to carry out their duties due to racist attitudes.

[30] As for the disadvantages Roma persons in Hungary might face on a social level, the Board noted the following:

1. Municipalities provide scholarships for socially disadvantaged students;

2. Parents in disadvantaged situations are eligible for annual grants towards education; and

3. The Sound Start program ensures early intervention to provide health, child welfare, and social services for disadvantaged children up to 5 years of age.

[31] On the other hand, 20% of Roma children live in a place where there is no preschool. There have also been instances of Roma children being turned away from preschools due to their parents' social disadvantage or unemployment.

[32] The Board also noted difficulty in assessing the effectiveness of programs for Roma integration because Hungary prohibits keeping records based on ethnicity, despite a recommendation from the Minority Ombudsman that this system of record-keeping should be changed.

[33] The Board noted the Hungarian government's participation in the following programs run by non-governmental organizations:

1. The Decade of Inclusion program for the improvement of Roma in employment, housing, healthcare and education;

2. The Roma Education Fund initiative to close the gap in educational outcomes between Roma and non-Roma;

3. The Roma Education Fund's "A Good Start" project, which targets 850 Roma and non-Roma children in six different locations in Hungary to prepare mothers for tasks related to preschool education and to increase the enrolment of Roma children in preschool;

4. The Unity in Diversity Foundation, which focuses on educational programs and projects related to Roma integration; and

5. The Association for Roma Solidarity, to improve the situation of Roma in education through programs based on voluntary work and to provide scholarships to students from disadvantaged backgrounds to ensure secondary and college education of Roma youth.

[34] The Board acknowledged the information about violent attacks against Roma, the complaints regarding the reluctance of the Hungarian law enforcement authorities, prosecutors and courts to recognize racial motivation for many crimes, and the existence of far-right organizations that incite prejudice against Roma. The Board noted widespread discrimination against Roma and evidence of specific incidents of persecution, often promoted and carried out by right-wing extremist groups with the support of the Jobbik Party, an extreme right wing political party with a strong anti-Roma agenda. It cited Amnesty International's concerns with respect to the attacks against Roma in 2008 and 2009 in various places across the country, causing fear among many in the community.

[35] On the other hand, the Board referred to the measures taken by the police to intervene in demonstrations and to enhance community safety by increasing patrols, as well as the fact that the government enacted strict legislation outlawing and controlling vigilante groups. In April

2009, protection was extended to "vulnerable settlements" or places where police believed similar attacks could be expected. These areas were patrolled at night and in the early morning hours.

[36] The Board concluded that the applicants had not demonstrated that state protection in Hungary is so inadequate that they did not need to approach the authorities at all, or that they should not have sought help from the oversight agencies, such as the Minorities Ombudsman's Office [MOO] or the IPCB.

[37] In its conclusions, the Board expressed the following points:

1. Effectiveness of state protection should not be set too high. As long as the government is taking serious steps to provide or increase protection for individuals, the individuals must seek state protection.

2. It is open to the Board to determine if the state was unable to protect the claimants, not in the absolute sense but rather to a degree that was reasonable, having regard to the circumstances of the applicants.

3. There was no evidence of a complete breakdown in the state apparatus in Hungary and there is no evidence of past personal experience that would lead the applicants to believe that state protection would not be adequate or reasonably available to them.

IV. Issues

[38] The issues in this matter, as stated by the applicant, are:

1. Did the Board err by failing to conduct a full and separate analysis of the need for protection pursuant to section 97 of the IRPA?

2. Did the Board err in its findings regarding the availability of state protection in Hungary for those of Roma ethnicity?

3. Did the Board err in finding that the applicants ought to have sought state protection, including complaining to policing oversight agencies when the police did not properly discharge their functions?

V. Standard of Review

[39] The issue of whether the Board erred in failing to conduct a separate analysis under section 97 is a question of mixed fact and law (*Velez v Canada (Citizenship and Immigration)*, 2010 FC 923 at para 22). Assessment of state protection also raises questions of mixed fact and law (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171, 282 DLR (4th) 413 at para 38, leave to appeal refused [2007] SCCA No 321 [*Hinzman*]; *Horvath v Canada (Citizenship and Immigration)*, 2014 FC 313 at para 16, 239 ACWS (3d) 457 [*Horvath (Judit)*]).

[40] Therefore, both issues are reviewable on the reasonableness standard. As stated at para 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Court will be

concerned with the "existence of justification, transparency and intelligibility within the decision-making process," but must also assess whether the decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. Analysis

A. *No Section 97 Analysis*

[41] The Board concluded that while the applicants suffered discrimination in "employment, health care, housing, and social services," their personal circumstances did not rise to the level of harm of persecution, nor did the discrimination threaten their fundamental rights. This conclusion was based on the Federal Court of Appeal decision of *Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796 (QL), 182 NR 398 [*Sagharichi*] setting out the distinction between discrimination and persecution. A distinction is made between discrimination that amounts to persecution based on the seriousness of the risk of harm and that of hardship which requires a less harmful form of discrimination (see for example *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, 372 DLR (4th) 539). The applicants did not challenge this finding.

[42] Notwithstanding the finding that the applicants' personal circumstances did not amount to persecution, the Board concluded that it was required to analyze whether the claimants would be persecuted should they return to Hungary simply because they are Roma. The applicants nonetheless argued that the Board was required to conduct a separate section 97 analysis, citing *Dunkova v Canada (Citizenship and Immigration)*, 2010 FC 1322, 377 FTR 306 in support of

their position. I find that there is no requirement for a separate section 97 analysis of either the applicants' personal circumstances or the availability of state protection.

[43] I say this in respect of personal circumstances based upon the definition of persecution in *Rajudeen v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 601 (QL) (FCA), 55 NR 129 at 134. It describes a risk of harm for persecution that is wider or of similar scope than required under section 97 for risks of death or cruel or unusual treatment or punishment (see generally *Peter v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1073 at paras 176 to 201 [*Peter*]). The legal standard is also lower for persecution under section 96 than that required for being in need of protection under section 97 (see for example *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, 249 DLR (4th) 306) and *Peter* at para 245). Accordingly, if the personal objective circumstances of the applicant does not establish a risk of persecution within the meaning of section 96, I do not see how they could reasonably make an alternative argument that the same personal circumstances could objectively establish a risk of torture or risk of cruel or unusual treatment or punishment or risk to life within the meaning of section 97.

[44] In addition, the Board considered the issue of state protection for the purposes of persecution and found that it was adequate and that the applicants were required to have recourse to it. There was no separate evidence before the RPD on state protection which would not be resolved by the analysis of state protection applying to persecution. In the circumstances, a separate section 97(1)(b) analysis is not required (see *Racz v Canada (Citizenship and*

Immigration), 2012 FC 436, 216 ACWS (3d) 206 at paras 6 and 7 [*Racz*] and the cases cited therein).

B. *State Protection: Whether Hungary is Unable to Provide Adequate State Protection to Roma*

[45] The applicants' submissions on state protection are two-fold: first, that the Board erred in not concluding that Hungary was unwilling or unable to provide protection and second, that it erred in concluding that the applicants were required to provide sufficient evidence to satisfy the Board that they had sought state protection. Given the controversy in the Federal Court over these issues, both will be analyzed in some detail below.

(1) Whether Hungary is Unable to Provide Adequate State Protection to Roma

[46] It is well recognized that there is a division in the ranks of judges of the Federal Court on the issue of state protection, particularly as it applies to claimants from the Hungarian Roma community. Justice Harrington in *Varga v Canada (Citizenship and Immigration)*, 2014 FC 510, 240 ACWS (3d) 950 recently summarised the contrasting outcomes in Hungarian Roma cases at paragraphs 18 and 19 of the decision as follows:

> [18] Counsel for Mr. Varga has cited fourteen recent cases of this Court which have been granted judicial review with respect to Hungarian Roma (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 (CanLII); *Balogh v Canada (Citizenship and Immigration)*, IMM-1892-12; *Sebok v Canada (Citizenship and Immigration)*, 2012 FC 1107 (CanLII); *Orgona v Canada (Citizenship and Immigration)*, 2012 FC 1438 (CanLII); *Varadi v Canada (Citizenship and Immigration)*, 2013 FC 407 (CanLII); *Budai v Canada (Citizenship and Immigration)*, 2013 FC 552 (CanLII); *Majoros v Canada (Citizenship and Immigration)*,

> 2013 FC 421 (CanLII); *Muntyan v Canada (Citizenship and Immigration)*, 2013 FC 422 (CanLII); *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 (CanLII); *Moczo v Canada (Citizenship and Immigration)*, 2013 FC 734 (CanLII); *Gulyas v Canada (Citizenship and Immigration)*, 2013 FC 254 (CanLII); *Ignacz v Canada (Citizenship and Immigration)*, 2013 FC 1164 (CanLII); *Horvath v Canada (Citizenship and Immigration)*, 2013 FC 95 (CanLII) and *Molnar v Canada (Citizenship and Immigration)*, 2013 FC 296 (CanLII)).
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> [19] The Minister has only been able to muster up five recent decisions in which judicial review has been dismissed (*Botragyi v Canada (Citizenship and Immigration)*, IMM-13187-12; *Dudu v Canada (Citizenship and Immigration)*, IMM-6686-13; *Horvath v Canada (Citizenship and Immigration)*, 2012 FC 253 (CanLII); *Riczu v Canada (Citizenship and Immigration)*, 2013 FC 888 (CanLII) and *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 (CanLII)).

[47] In fact, there are several other cases, from three different judges, where the judicial review applications of decisions involving Roma were dismissed on the basis that the decisions were reasonable: *Onodi v Canada (Citizenship and Immigration)*, 2012 FC 1191 at para 16, 221 ACWS (3d) 420 (per Rennie J.); *Molnar v Canada (Citizenship and Immigration)*, 2012 FC 1475, 224 ACWS (3d) 446 (per Boivin J., as he then was); *Majlat v Canada (Citizenship and Immigration)*, 2014 FC 965, 246 ACWS (3d) 664 (per Gleason J.) [*Majlat*].

[48] By and large, the decisions setting aside Board conclusions of adequate state protection are based upon the failure of the Board's reasons to demonstrate "the extent to which government action translates into operational adequacy" (see *Buri v Canada (Citizenship and Immigration)*, 2014 FC 45 at para 62, 237 ACWS (3d) 188; *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5, 211 ACWS (3d) 946 [*Hercegi*]; *Stark v Canada (Citizenship and Immigration)*, 2013 FC 829 at paras 10-11, 234 ACWS (3d) 1012; *Beri v*

Canada (Citizenship and Immigration), 2013 FC 854 at paras 36-37, 231 ACWS (3d) 777 [*Beri*]); *EYMV v Canada (Citizenship and Immigration)*, 2011 FC 1364 (CanLII), [2011] FCJ No 1663 (QL) [*EYMV*]).

[49] These views are well articulated in *Beri* at paragraph 44 as follows:

> [44] In my view, the RPD's Decision as regards to state protection is more descriptive in nature than it is analytical. That is, it describes state efforts intended to address discrimination, persecution and protection of the Roma but undertakes no real analysis of the operational adequacy or success of those efforts. As stated by Justice Mosley in *EYMV v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 (CanLII), [2011] FCJ No 1663 (QL) [EYMV]:
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> > [16] The Board did not provide any analysis of the operational adequacy of the efforts undertaken by the government of Honduras and international actors to improve state protection in Honduras. While the state's efforts are indeed relevant to an assessment of state protection, they are neither determinative nor sufficient (Jaroslav v. Canada (Minister of Citizenship and Immigration), 2011 FC 634 (CanLII), [2011] F.C.J. No. 816 at para 75). Any efforts must have "actually translated into adequate state protection" at the operational level (*Beharry v. Canada (Minister of Citizenship and Immigration*), 2011 FC 111 (CanLII) at para 9.
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> [Emphasis added.]

[50] If other evidence has not established to the Court's satisfaction that there has been a failure of state protection, in my view, these reasons tend effectively to shift the onus away from the applicant having to establish inadequate state protection such that it becomes incumbent on the RPD, if it wishes to avoid committing a reviewable error, to demonstrate that the measures

taken by the Government of Hungary have been translated into "operational adequacy" of state protection for Roma citizens.

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

[52] With full respect to my colleagues, I am of the opinion that this line of analysis is inconsistent on a number of grounds with the principles of judicial review of the Board's findings of adequate state protection. In the first place, I respectfully think that it is highly problematic because it is generally not the Court's role to review the evidence with the view to concluding that it is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens. This is not what is usually thought of as a reviewable error. I believe this form of reasoning borders on the substitution of the Court's opinion in the guise of unreasonableness, i.e. outside the range of possible, acceptable, reasonable decisions. This judgment is made despite the fact that the RPD's determination of state protection involves a

complex, multifaceted question of mixed fact and law and that the Board is considering all the evidence on a subject matter which falls squarely within its core area of expertise.

[53] The Court can set aside a decision where there is a perverse finding of fact; but determining the adequacy of state protection is not a pure factual issue, particularly because it is so difficult to state what constitutes the legal standard of adequate state protection. Otherwise, when this Court concludes that a decision is substantively unreasonable, it usually does so based upon some breakdown in logic in the reasons that does not permit the undisputed facts to rationally support the decision. Apart from reviewable errors, such as overly selective treatment of key documents, I do not believe that it is the Court's function to review 3 to 6 inches of country conditions documentation of varying probative value to arrive at a conclusion of mixed fact and law about the adequacy of state protection. The Court is not functioning as a court of appeal.

[54] In support of this conclusion, I cite the opinion expressed in *Sinnappu v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 791, 126 FTR 29, aff'd [1999] FCJ No 2023 (QL), 179 FTR 320 (note) to the effect that it is not the judge's role to review the evidence to determine country conditions:

> [57] In my opinion, the submissions of counsel for the respondent are based on a misreading of that paragraph. In particular, Marceau J.A. did not indicate that such a standard of proof would be required in order to determine the threshold question of the engagement of section 7. Furthermore, I see nothing whatsoever in the reasons of Marceau J.A. to indicate that the Court must determine the state of the country conditions at any point in its analysis of the issues pertaining to the application of section 7 of the Charter. Indeed, I am of the opinion that it is

> simply not the function of a judge, in judicial review proceedings of this nature, to determine the state of country conditions. I am further of the opinion that it would be highly undesirable for a judge to engage in such an exercise, particularly given that the legislative scheme requires immigration officers, who have specialized training and expertise in relation to country conditions, to make such decisions.
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> [Emphasis added.]

[55] Second, I respectfully think it is also incorrect to, in effect, reverse the presumption of adequate state protection in a democratic society when a country enacts legislation, or when there is evidence of increasing acts of violence, thereby requiring the Board to demonstrate the operational adequacy of measures taken to prevent incidents of persecution in its reasons. There is no direct one-to-one, cause-and-effect conclusion that an increasing risk of harm to the Roma demonstrates a failure of state protection. One would first have to determine that the evidence demonstrates that the increasing violence reached the point of demonstrating inadequate state protection, which is the same conclusion as the Court arrived at in *Hercegi*.

[56] Nor should the fact that a democratic government enacting legislation and putting other measures in place to combat persecution, somehow be seen as an admission of a failure of state protection. The Court starts from the presumption of adequate state protection in a democratic nation (*Ward* at 724-726). I think that extensive and substantial legislation and other measures being undertaken should be treated as evidence supporting the democratic foundations of the country, thereby enhancing the presumption of adequate state protection as opposed to requiring the Board to demonstrate operational adequacy. It is for that reason that I am in agreement with the Board's conclusion in this case that the legislation and other measures taken by the Hungarian government to protect Roma citizens strengthens the presumption of adequate state

protection and escalates the challenge facing an applicant. This is particularly true when an applicant is unable to provide clear and convincing evidence of a subjective well-founded fear of persecution or an objective need for protection.

[57] Third, and perhaps most importantly, I believe it to be incorrect to impose on a government an obligation to demonstrate the "operational adequacy" of its recently instituted protection measures. This threshold is, realistically, not subject to proof, even if the legislation is having a positive effect. At the very least, when setting aside the Board's decision, the Court should indicate how one goes about demonstrating operational adequacy from state measures or what information is lacking that shows that operational adequacy has not been achieved. How does one demonstrate that Canadian legislation is effective? Demonstrating the adequacy of state protection is, by and large, an empirical task or one that probably requires opinion evidence from state security experts who can provide criteria and measures based on standards drawn from the international community, none of which evidence exists. Moving the onus to the Board to prove operational adequacy of its legislative and other measures is, in effect, finding for the applicant.

[58] The materials contain very little in the way of empirical data or opinions of state security experts as to either whether state protection is adequate or operationally adequate. The evidence generally consists of information from various agencies and newspapers, some more reliable than others depending upon mandates and other influencing factors in the collection of information, reporting descriptions of a wide variety of incidents dating back to 2008. The most recent information is one to two years out of time. There is some empirical evidence of sorts on the lack of police responsiveness to complaints and recommendations of ombudsmen. However,

by and large, the overall situation describing a need for protection is documented at a generalized level, leaving it as a matter of generalized opinion, which in these cases is based upon the expertise of the RPD, whose members deal with these issues on a daily basis.

[59] Moreover, the Court can do no better, as its decisions are invariably expressed at a generalized level of opinion, although in *Beri* there was a more comprehensive consideration of the materials. This is not a criticism, but simply a statement of the challenge facing the Court in attempting to reasonably analyze a great amount of evidence provided in these cases and to state conclusions on this evidence with any degree of particularity, as well as the recognition of its restrained and deferential role in the judicial review context.

[60] In light of this background, the Board enjoys a very wide degree of discretion to decide these matters before the Court can establish a reviewable error permitting it to intervene. The following factors contribute to that very wide discretion: (1) the amorphous nature of the question of what constitutes adequate protection, not to mention operational adequacy; (2) the extensive number of factors and the assessment of their relevance and weight that contribute to a decision on state protection; (3) the extensive documentation consisting of hundreds of pages on issues related to state protection, little of which reports directly on the operational adequacy of measures to combat persecution and discrimination; (4) the absence of empirical and aggregated evidence to provide an objective means to evaluate state protection, particularly at an operational level; and (5) the singular expertise of the RPD as the only body with experience in evaluating issues of state protection as an essential core function of its duties.

[61] On this latter point of the need to recognize and pay deference to the Board's experience, I cite Justice Gleason at paragraphs 24 and 25 of *Majlat* as follows:

> [24] Thus, under the reasonableness standard, the issue is neither whether the court would have reached the same conclusion as the tribunal nor whether the conclusion the tribunal made is correct. Rather, deference requires that tribunals such as the RPD be afforded latitude to make decisions and to have their decisions upheld by the courts where their decisions are understandable, rational and reach one of the possible outcomes one could envisage legitimately being reached on the applicable facts and law.
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> [25] This is particularly so when the case involves a matter falling within the core specialized expertise of the tribunal, as does the assessment of state protection by the RPD. As I stated at para 5 in *Arias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 322 (CanLII), [2012] FCJ No 1105, "[t]he Board is to be afforded considerable deference in respect of its … conclusions regarding state protection [which]…fall within the core of the Board's expertise and are intimately tied to the facts of a particular case".
>
> [Emphasis added.]

[62] I have attempted to portray in my description of the Board's decision, the exhaustive accounting that it has provided in describing the measures and organizations in place to counter persecution and discriminatory violence directed at the Roma in Hungary. The Board considered the state protection afforded to Roma and found that the Hungarian government was taking important steps to ensure the protection of citizens of Roma ethnicity. The Board relied on the USDOS 2012 Report which concluded that the government generally took steps to prosecute and punish officials who committed abuses, whether in the security services or elsewhere in the government, along with the other evidence referred to above in my description of its decision.

[63] Random attacks are the most serious problem afflicting these applicants and the Hungarian Roma community in general. Operational measures have been put in place both to outlaw vigilante organizations and to increase patrolling in areas where these incidents are likely to arise. There is some evidence that they are being enforced.

[64] The most damning evidence in the materials on country conditions that raises concerns about state protection in the face of violent attacks on Roma citizens is the description of the Commissioner of Police's refusal to accept recommendations from investigations by the oversight agencies. The IPCB had investigated 458 of the 805 public complaints in 2011, though there is no indication of the number of complaints involving Roma. As noted, the IPCB found serious legal violations in 67 complaints. Two of these had been accepted and three rejected, with responses outstanding on the remaining complaints. These statistics should also be considered in light of reports in Responses to Information Requests of statements (which did not appear to be contained in official reports) that in 2010 the Ombudsman had stated that the Commissioner had rejected the findings in 90% of the serious complaints from the previous year.

[65] However, this information is difficult to evaluate in light of other information contained in Hungary's report to the United Nations with respect to the actions of the National Police Commissioner regarding police response to complaints lodged by Roma citizens (see Response to Information Requests dated October 12, 2011). The report indicates that the Commissioner may only "deviate" from the IPCB's recommendations on the basis of "detailed argumentation" and the Commissioner's decision is subject to judicial review.

[66] It would also seem to me, referring back to the 67 serious complaints found by the IPCB, that it is difficult to judge whether this is a significant number of complaints out of a population ranging in estimates from 200,000 to 500,000 Roma. I say this only because Canada is experiencing serious issues in significant numbers of an inability to protect First Nation women. My point is that only experts with experience and some form of benchmarks that have been developed from their expertise are able to interpret the implications on state protection from these statistics.

[67] While the emphasis has been on the extent of the protections created by the state on a going-forward basis, the Board has not minced words in portraying the gravity of the violence, or the social and economic discrimination the Roma suffer in Hungary. The Board has obviously balanced those considerations with all the evidence on state protection. I am satisfied that the Board has correctly stated the law on state protection and has applied it to the totality of the evidence on this issue with the conclusion that for these applicants, state protection was adequate. I see no reviewable error in the Board's conclusions in this regard.

[68] The Board, who appears to be aware of similar Federal Court decisions overturning similar RPD decisions involving Roma, declares that "it is open to the panel" to determine if the state was unable to protect the applicants "not in the absolute sense, but rather to a degree that was reasonable, having regard to the circumstances of the claimants." I see this as a "cri de Coeur" from this Board member at least, querying who the experts are in this field: RPD Board members and other officers charged with assessing risk, or the Federal Court?

[69] The Board quotes Justice Gibson in *Smirnov v Canada (Secretary of State)*, [1995] 1 FC 780, 89 FTR 269 for the well-established proposition that the threshold for adequate state protection should not be set too high. What this proposition really means is that the Federal Court should not set aside the decisions of the RPD, or other risk assessing officers, unless there is some persuasive and compelling justification to categorize the decision as falling outside the range of any acceptable standard of reasonability that the experts might apply.

[70] The more occasions where the Federal Court overturns decisions in this area on the grounds of failing to demonstrate operational adequacy, the more it is in effect stating that the Board has set the standard for adequacy of protection too low. This is, in effect, substituting the Court's opinion for what appears to be the collective opinion of the experts in the field.

[71] As stated, I do not believe that is the Court's role, nor that it is practicable to come to a generalized conclusion on the adequacy of state protection for the Roma minority in Hungary in the context of a judicial review application, the intent of which is to review the "quality" of the decision as applied to the circumstances of the individual applicants.

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

(2) Failure to Follow Up on Alleged Failures of Police to Investigate or Report on Incidents of Violence

(a) *Requirement to Exhaust All Available Recourses of Protection*

[73] The Board reviewed the four incidents relied upon by the applicants to demonstrate persecution. It found that the police could not be criticized for two of them. The 2009 incident involving the principal claimant's common-law partner was investigated and closed for lack of evidence. The 2011 incident where the family was pursued, the police intervened to prevent any harm occurring. With respect to the 2009 attack by skinheads, a police report was produced, but the applicants did nothing to follow up. Similarly, with respect to the incident involving the high-speed motor vehicle chase and accident during which the principal applicant was injured, he stated that the police visited him at the hospital and took notes, but no report was filed. The applicant took no steps to complain to oversight agencies about the failure of the police to report and take action against the perpetrators of the incident.

[74] In light of these circumstances, the Board concluded that the applicants had not provided clear and convincing evidence of the state's inability to protect them. In that respect, they had not demonstrated that state protection in Hungary was so inadequate that they need not have approached the authorities at all, or that they ought not to have sought help from the oversight agencies.

[75] The applicants again relied upon the decision of *Hercegi* for the proposition that Roma claimants from Hungary are relieved from having to provide documentation on violent attacks

against them on the basis that the police do not report such incidents, and that there is no obligation to complain to policing oversight agencies when police fail to do their job:

> [3] I will mention the insistence of the Board Member to have further, and yet further, documentation to back up some of the evidence given by the claimants. They claim they were beaten on several occasions by "skinheads". Photographs attest to large bruising on the body of some of the applicants. There are scars and missing teeth. Two babies died - one while still in the womb when the mother was struck by several blows, the other in a melee during an attack. Death certificates were produced. The applicants gave evidence as to complaints that they made to police authorities and the refusal of the police to investigate or even document the complaints. There is evidence that the Hungarian police will not document complaints by Roma. The insistence by the Board Member for yet further documentation was unreasonable.
>
> [Emphasis added.]

[76] In addition, the applicants relied upon cases explicitly excusing a claimant from complaining to policing oversight agencies when not satisfied with the police's response to their reported incidents of persecution. Two rationales were offered in these cases justifying the claimants' failure to follow-up on policing deficiencies: (1) oversight agencies do not have primary responsibility for protection services and (2) respondents could not demonstrate that complaining to police watchdog agencies would protect Roma or make them any safer. These views are probably best summarized in the decision of *Ignacz v Canada (Citizenship and Immigration)*, 2013 FC 1164, 235 ACWS (3d) 1057 at paras 22-23 [*Ignacz*] as follows:

> [22] […] I agree entirely with the observation of Justice de Montigny that the mandate of these and similar organizations [agencies overseeing the activities of police forces] in Hungary "is not to provide protection but to make recommendations and, at the best, to investigate police inaction after the fact:" *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at para 14. I further agree with his statement at paragraph 15 that

> "the jurisprudence of this Court is very clear that the police force is presumed to be the main institution mandated to protect citizens, and that other governmental or private institutions are presumed not to have the means nor the mandate to assume that responsibility."
>
> [23] I repeat the question I posed in *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421: Had the applicants followed up with the president of their Roma community, or used the complaints mechanisms available through the CFR and the IPCB, would they be any safer or any more protected? Unless, one can answer that question positively - and there is nothing in the NDP that would support that response - then failing to approach these authorities cannot be fatal to a refugee claim when police protection has been unsuccessfully sought. The Member's finding that these institutions offered the applicants - and Roma generally - effective protection at the operational level is just not supported by the evidence and her conclusion that the claims of the applicants must fail because they failed to seek it out, is therefore unreasonable.
>
> [Emphasis added.]

[77] With full respect to my learned colleagues, I disagree with important aspects of the foregoing statement of principles on the requirement to seek and exhaust all recourses of state protection when applied to the claims of Roma citizens in Hungary, which includes complaints to policing oversight agencies where appropriate. I believe that these statements generally place too low a burden on the applicants where the Federal Court of Appeal has indicated that claimants are required to exhaust all possible avenues of protection available except in the most exceptional circumstances. It is my view that such exceptional circumstances do not arise in a functioning democracy that is taking significant measures to combat persecution of Roma citizens and where the applicants cannot demonstrate that a serious risk of harm will result from seeking state protection to its fullest extent.

(b) *Oversight Agencies Do Not Have Primary Responsibility for Protection Services*

[78] I cite the paragraphs 56 and 57 of *Hinzman* in support of the proposition that applicants confront a heavy burden to exhaust all avenues of state protection except in the most exceptional circumstances, as follows:

> [56] I cannot agree. A careful reading of *Ward* illustrates that when the Supreme Court of Canada adopted the test formulated by Professor Hathaway (that only in situations in which state protection "might reasonably have been forthcoming" will the claimant's failure to approach the state for protection defeat his claim), the Court did not intend that refugee claimants would easily be able to avoid the requirement that they approach their home countries for protection before seeking international refugee protection. La Forest J. clarifies in the next sentence of his Reasons, at page 724, that the test is meant to be an objective one:
>
> > …the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities...
>
> [57] *Kadenko* and *Satiacum* together teach that in the case of a developed democracy, the claimant is faced with the burden of proving that he exhausted all the possible protections available to him and will be exempted from his obligation to seek state protection only in the event of exceptional circumstances: *Kadenko* at page 534, *Satiacum* at page 176. Reading all these authorities together, a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status. […]
>
> [Emphasis added.]

[79] Therefore, Roma claimants face a very heavy burden to demonstrate the exceptional circumstances permitting the dispensation of the need to access state protection, which in my

respectful opinion extends to state protection oversight agencies. In this regard, I am in respectful disagreement with my colleagues who discount the role of oversight agencies in ensuring effective policing due to the need for the full involvement of victims in crime prevention. For that matter, I see little distinction in the requirement to seek state protection in the first place and the obligation to follow up on the investigation right through to complaining to the applicable oversight agencies if the police do not provide adequate assistance.

[80] Conversely, if such oversight institutions were not in place in Hungary, it would most certainly be counted as an indicator of inadequate state protection by the Court.

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

[82] The requirement to access police oversight agencies is particularly important where the persecution is in the form of random incidents, such as is normally the case for members of the Roma community. Adequate state protection against random crime must operate at a community level over a longer time frame, because responding to any particular victim cannot assure that future random attacks from other assailants will not occur. To the extent that random criminal conduct can be prevented by means other than increased patrols, effective policing can have a deterrent effect by arresting and successfully prosecuting wrongdoers accompanied by the declaratory publicity attached to successful convictions.

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

[84] In addition, *Ward* teaches us that refugee protection is an international commitment where Canada acts as a surrogate of those countries suffering a failure of their institutions of state protection by offering a safe haven to their citizens who flee to Canada. On the other hand, citizens of Canada are expected to report crimes to the police, even if there is no expectation of arresting and convicting the guilty persons, as may be the case for random incidents of crime. Indeed, insurance companies make reporting crimes a contractual obligation in seeking indemnification for their loss. But it is really part of our civic duties, just as it is to report crimes being committed on others. In a democracy we count on the full participation of our citizens in

combating crime, which includes complaining to policing oversight agencies. As surrogates for those seeking protection in our country, we expect no less from them in their country as a condition to become permanent residents of Canada, when no risk of harm arises in complaining to oversight agencies.

[85] Moreover, there is no basis for the Court to adopt a legal principle that undermines the attempts by the home country to correct deficiencies in its state protection facilities by the employment of its democratic powers.

(c) *The Requirement to Establish that Protection Will Result from Complaining to Oversight Agencies*

[86] In my respectful opinion the heavy burden described in *Hinzman* to demonstrate the exceptional circumstances before permitting the dispensation of the need to access state protection is not discharged in respect of oversight agencies by answering the rhetorical question posed in *Ignacz*. It is recalled that the question posed by the Court was whether the claimant would be any safer or more protected by complaining to the police or the oversight policing agencies.

[87] First, I see the rhetorical question in *Ignacz* as effectively shifting the burden to the Board to demonstrate state protection, rather than the applicant showing by clear and convincing evidence that state protection is not adequate. The burden of proving or not proving state protection is in many respects highly significant, because anything having to do with establishing state protection is challenging, making the onus an important factor in the outcome.

[88] Additionally, requiring a positive reply to the rhetorical question of how protection for the victim improves by complaining to oversight agencies is particularly difficult in a situation of random acts of persecution, which typically are those afflicting members of the Roma community. The reality is that proving improved protection for the victim of random acts of persecution is largely unattainable, as the courts have repeatedly pointed out. When neither the claimant nor the police can know when and by whom a future act of persecution against any particular claimant may occur, it can always be posited that increased protection cannot be reasonably obtained by the individual approaching state authorities.

[89] In this regard, I refer to the point already made that reporting to oversight agencies tends to improve the state protection afforded to all members of the Roma community.

[90] As well, if this rationale of needing to demonstrate protection from complaining applies to oversight agencies, there is no logic why the same requirement would not apply to seeking state protection from the police in the first instance. It has not been suggested that there is no requirement to report acts of random violence to the police in the first instance if not assured some protection will follow. It is not clear therefore, why it should be any different in respect of being required to follow up if not satisfied with the efforts of the police, when there is no risk of harm in doing so.

(d) *Absence of Risk of Harm in Making Further Complaints*

[91] It is apparent from my comments above that I judge whether any risk of harm or other downside to the claimant would result from seeking police protection, to be an important

underlying factor in these cases. The absence of risk to members of the Roma community who are normally victims of random attacks is an important factual distinction when considering the requirement to seek state protection in these cases. For targeted attacks, a common risk of seeking police assistance or complaining to policing oversight agencies is the possible threat of retaliation by the assailants. This distinction however, does not appear to be considered in these cases when determining whether exceptional circumstances exist to exempt the need to seek state protection, or to complain about its inadequacies to oversight agencies.

[92] My view is that the absence of risk of harm in seeking state protection is one of the important factors that underlies the exceptional burden of seeking state protection in a functioning democracy. Democracies, by their nature, generally present little risk of harm in reporting crimes or complaining about the adequacy of protection. Moreover, the absence of harm in accessing state protection only appears to be relevant in the circumstances of complaining about the adequacy of policing. It is generally conceded that no exemptions apply for first reporting crimes when no risk arises from doing so, even if the issue of absence of risk of harm is not stated as the underlying rationale.

[93] Besides targeting, a risk of harm may arise by simply remaining in the country instead of fleeing, when there exists the possibility of an imminent attack by the aggressors. The *Ward* decision is an example of this form of risk - the applicant had to flee Ireland because his life was in imminent danger as a target of the Irish Republican Army and it was admitted that the state could not adequately protect him. The Supreme Court pointed out why the imminent risk of harm to Mr. Ward excused him from seeking police protection, as follows:

> Moreover, it would defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state merely to demonstrate ineffectiveness.
>
> [Emphasis added.]

[94] In *Ward*, the Supreme Court set out two formulations to determine whether there is a requirement to approach state authorities in the following oft-cited passage:

> Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection [1] "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" [2] where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.
>
> [Emphasis and numbering added.]

[95] I think it important to note that the Court's formulation of the test, "where it is objectively unreasonable" not to seek protection, is broader and more generic than that of Professor Hathaway who formulates a subset of the principle that the requirement to seek protection arises only in situations when protection "might reasonably have been forthcoming." It would appear that the distinction between the two formulations underlies the comment in *Hinzman* that "a careful reading of *Ward*" should not lead to the conclusion that refugee claimants can easily avoid seeking state protection.

[96] I am not aware of any case that has considered whether it is "objectively unreasonable" for an applicant not to seek state protection when no risk of harm arises from doing so. I think

this is the fundamental issue in these debates. Given the Court's reference to the risk of harm to Mr. Ward in approaching the state for protection in the passage cited above, I think it is reasonable to conclude that the Court in *Ward* did not have in its full contemplation an exception to the requirement to approach state authorities in a democratic state when there is no risk of harm in seeking protection.

[97] I say this because the founding principle underlying refugee protection stems from the risk of harm in the home country, whether in the form of a well founded fear, or being in need of protection. If there is no risk of harm in accessing state protection, it would be objectively unreasonable not to seek state protection, because seeking state protection cannot add to the risk of harm that causes the individual to flee. Seeking state protection when no risk of harm ensues from doing so can only diminish the risk, if the police prove successful. That is to say that there could only be an upside to going to the police, however remote.

[98] At the very least, *Ward* contemplates a requirement to access state protection in incidents prior to the "culminating incident", being the last one that led the claimant to flee to Canada. This distinction between past and the culminating incidents of persecution is implicit in the Supreme Court's statement in *Ward* that an "exceptional exemption" from seeking state protection arises from "the claimant's testimony of past personal incidents in which state protection did not materialize". Logically, this can only mean that the applicant must have exhausted the state protection mechanisms in all previous incidents before giving up on state protection. Similarly, if according to Professor Hathaway state protection is about giving the state an opportunity to respond to a form of harm, then as long as the claimant intends to remain

in the home country, there is no logic why that opportunity would not be given to the state to respond to the harm, if it does not add to the risk of the claimant.

[99] Thus, if a risk of persecution leads the claimant to flee after giving state protection every opportunity to provide protection, then the objectively reasonable ground is met not to seek state protection regarding the last incident. But, in my view, if the claimant remains in the country for any appreciable time, such as for arranging their affairs as is often the case, the requirement to seek state protection remains when no risk of harm arises in doing so. It is a question of fact to be determined in the circumstances whether it was reasonable to give up on the protections of the state when the decision has been made to leave. But it is only in issue after the culminating incident occurs; otherwise the applicant is required to exhaust all avenues of state protection.

(e) *Facilitating Corroboration of Incidents of Persecution*

[100] For what is admittedly a corollary consideration but still an important factor for the RPD and this Court, the requirement to access state protection generally improves the reliability of the factual conclusions regarding the incidents of persecution alleged by Roma claimants. Normally, accessing state protection should lead to reliable corroborative evidence being available due to the state authority's documentation that is generated in the process. This is particularly significant in terms of corroboration where claimants allege that the police failed to prepare reports or inadequately dealt with their case.

[101] By being required to complain about inadequate police services to one of the oversight agencies, who are diligent in following up on such complaints, the record of the incident and policing failures would be available for the Board's consideration.

[102] This would also be of benefit to the refugee claimant, whose application should receive a more favourable consideration since such documentation would corroborate the incidents of persecution and their claim would not be solely based on his or her bare testimony.

[103] The case at hand is a good example to demonstrate the Court's concerns about the exception of the need to report policing failures to the various oversight agencies for lack of corroboration that would have resulted by complaining to the oversight agencies. The principal applicant claims to have been involved in a random violent attack during which he and a friend were pursued by assailants in a car chase at speeds up to 150 kilometres per hour. The applicant alleges that they were run off the road, destroying his automobile and causing him personal injury. He testified that the police visited him at the hospital and took notes but prepared no report. Besides it being somewhat difficult to believe that no accident report was prepared and filed on such a public and provable event, this was an occasion where the identity of the assailants would have been known to the police by their investigation.

[104] This would have been a particularly helpful case for the applicant to have pursued with the police and thereafter with the oversight agencies to ensure either that the perpetrators were brought to justice or, failing this resolution, that police inadequacies were highlighted. Not only

would this have served the purpose of deterrence and transparency, the applicants' allegations would have been corroborated and their chance of success in their refugee claim improved.

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

[106] In my view, these principles do not properly state the requirements of state protection. Moreover, they result in the circumstances where all citizens of Canada and Hungary lose by this rule, except the refugee claimant making a false claim of having been the victim of an incident of persecution.

IV. Conclusion

[107] For the reasons described above, I conclude that no reviewable error was made by the Board in its conclusions that the personal circumstances of the applicants did not demonstrate persecution or being in need of protection and that the state protection afforded to the applicants was adequate in the circumstances. Its decision falls within the range of reasonable acceptable outcomes and is justified by transparent and intelligible reasons. Accordingly, I dismiss the application.

A. *Certified Questions*

[108] Given what I considered to be the determinative role of the principles of state protection discussed above, and the fact that I had not asked the parties during argument whether they wished to propose any certified questions, I provided an advance copy of my reasons for that purpose, which included the following questions for their consideration:

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

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

[109] The applicant replied that the questions proposed by the Court should be certified. However, the reasoning offered was not of assistance, to the effect only that the answers to the questions would be helpful to Members of the Immigration and Refugee (Bar) in rendering decisions for Convention Refugee Claims and for determining if persons are in need of protection in Canada.

[110] Conversely, the respondent submitted that the proposed questions did not meet the requirements for certification, being that of transcending the interests of the immediate parties to the litigation, contemplating issues of broad significance or general application, and being determinative of the appeal. In its reply, it discussed certain principles in support of its position, in effect claiming that the legal principles were clear and not determinative.

[111] I am not in agreement that the questions proposed do not address issues that are determinative of the decision (in the respondent's favour). The Board's reasons regarding state protection vary largely fixated on the measures introduced by the state to enhance protection of the Roma minority with very little evidence demonstrating their operational adequacy. Based on the jurisprudence referred to in my reasons, this would otherwise render the absence of such analysis a reviewable error. To similar effect was the Board's justification of its decision on the basis of the applicant's failure to follow up on complaints to the police and their oversight agencies even though no risk arises in doing so. The jurisprudence cited above has rejected failures to seek state protection in the circumstances as insufficient grounds to reject a claim.

[112] I also am of the view that the proposed questions raise issues that both remain unresolved and transcend the interests of the immediate parties, particularly as they relate to a significant division of opinion in this Court regarding the application of legal principles underlying the certified questions. The cases cited by the respondent, such as the *Villafranca* and *Hezman* in respect of the first and second certified questions have not received general application in this Court. There appears to be a difference of opinion in the Court on several issues involving state protection. These include the degree of deference owed to the decisions of the Board pertaining

to the exercise of a wide discretion on these issues falling squarely within its area of expertise, the effect of the state undertaking extensive measures to protect the Roma minority and the requirement to seek state protection when no risk arises from the claimant's doing so. The resolution of the different views of the Court that determine the outcome of decisions transcends the interests of the parties in this matter.

[113] Accordingly, the Court certifies the two questions set out in paragraph 108 above.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. the application is dismissed; and

2. the following questions are certified for appeal:

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

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

"Peter B. Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Joseph S. Farkas	FOR THE APPLICANTS
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Joseph S. Farkas Law Firm Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT