Federal Court  Cour fédérale

Date: 20150317

Docket: IMM-7225-13

Citation: 2015 FC 337

Ottawa, Ontario, March 17, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JENO KOVACS
JENONE KOVACS
PETRA IZABELLA KOVACS
ANNET KOVACS
DIANA MOLNAR
JENO (JR.) KOVACS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, a Roma family of six (two adults and four children) who are citizens of Hungary, seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), of the decision of a Senior Immigration Officer (the Officer) made on September 25, 2013, which refused their Pre-Removal Risk Assessment (PRRA) and found

that they were not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the Act.

[2] For the reasons that follow, the application is dismissed.

Background

[3] The adult applicants, Mr. and Ms. Kovacs, and their two eldest children first came to Canada in 2000 and made claims for refugee protection under their former surname (Mata) but returned to Hungary.

[4] The applicants then returned to Canada in November 2009, with four children, two of whom had been born since their return to Hungary, and made claims for refugee protection using their new surnames. The Refugee Protection Division of the Immigration and Refugee Board (the Board) discovered the applicants' change of name. Mr. and Ms. Kovacs and the two eldest children were found to be ineligible for refugee protection pursuant to section 101 of the Act, as they had previously made claims for protection in Canada. The claims of the two youngest children were considered. Ms. Kovacs provided the evidence at the hearing on behalf of the children, who were represented by a Designated Representative.

[5] In its June 23, 2011 decision, the Board noted very serious credibility concerns. In addition to the applicants' deception regarding their change of name, their evidence was found to be inconsistent and embellished. The Board's credibility findings are described in the PRRA decision, as noted below. The Board found that the applicants had not established their Roma

ethnicity with sufficient evidence. However, the Board considered the claims assuming that they were Roma. The Board found that Ms. Kovacs had failed to adduce sufficient, credible evidence to support the claims for refugee protection and that the evidence of discrimination and harassment as Roma in Hungary did not amount to persecution.

The PRRA Application

[6] In support of their PRRA application, made in May 2013, the applicants submitted amended Personal Information Forms (PIF) reiterating their allegations of persecution in Hungary on the basis of their Roma ethnicity, and new evidence to establish their Roma identity.

[7] In addition, Ms. Kovacs submitted an affidavit detailing a new risk based on a threat from her husband's uncle, Mr. Illes Ruszo. Ms. Kovacs stated that she feared returning to Hungary because she had been raped by Mr. Ruszo in Canada in September 2011. Ms. Kovacs did not report this offence to the police in Canada. Mr. Ruszo subsequently returned to Hungary. Ms. Kovacs stated that, after she told her husband, he contacted Mr. Ruszo in Hungary. Following this, Mr. Ruszo sent letters threatening to kill Ms. Kovacs and her family if they returned to Hungary. The applicants attached two letters from Mr. Ruszo, one post marked December 4, 2012 and the other January 16, 2013 and their certified translations.

[8] The applicants argued that this new evidence established that they would face risks in Hungary from Mr. Ruszo and due to their Roma ethnicity and would not have access to adequate state protection. The applicants referred to documentary evidence regarding state protection in

Hungary, including with respect to gender violence, to support their assertion that Hungary "does not act on complaints of gender violence – especially from Roma women".

The PRRA Decision Under Review

[9] The Officer noted that the applicants submitted new evidence to support their PRRA in an effort to overcome the findings of the Board, including: confirmation of their Roma ethnicity; progress reports from Parkdale Community Health Services regarding Ms. Kovacs' current psychological state; the psychological report of Dr. Durish regarding Mr. Kovacs' diagnosis of Post-Traumatic Stress Disorder (PTSD); and the psychological report of Dr. Kussin regarding Ms. Kovacs' diagnosis of PTSD, depression, anxiety and some psychotic experience. The Officer indicated that he would consider the documentary evidence regarding the mistreatment of Roma in Hungary in his assessment of country conditions.

[10] The Officer concluded that the new evidence was not sufficient to rebut the Board's findings about Ms. Kovacs' credibility or to persuade him to arrive at a different conclusion than that of the Board. The Officer reviewed the relevant portions of the Board's decision, including the significant credibility findings of the Board regarding the applicants' deception, noting that their evidence was found to be an embellishment and concluding that the new material submitted did not contradict the findings of credibility.

[11] The Officer recited relevant parts of the Board's decision including its finding that "the parents deliberately set out on a path to deceive the Canadian government, by entering Canada and making refugee claims under fresh names they had just adopted, after previously failing

under other names, and knowing they were ineligible to apply under their names"; with respect to the allegations of risk, "the parents only made these allegations and submitted these documents once they were 'outed' and had nothing to lose by doing so"; with respect to allegations of an attack, "the mother presented oral evidence inconsistent with the medical report, which report itself (sic) found to be an embellishment"; and, in conclusion "the panel has found this entire body of evidence to be an embellishment, it assigns these new allegations and purported corroboration little weight". The Officer provided the following summary:

> The facts are: this family, whether Roma or not, willingly engages on a path to deliberately deceive the Canadian authorities. In 2000, they made a refugee claim under the name of Mata. In 2009, they made a second refugee claim under the name Kovacs, hiding the change of name in order to increase the likelihood of success in a second refugee claim. With the second claim, the family presented an entire body of evidence that was determined by the Board to be an embellishment. I find that the confirmations of ethnicity, the death threat letters, the affidavits, the psychological reports, and the documents on country conditions do not contradict a finding of fact made by the Board, in this case a finding of credibility.

[12] The Officer indicated that the threat from Mr. Ruszo was a new risk and would be considered in the PRRA. The Officer also considered the risk arising from the medical condition of Mr. and Mrs. Kovacs and the risk arising from the applicants' Roma ethnicity.

[13] With respect to the risk from Mr. Ruszo, the Officer noted Ms. Kovacs' claim that she was sexually assaulted in September 2011, did not report the crime to the police, told her husband a few months before their PRRA application, and had received death threats from Mr. Ruszo following her husband's contact with him. The Officer understood that the sexual assault occurred in Canada and that Mr. Ruszo had returned to Hungary.

[14] The Officer then considered the documentary evidence regarding the criminal law governing sexual offences in Hungary and its enforcement and stated "I do not find Mr Ruszo is above the law. If he is reported as a criminal he will be prosecute (sic) as a criminal". The Officer concluded that, on a balance of probabilities, he did not find that Ms. Kovacs and her family "face a risk to their life or of cruel and unusual treatment or punishment in Hungary due to the presence of Mr. Illes Ruszo in Hungary. I find that the female applicant and her family have access to adequate state protection in Hungary."

[15] The Officer then considered the risk arising from the medical condition of Mr. and Ms. Kovacs as described in the psychological reports. He found the reports were reliable evidence of their current psychological states, but were not objective evidence that the applicants would likely be at risk upon return to Hungary. The Officer noted that a claim under section 97 cannot succeed based on the inability of a country to provide adequate health or medical care.

[16] Finally, the Officer accepted the confirmation of the applicants' Roma ethnicity and assessed whether they would be at risk on that basis if returned to Hungary. The Officer noted Ms. Kovacs' submission that the police "do not even try to protect Roma people" and are "even more reluctant to get involved in 'domestic' disputes." Based on the applicants' stated reluctance to engage the state for protection, the Officer indicated that objective evidence was critical to establish whether adequate state protection would be available in Hungary.

[17] The Officer reviewed the documentary evidence regarding state protection and summarized his assessment. He acknowledged that there are inconsistencies in the documentary

evidence, but found that the preponderance of objective evidence showed there is adequate state protection, although it is not perfect. The Officer found that the applicants had failed to rebut the presumption of state protection with clear and convincing evidence. The Officer then concluded that there was no persuasive evidence that the applicants would face persecution, or on a balance of probabilities, face a risk to life, risk of cruel and unusual treatment or punishment, or risk of torture if they returned to Hungary.

The Issues

[18] The applicants argue that the Officer applied the wrong test for state protection and, as a result, his analysis is incorrect. Alternatively, the applicants argue that the decision is unreasonable on several grounds: the Officer failed to assess state protection in the context of the applicants' circumstances, particularly the risks of sexual and gender violence and the lack of protection for Roma; the Officer ignored evidence provided by the applicants; the Officer's decision is unintelligible because the Officer failed to consider the risks of persecution claimed by the applicants in their PIFs and failed to consider the corroborative evidence from the psychological reports and offered no explanation for not doing so.

Standard of Review

[19] As the applicant notes, in *Dawidowicz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 115, [2014] FCJ No 105 [*Dawidowicz*] Justice O'Keefe highlighted the distinction between two issues; whether the correct test was applied, which is reviewed on the standard of correctness, and whether the decision maker applied the test to the particular facts, which is reviewed on the reasonableness standard. Justice O'Keefe stated at para 23:

> [23] Chief Justice Paul Crampton recently explained the standard of review for decisions on persecution and state protection in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 20 to 22, [2013] FCJ No 1099 (QL) [*Ruszo*]. In essence, since the jurisprudence has developed clear tests for both, a board cannot depart from them. Therefore, where applicants allege that a board misunderstood the test, the standard is correctness and no deference is owed to the board's understanding of the relevant tests. However, where applicants challenge how the tests were applied to the facts, those are questions of mixed law and fact and the standard is reasonableness (*Ruszo* at paragraphs 20 to 22; *Gur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 992 at paragraph 17, [2012] FCJ No 1082 (QL); *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 38, 282 DLR (4th) 413 [*Hinzman*]).

[20] It is well established, that where the standard of reasonableness applies, the role of the Court is to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). Deference is owed to the decision maker. The Court will not re-weigh the evidence or remake the decision.

[21] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], noting that reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" and that courts "may, if they find it

necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (at paras 14-16). The Court summed up its guidance in para 16:

> In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[22] In *Majlat v Canada (Minister of Citizenship and Immigration)*, 2014 FC 965, [2014] FCJ No 1023 Justice Mary Gleason summarized the notion of deference, following a comprehensive analysis of the reasonableness standard of review, at para 24:

> [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.

[23] In this case the applicants argue that the Officer applied the wrong test. That issue is addressed below. Alternatively, the applicants argue that the assessment of state protection is not reasonable because the Officer ignored evidence and failed to conduct a contextual analysis of the risks they asserted. With the guidance of the jurisprudence noted above, I have considered whether the Officer's findings and decision are reasonable with regard to the outcome and the record.

[24] Before addressing these issues, it is helpful to first examine the applicants' last argument - that the Officer's decision is not intelligible.

Is the decision unintelligible?

The applicants' position

[25] The applicants argue that the Officer's reasons are unintelligible. First, the applicants submit that the Officer erred by failing to address their allegations of persecution, claimed in their PIFs, without explanation. Second, the Officer erred in not providing an explanation for rejecting the psychological reports which the applicants assert corroborate their allegations of persecution.

[26] The applicants submit that the Officer's finding that their "new evidence" was insufficient to rebut the Board's credibility findings or persuade the Officer to reach a different conclusion is perverse because the determinative finding of the Board was that the applicants were not Roma. The Officer accepted that the applicants were Roma which, therefore, rebuts the Board's finding. The applicants argue that given this rebuttal, their allegations of persecution should have been considered.

[27] The applicants also argue that the Officer did not explain why their new evidence was insufficient. In particular, the Officer did not provide reasons for rejecting the psychological reports which corroborate their allegations of persecution in Hungary. The adult applicants note that the psychologists did not solely rely on their accounts, but conducted psychological testing to diagnose their mental state.

The respondent's position

[28] The respondent notes that the Board had numerous credibility concerns regarding the applicants, but found that even if the applicants were Roma, they did not establish a well-founded fear of persecution. The Officer explained his finding that the credibility issues were not addressed by the new evidence as it did not contradict findings made by the Board.

The Decision is not unintelligible; the Officer did not err in considering only the new risk

[29] As noted, it is helpful to address this issue first to provide the proper framework to review the Officer's decision.

[30] A PRRA is not an appeal of the refugee protection determination conducted by the Board or an opportunity to reargue the facts that were before the Board as noted by Justice Judith Snider in *Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1380, [2006] FCJ No 1778 at para 12. Justice Snider added, "[t]he decision of the RPD is to be considered as final with respect to the issue of protection under s. 96 or s. 97, subject only to the possibility that new evidence demonstrates that the applicant would be exposed to a new, different or additional risk that could not have been contemplated at the time of the RPD decision."

[31] The Board's decision was based on significant negative credibility findings. Although that decision determined the claims of the two youngest children, Ms. Kovacs gave evidence on their behalf and the allegations of the whole family were assessed.

[32] The Officer carefully reviewed the Board's decision and the new evidence submitted and reasonably found that the new evidence did not rebut the credibility findings of the Board.

[33] The applicants' argument that because they had established their Roma ethnicity, the Officer erred in not assessing their reiterated allegations of persecution, completely overlooks the fact that the Board's determinative finding in rejecting their claim for protection was their significant lack of credibility. Although the Board had not been satisfied regarding the establishment of their Roma ethnicity, the Board nonetheless assessed the claim assuming that they were Roma. Therefore, the subsequent establishment of their Roma ethnicity to the Officer does not rebut the determinative findings of the Board, which were credibility findings.

[34] The Officer did explain why he attributed little weight to the reports from Dr. Durish and Dr. Kussin. The Officer accepted the psychological reports only as evidence of the adult applicants' current mental state. The Officer explained that these reports were not corroborative of any risk the applicants alleged, noting that the Doctors were not experts on the country conditions in Hungary and could not provide objective evidence of country conditions. The Officer also noted that the reports, apart from the applicants' current mental state, were based on what the adult applicants had recounted.

[35] Because the only new risk asserted was the risk from Mr. Ruszo, the Officer did not err in failing to consider the allegations of persecution that the applicants re-submitted with their PRRA application. These were not new risks. Moreover, these risks had been found by the Board to not be credible.

[36] The decision is not unintelligible. The reasonableness of the decision must be reviewed bearing in mind that the Officer's role was to assess only the new risk from Mr. Ruszo, the risk arising from the adult applicants' medical condition and the risk arising more generally from their Roma ethnicity on a prospective basis, if the applicants were returned to Hungary.

Did the Officer apply the wrong test for state protection?

The applicant's submissions

[37] The applicants argue that the Officer applied the wrong test for determining whether there is adequate state protection for the Roma in Hungary by focusing on efforts rather than on the effectiveness of such efforts, that such an error is reviewable on the correctness standard (*Dawidowicz* at para 23; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004, [2013] FCJ No 1099 [*Ruszo*] at paras 20-22), and that any analysis based on this wrong test is erroneous.

[38] The applicants point to several references in the decision that refer to Hungary's efforts rather than operational adequacy as demonstrating that the Officer applied the wrong test:

> • "measures are not always implemented effectively at the local level"
>
> • "failures implementing centrally exacted legislation…continue to lie at the heart of much of the discrimination towards the Roma"
>
> • "the central government's general failure to maintain strong and effective control mechanisms over rights violations takes its toll…on the Roma" , and,
>
> • "the central authorities appear somewhat hamstrung in their efforts to achieve change".

[39] The applicants note that the test for state protection is whether a state is able to provide adequate protection (*Elcock v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1438; *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79; *Canada (Attorney General) v Ward*, [1994] 2 SCR 689 [*Ward*]). "Adequate protection" and "serious efforts at protection" are not the same thing; evidence of adequacy of state protection will indicate whether or not a given law actually functions to protect citizens (*Kumati v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1519, [2012] FCJ No 1637 [*Kumati*] at paras 27, 28, 34, and 39). The applicants note that this Court has held that "adequate" protection requires evidence that it is more likely than not that the individual will be protected (*Salamanca v Canada (Minister of Citizenship and Immigration)*, 2012 FC 780, [2012] FCJ No 809 [*Salamanca*] at para 17). In addition, the applicant submits that some empirical assessment of the adequacy of state protection is required (*Dawidowicz* at paras 29-30).

The respondent's submissions

[40] The respondent submits that the passages referred to by the applicants must be considered in their full context. For example, the Officer's comment that measures are not always implemented effectively at the local level does not suggest that the Officer applied the wrong test. The Officer considered the conflicting evidence and concluded that the preponderance of objective evidence demonstrated that adequate state protection was available to the applicants.

The Officer applied the correct test for state protection

[41] I have carefully reviewed the Officer's decision, including the passages noted by the applicants. I have also reviewed all the other passages in the Officer's decision regarding state

protection, which referred to the various initiatives being developed, implemented and assessed in Hungary to protect Roma from persecution and to counter discrimination, including the oversight or redress mechanisms available to Hungarian citizens. Contrary to the applicants' view that the Officer applied the wrong test, the decision reveals that the Officer understood that the test for state protection is that of adequacy and that the onus is on the applicants to rebut the presumption of adequate state protection in Hungary given that it is a functioning democracy.

[42] The passages noted by the applicants above do not demonstrate that the Officer misunderstood the test or applied the wrong test. Several of the Officer's references were made in the context of initiatives to address discrimination in employment and housing and not persecution or risk of personal violence. The Officer candidly acknowledged that the country condition evidence was inconsistent or mixed and the situation was not perfect. His references to the efforts being made were related to his assessment of the adequacy of state protection and do not reflect any misunderstanding of the test.

[43] The issue is whether the Officer's assessment of the adequacy of state protection for the applicants, including his finding that they had not rebutted the presumption of state protection, is reasonable. In other words, the issue is the reasonableness of the conclusion that adequate state protection would be available to the applicants if they returned.

Is the decision reasonable?

The applicants' submissions

[44] The applicants argue that the Officer failed to assess the adequacy of state protection for them based on their circumstances and the risks they faced, which include the risk to Roma victims of domestic and gender violence. The applicants note these risks underlie the threats from Mr. Ruszo and would not be taken seriously.

[45] The applicants further argue that the Officer ignored the contradictory documentary evidence which establishes that there would be no adequate state protection for the applicants. They again note that domestic and gender violence underlies the threats and that the police do not respond to domestic disputes.

[46] The applicants also submit that the Officer ignored relevant jurisprudence which has established how the adequacy of state protection should be analyzed.

[47] With respect to the Officer's failure to conduct an individualized assessment, the applicants note that they stated that, as Roma, they would not receive protection as victims of crime. They provided documentary evidence that Hungarian authorities rarely get involved in "domestic disputes" or those involving gender-based violence. The applicants acknowledge that the threats from Mr. Ruszo are of physical violence or death, but submit that these threats arise from the disclosure of the sexual assault. The Officer erred in failing to analyze whether state protection would be adequate to respond to the threat in the context of domestic violence and the

family's Roma ethnicity (*Djubok v Canada (Minister of Citizenship and Immigration)*, 2014 FC 497, [2014] FCJ No 672 [*Djubok*] at paras 18-19).

[48] The applicants note that this Court has intervened in several recent decisions where PRRA officers have made unreasonable findings about the adequacy of state protection for the Roma in Hungary: *Gulyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 254, [2013] FCJ No 280 at para 78; *Buri v Canada (Minister of Citizenship and Immigration)*, 2014 FC 45, [2014] FCJ No 47 at paras 64-67; *Kemenczei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1349, [2012] FCJ No 1457 at paras 57, 60-61; *Mozco v Canada (Minister of Citizenship and Immigration)*, 2013 FC 734, [2013] FCJ No 776 at para 10; *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421, [2013] FCJ No 447 [*Majoros*] at para 18. The applicants submit that the Officer's analysis of the adequacy of state protection was flawed as he failed to follow the guidance of this jurisprudence.

[49] In addition, the Officer erred in failing to refer to contradictory country condition evidence that could only lead to the conclusion that there is no adequate state protection for the Roma in Hungary (*Goman v Canada (Minister of Citizenship and Immigration)*, 2012 FC 643, [2012] FCJ No 866 at para 14).

The respondent's submissions

[50] The respondent highlights that a refugee claimant bears the onus of providing clear and convincing proof of the state's inability to protect (*Ward*, supra at 724-726; *Hinzman et al*; *Hughey v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] FCJ No 584

[*Hinzman*]). The applicants failed to provide evidence establishing that state protection was not available (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636 [*Carrillo*] at para 30; *Ruiz Martinez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1163, [2009] FCJ No 1443 at para 42-43).

[51] The respondent notes that with respect to the new risk allegation, the Officer accepted that the sexual assault occurred but found that state protection would be available to the applicants if Mr. Ruszo attempted to persecute them in Hungary. The documentary evidence demonstrated that state protection would be available, although the Officer recognized some problems with the implementation of measures (*Horvath v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1132, [2012] FCJ No 1217 [*Horvath*]; *Ruszo* supra).

[52] The Officer assessed the risk from the perspective of its link to gender and sexual violence noting the laws in place, that the police would be responsible for protection, and that if reported, Mr. Ruszo would not be above the law. The Officer also considered the initiatives underway to respond to domestic violence, noting these were not perfect, but that there were services and assistance available.

[53] The Officer did not ignore evidence. The Officer recognized problems with gender-based violence but found that the preponderance of the evidence demonstrated that state protection was available. Merely because the Officer did not refer to specific documents or passages does not amount to an error.

[54] The respondent notes that findings of a lack of state protection in other cases cannot be used as evidence to impugn the Officer's decision (*Konya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 975, [2013] FCJ No 1041 [*Konya*]; *Molnar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 530, [2012] FCJ No 551; *Riczu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 888, [2013] FCJ No 923, *Ruszo*, supra; *Botragyi v Canada (Minister of Citizenship and Immigration)*, IMM-13187-12, February 7, 2014).

The decision is reasonable; the Officer's assessment of the adequacy of state protection is reasonable

[55] The Officer did not ignore the risks faced by the applicants or their particular circumstances.

[56] As noted above, the Officer first assessed the risk from Mr. Ruszo. The Officer noted that Ms. Kovacs stated that she was raped by Mr. Ruszo in Canada but she had not reported the offence to the police in Canada. The Officer, therefore, considered what could be expected if the applicants returned to Hungary. This was the proper approach because risk assessment is forward looking.

[57] The Officer considered that the risk from Mr. Ruszo was a threat of violence, noting that the police would be responsible and that if reported, the police would respond. That conclusion is reasonably based on the Officer's assessment of the country condition evidence, and as acknowledged, it is not perfect state protection. However, the preponderance of evidence supports the finding of adequate state protection.

[58] The Officer noted the applicants' assertion that there was limited protection for Roma women who are victims of domestic violence. The decision does not explicitly acknowledge the need to consider the intersection of the risk from Mr. Ruszo and the risk arising from the applicants' ethnicity. However, it is apparent when the reasons are read with the record that the Officer approached the state protection analysis by, first, considering the primary risk of the threat from Mr. Ruszo and, then, by considering that risk in the context of the risk arising from the applicants' Roma ethnicity.

[59] The Officer did not ignore the documentary evidence that the applicants say establishes that there would be no adequate state protection for them. The Officer noted that, given the applicants' stated reluctance to engage the state, his assessment of whether they had rebutted the presumption of state protection would be based on the documentary evidence.

[60] The Officer began by describing the situation of the Roma in Hungary, noting: that violent attacks continued, which had generated strong public concern; that human rights NGOs had criticized law enforcement authorities for failing to recognize the racial motivation for many crimes; and, that these same organizations have reported that the Roma are discriminated against in all 'fields of life'. The Officer also noted the reports of violence by right wing extremist groups, adding that investigations and arrests did occur.

[61] Against this backdrop, the Officer considered state protection for the applicants due to their Roma ethnicity. He noted that the ongoing challenges with racism were counterbalanced with information about anti-discrimination measures. The Officer acknowledged that despite

these measures, "the system is not perfect to be sure". He also referred to alternative recourse if the applicants do not want to approach the police, including complaint mechanisms such as the Minorities Ombudsman and the Independent Police Complaints Board. The Officer concluded that, although there were reports of police corruption, the evidence also shows that the state takes action when complaints are made.

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

[63] The Officer found, in conclusion, that having considered the totality of the evidence, the applicants had failed to rebut the presumption of state protection with clear and convincing evidence and that the objective evidence did not establish that state protection would not be available to the applicants. In reaching this conclusion, the Officer did not ignore the objective country condition evidence indicating on-going problems with Hungary's treatment of the Roma. Rather, the Officer recognized that discrimination and racial violence continues. The Officer was not required to refer to every report included in the documentary evidence (*Newfoundland Nurses* at para 16).

[64] The Officer did not depart from the jurisprudence or ignore its guidance about how the adequacy of state protection should be analyzed.

[65] The applicants referred to several cases where, based on the particular circumstances, this Court found the analysis and, consequently, the determination of state protection to be unreasonable. However, the starting point in all cases must be an examination of the basic principles.

[66] The Supreme Court of Canada set out the rationale underlying the international refugee protection regime in *Ward* at para 18. This regime is meant to be relied upon when the protection one expects from the state of which he or she is a national is unavailable. As noted, a state that is a functioning democracy is presumed to be capable of protecting its citizens. The onus is on the applicants to rebut that presumption with clear and convincing evidence that satisfies the trier of fact, on a balance of probabilities, that state protection is inadequate or non-existent (*Carrillo* at para 30).

[67] In *Konya*, supra Justice Judith Snider reiterated that the standard is adequate state protection, at para 34:

> [34] The test for state protection is not a test of effectiveness, but whether it is adequate (*Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668 at para 25, [2011] FCJ No 840; *Kis v Canada (Minister of Citizenship and Immigration)*, 2012 FC 606 at para 16, [2012] FCJ No 603). It is not enough for the Applicant to demonstrate the state is not always effective at protecting persons in the Applicant's situation (*Lakatos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1070 at para 14, [2012] FCJ No 1152).

[68] In *Ruszo*, supra (no relation to the applicant's uncle), the Chief Justice reviewed the governing principles and the recent jurisprudence and addressed the issue of how an applicant could rebut the presumption when they are no longer in their country of origin, noting, at para 30:

> [30] In discharging this burden, refugee claimants who are outside their country of nationality may demonstrate either that they are "unable" to obtain adequate state protection or that, by reason of a well founded fear of persecution, are unwilling to avail themselves of the protection of their home state. As stated in *Ward*, above, at para 49:
>
> > The distinction between these two branches of the "Convention Refugee" definition resides in the party's precluding resort to state protection: in the case of "inability", protection is denied to the claimant, whereas when the claimant is "unwilling", he or she opts not to approach the state by reason of his or her fear on an enumerated basis.
>
> (emphasis in original)

[69] The Chief Justice added at para 33 that an applicant cannot simply express reluctance to seek state protection, noting:

> [33] In this regard, doubting the effectiveness of state protection without reasonably testing it, or simply asserting a subjective reluctance to engage the state, does not rebut the presumption of state protection (*Ramirez*, above; *Kim*, above). In the absence of a compelling or persuasive explanation, a failure to take reasonable steps to exhaust all courses of action reasonably available in the home state, prior to seeking refugee protection abroad, typically will provide a reasonable basis for a conclusion by the RPD that an applicant for protection did not displace the presumption of state protection with clear and convincing evidence (*Camacho*, above).

[70] In this case, the applicants were not in Hungary and had not, therefore, taken any steps to protect themselves from any prospective risk from Mr. Ruszo. The Officer looked to the

objective country condition evidence to determine whether their unwillingness or inability to engage state protection upon their return would be justified. This is the proper approach given that the onus remains on the applicants to rebut the presumption.

[71] I have considered all the jurisprudence noted by the applicants regarding the assessment and determination of adequate state protection, including: *Dawidowicz*, which reiterated that efforts alone were small comfort and that the empirical reality of the adequacy of state protection should be evaluated; *Kumati*, which noted that a law on the books is not sufficient without evidence that the law actually functions to protect; *Majoros*, which noted that state protection should be sufficiently effective at the operational level; *Salamanca*, which suggests that adequate state protection means that it is more likely than not that the applicant will be protected; and, *Djubok*, which notes that the various risk factors, as well as their intersection, must be assessed.

[72] In my view, this guidance elaborates on the indicators of adequate state protection but it does not elevate the standard. Adequacy remains the standard and what will be adequate will vary with the country and the circumstances of the applicants. In this case, the Officer's reasons as a whole indicate that he considered the mixed evidence about state protection in Hungary and its effectiveness. This mixed evidence was the context for his assessment of the adequacy of state protection for the risks faced by these applicants.

[73] With respect to the guidance from the jurisprudence, this Court has consistently applied the same principles, leading to different results in different cases due to different facts and circumstances. Each case must be decided on its own facts. On judicial review, the issue is

whether the decision maker made findings which are reasonable based on the evidence before the decision maker.

[74] The applicants and respondent each pointed to cases suggesting that adequate state protection ranges from serious efforts to operational or "on the ground" effectiveness.

[75] The applicants argue, for example, that the empirical reality of state protection measures should be evaluated. However, the evaluation of the empirical reality of state protection would be a challenge in cases such as this where the applicants assert a prospective risk from one particular individual and a subjective reluctance to seek state protection if that risk materializes. The applicants have obviously not sought state protection against this future potential threat, so the Officer can only look to the objective evidence.

[76] The applicants also note the need to consider the full context – i.e. that Ms. Kovacs is a Roma woman facing a threat of violence from a family member. Although the Officer did not state he was conducting a contextual analysis, in fact, he did so by acknowledging the domestic and gender violence context to the risk and by considering the range of initiatives to counter domestic and gender violence in Hungary. While several of the references to initiatives for domestic and gender violence victims may appear irrelevant given that the applicant was sexually assaulted in Canada, the Officer considered the threat (which was of physical violence to the family upon their return to Hungary), the underlying familial relationship, and the context of sexual or gender violence, before concluding that Mr. Ruszo would not be above the law. The

Officer's reasons are sufficient to demonstrate that he considered the adequacy of state protection from this specific risk in the context of the applicants' Roma ethnicity.

[77] The Officer also canvassed the programs, policies, mechanisms, and institutions in Hungary that address discrimination against the Roma, several of which may ultimately have no application to the applicants, but do demonstrate the range of initiatives underway. The Officer acknowledged that despite these initiatives, the Roma still face discrimination in housing, education, employment. However, discrimination, as offensive as it is, does not necessarily rise to the level of persecution. In the present case, the applicants' earlier allegations of persecution had been found not credible and were, therefore, not assessed by the Officer.

[78] As the applicants pointed out, the police are primarily responsible for state protection against any violence, including sexual and gender-based violence (*Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326, [2012] FCJ 1444 at para 15). In this case, the Officer recognized that the police would be responsible and found that if reported, the police would respond and that Mr. Ruszo would not be above the law.

[79] The Officer referred to many agencies that, in my view, might not be of assistance or benefit to the applicants regarding the new risk from Mr. Ruszo but would be of assistance with respect to the risks arising from their Roma ethnicity. Many of the Officer's references to measures implemented in Hungary to address racism, including the Minorities Ombudsman and the Equal Treatment Authority, would not have any role in the direct protection of the applicants against threats of violence, as this would be the responsibility of the police, which the Officer

noted. However, these measures were referred to in the context of the Officer's consideration of the applicants' risk as Roma.. The Officer acknowledged that discrimination continues despite efforts to combat it.

[80] The applicants note that several references to the country condition evidence relied on by the Officer appear *verbatim* in other refugee protection decisions, for example, references to Hungary being part of the European Union and references to objective evidence suggesting that "although not perfect, there is adequate state protection for Roma who are victims of crime, police abuse, discrimination or persecution….".

[81] I understand that it is troubling to the applicants to find the same passages in their decision as in others which arise from different facts. However, there may be no better way to summarize the available documentary evidence on the issue of state protection in Hungary. The important issue is whether the Officer assessed this information in the context of the risks to the applicants. In the present case, despite some familiar passages, the Officer demonstrated that he considered and applied the country condition evidence to the applicants' circumstances.

Conclusion

[82] In conclusion, the Officer considered the new risks to the applicants, including the risk arising from the threat of violence from Mr. Ruszo and the risk to the applicants as Roma in Hungary. The Officer also considered the context of the risk from Mr. Ruszo, finding that the police would be responsible for the protection of the applicants from threats of violence from a family member. This finding was made based on an assessment of the country condition

documents and taking into account that Ms. Kovacs had asserted that the police do not take threats of sexual and gender violence from the Roma seriously.

[83] Given that the applicants had expressed a reluctance to engage the state to protect them upon their return, the Officer had only the objective country condition evidence to consider in determining whether the applicants had rebutted the presumption of adequate state protection. On this basis, his finding that the applicants had not rebutted the presumption is reasonable.

[84] The Officer also considered the risks to the applicants as Roma returning to Hungary. He acknowledged the inconsistencies in the country condition evidence but found that, overall, the evidence supported a finding that if the applicants faced discrimination upon their return, they would have programs and assistance to turn to. As noted above, a decision need not be perfect to be reasonable. The Officer reasonably did not consider the previous risks found not to be credible. He focussed on the new risk and the overall or ongoing risk as a Roma and considered these risks and their relationship to each other. Although the Officer referred to measures that may not be applicable for these applicants and borrowed similar language from other decisions, he assessed their risks, the adequacy of state protection for them and whether they had rebutted the presumption of state protection based on the available evidence and with a full appreciation of the applicants' circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. The Minister of Public Safety and Emergency Preparedness is removed as a respondent.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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