Federal Court  Cour fédérale

Date: 20211206

Docket: IMM-1652-20

Citation: 2021 FC 1353

Ottawa, Ontario, December 6, 2021

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

GYORGY SANTHA
TIMEA SANTHANE HOMONNAI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a redetermination decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated February 4, 2020, wherein the RPD determined that: (a) pursuant to Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6 [Convention] and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], Gyorgy

Santha [Male Applicant] was excluded from refugee protection; and (b) Timea Santhane Hommai [Female Applicant] was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the IRPA.

[2] The Applicants submit that the RPD's decision is unreasonable and that it erred in: (a) determining that the Male Applicant was excluded from refugee protection; (b) failing to conduct both a proper section 96 and 97 analysis, including a consideration of the country condition evidence and the Applicants' profile; (c) failing to assess the Applicants' claims of persecution on cumulative grounds; and (d) determining that the Female Applicant had recourse to state protection.

[3] For the following reasons, I find that this application for judicial review should be dismissed is its entirety.

II. Background

[4] The Applicants, who are spouses, are citizens of Hungary and are of Roma ethnicity. The Applicants' claims for protection were based on their fear of persecution due to their ethnicity and the widespread mistreatment of Roma people in Hungary by both the government and the non-Roma Hungarian population at large. The Applicants relied on the following specific incidents of alleged discrimination:

A. Between 2000 and 2010, the Applicants were forced to move six times as a result of discrimination and harassment due to their ethnicity.

B. In 2007, the Male Applicant and a friend were refused entry into a nightclub because they were Roma.

C. In January 2009, the Applicants' fence was destroyed. As there were no other Romas living on their street and theirs was the only property that was damaged, the Applicants surmised that the destruction of their fence was more than a random act of vandalism. The Applicants contacted the police to file a report, but assert that the police did not do anything.

D. In November 2009, a black car pulled up next to the Male Applicant and three Hungarian guards came out of the car and confronted the Male Applicant. The guards insulted him (calling him a "dirty gypsy"), threatened him by telling him that they knew where he lived and that they were going to kill him and his family, and physically assaulted him. However, he was able to escape and while he fled the scene, he heard the guards continuing to utter death threats against his family.

E. A few weeks after the event in November 2009, people showed up at the Applicants' home and tried to break in, while screaming profanities and threats. The Male Applicant called the police and the people left. The Male Applicant reported this incident, as well as the November 2009 incident, to the police and the police advised

that they would investigate. One month later, the Male Applicant received a letter from the police advising that they had closed the investigation, with no arrests made and no request made of the Male Applicant to identify any of the people that attacked him.

F. In January 2010, the Applicants' landlord obtained an order evicting them from their apartment because of complaints made by their neighbours that they did not want any people of Roma ethnicity living there.

G. In February 2010, the Male applicant was returning home from the store and was approached by two Hungarian guards who started insulting him and pushing him to the ground. He got up and fled, but could hear them insulting him as he ran away.

H. On April 6, 2010, the Female Applicant was attacked by two men who insulted her and beat her. She sought medical treatment and thereafter filed a report with the police. During the assault, one of the men pushed their daughter off her stroller and onto the ground. While their daughter was not hurt, she was scared, as were their two sons who were also with the Female Applicant at the time of the attack.

I. Between September 2009 and April 2010, the Applicants' son experienced discrimination when he started school for being of Roma ethnicity. The teacher separated him from the rest of the class, placing him away from the other students. During recess, the other students would constantly harass him, resulting in him regularly coming home from school distraught.

[5] The Male Applicant claimed refugee protection in Canada on April 16, 2010. The Female Applicant and their children claimed refugee protection in Canada on April 30, 2010.

[6] Both Applicants indicated in the respective Personal Information Form that they had never been sought, arrested or detained by the police or military or any other authority in any country and had never committed or been charged with or convicted of any crime in any country.

[7] However, it was subsequently determined that, while in Hungary and prior to arriving in Canada, the Male Applicant had been indicted on, and found guilty of, two counts of fraud, five counts of playing the part as instigator to committing fraud, eleven counts of document forgery as an accomplice and one count of document forgery. The Male Applicant was ultimately sentenced to a term of prison of two years and eight months. The Male Applicant did not dispute his convictions or sentence and admitted that he fled Hungary for Canada to avoid serving his prison sentence.

[8] It was also subsequently determined that, while in Hungary and prior to arriving in Canada, the Female Applicant had been indicted on, and found guilty of, two counts of fraud and two counts of document forgery. The Female Applicant was initially sentenced to a term of prison of one year, which was subsequently reduced to two years of probation.

[9] On August 20, 2013, the RPD rendered its first decision in relation to the refugee claims of the Applicants and their children [First Decision]. The RPD held that both Applicants were excluded from claiming for refugee protection pursuant to Article 1F(b) of the Convention.

[10] The Applicants filed an application for leave and for judicial review of the First Decision. On the consent of the parties, on January 23, 2015, this Court granted the application for leave and for judicial review, set aside the First Decision and remitted the matter to the RPD for redetermination by a differently constituted panel.

[11] The Minister of Emergency Preparedness and Public Safety initially indicated an intention to intervene in the redetermination hearing to argue: (a) that, pursuant to Article 1F(b) of the Convention and section 98 of IRPA, the Male Applicant was potentially excluded from Convention refugee protection; and (b) the Applicants' credibility was impugned because they did not disclose their Hungarian criminal convictions at the time that they made their claim for refugee protection. The Minister ultimately changed his position and withdrew his intervention regarding exclusion, but maintained his position with respect to the issue of credibility.

[12] The hearing of the RPD was held over a period of two days and the Minister participated solely by means of documents.

III. Decision at Issue

[13] In the RPD's redetermination decision, the RPD concluded that the Male Applicant was excluded from refugee protection, pursuant to Article 1F(b) of the Convention and section 98 of the IRPA, and that the Female Applicant was not a Convention refugee, nor a person in need of protection.

A. *Male Applicant*

[14] Notwithstanding the Minister's withdrawal of his intervention on the basis that the Male Applicant was excluded from Convention refugee protection for the commission of a serious non-political crime, the RPD found that it remained incumbent upon the panel to determine whether the Male Applicant was inadmissible to Canada, and that the non-participation of the Minister did not preclude an exclusion finding.

[15] The RPD began its consideration of whether there were serious reasons for considering that the Male Applicant had committed a serious non-political crime by looking at the various criminal offences with which the Male Applicant was charged, including those related to the Minister's initial intervention. These included: (a) one count of persistent fraud with incitement as per paragraph 318(1), Section (2), Point c.) and Section (5) Subsection B.); (b) five counts of persistent fraud with incitement as per Paragraph 318, Section (1) Subsection c.), and Section (5), subsection b.); (c) one count of criminal fraud as per Paragraph 318, Section (1) and (2), (5) Subsection b.), as well as Paragraph 16; (d) one count of criminal fraud as per Paragraph 318, Section (1) and (2) Section (4), Subsection b.); (e) eleven counts of document forgery as per Paragraph 276 (Indictment section 1, 2, 3, 4, 6, 7, 8, 9, 10, 14, 16); and (f) one count of document forgery as per paragraph 276 (indictment section 15), all of the Criminal Penal Code [Hungary].

[16] The RPD held that the relevant sections of the Hungarian Criminal Penal Code were equivalent to section 380(1)(a) of Canada's *Criminal Code*, RSC, 1985, c C-46, which addresses the crime of fraud where the value of the subject matter of the offence exceeds $5,000 and sets a

maximum term of imprisonment of 14 years. The RPD found that the Male Applicant was charged with, and convicted of, seven counts of fraud, for which, had he committed the alleged crimes in Canada, he could have received the maximum penalty.

[17] As for whether the Male Applicant committed a serious non-political crime, the RPD found that the fraud charges are patently non-political crimes. As for the seriousness of the offences, the RPD determined that it is the potential penalty that is determinative of the threshold for seriousness, rather than the actual sentence received. The RPD relied on the Supreme Court of Canada's decision in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 for the proposition that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. As section 380 of the *Criminal Code* imposes a maximum sentence of ten years or more for the crime of fraud, the RPD found that the Male Applicant's fraud convictions were *prima facie* convictions for serious crimes.

[18] In considering whether there were "serious reasons for considering" that the Male Applicant had committed the crimes at issue, the RPD considered the cumulative effect of the indictment, the Male Applicant's admissions as to his convictions and his guilty plea and concluded that there are serious reasons for considering that he committed a serious non-political crime.

[19] The RPD then went on to consider whether the presumption that the offences at issue were serious was rebutted as per *Febles* and therefore, the RPD reviewed the various factors set out in

Jayasekara v Canada (Minister of Citizenship and Immigration), 2008 FCA 404 – namely, the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction.

[20] The RPD made the following findings with respect to the above factors:

A. **Elements of the crime -** The relevant legislative provisions in the Hungarian Criminal Penal Code and the Canadian *Criminal Code* were found to be substantially similar. The RPD also noted that the Male Applicant testified that the fraudulent activity involved fraudulent credit applications for loans, consumer goods, and used cars. The persons applying for the loans and the credit were all of Roma ethnicity. In some instances, they passed the receipts, either in whole or in part, back to the Male Applicant. The Male Applicant alleged that the salesmen in the car dealerships were aware of, and participated in, the fraudulent activity by providing paperwork for the fraudulent car loans.

   The RPD also noted that sections 374 and 375 of the Canadian *Criminal Code* address forgery and offences resembling forgery. These sections make them indictable offences that carry a maximum penalty upon conviction of fourteen years.

B. **Mode of prosecution and prescribed penalties** - The Male Applicant was convicted on twelve counts of document forgery and found guilty of a lesser offence in respect of five other counts. At least five of these fraud charges were laid under section 318(5)

of the Hungarian law, which attracts a higher penalty and acknowledges that the frauds were carried out as part of a criminal conspiracy, on the scene of public danger or, what the Hungarian legislation describes as a "business-like" manner. In this regard, the Male Applicant admitted that the frauds were carried out in respect of commercial ventures. The Male Applicant was also charged with twelve counts of uttering forged documents, which proceeded on indictment, indicating, according to the RPD, that these were viewed as serious offences. The RPD also inferred that the sentence of over two years indicated that the charges were treated as felonies and not misdemeanors.

C. **Facts -** The indictment states that the Male Applicant was involved in fraudulent activity that affected banks, grocery stores, electronic stores and car dealerships. The amounts ranged from 58,060 to 1,680,000 Hungarian forints, although the Hungarian counsel for the Male Applicant stated in a letter that the victims of the frauds for which the Male Applicant was found liable suffered total financial damage in the amount of approximately $4,162 CDN. In his testimony, the Male Applicant did not contest the facts of the frauds as set out in the indictment and in fact amplified the circumstances of the charges, stating that the criminal conduct spanned not just three months (as indicated in the indictment) but a period of three to four years. The Male Applicant also admitted that he received "kickbacks" from those whom he assisted in obtaining goods and loans using false documents.

D. **Mitigating and aggravating circumstances underlying the convictions** – The Male Applicant had submitted that the relevant mitigating factors included the Male

Applicant's Roma identity, that the Male Applicant was scapegoated and received a harsher penalty because he is of Roma ethnicity, the fact that the crimes were financial in nature, the fact that the crimes did not involve violence of any kind and the fact that the amounts involved were not overly significant.

The RPD accepted that the Male Applicant's guilty plea was a mitigating factor, as it rendered the expense of a trial unnecessary. However, the RPD found that the other rationales put forward by the Male Applicant did not provide satisfactory mitigating factors. The RPD found that financial crimes are not victimless and a claimant can be excluded for economic reasons, that the Male Applicant was aware that he was engaging in a fraudulent enterprise, that the Male Applicant benefitted from the scheme, that the Male Applicant was not forced to participate in the scheme, that the sole intent of the scheme was to obtain goods and money fraudulently and that he was not remorseful.

The RPD added that, while it accepted that Roma offenders may experience additional difficulties within the Hungarian justice system, there was no independent evidence that the Male Applicant was handed a harsher penalty. In fact, his original sentence was shortened on appeal. Moreover, the Male Applicant could have received a maximum penalty of five years under Hungarian law for at least one of the fourteen offences. Given that he only received a total sentence of two years and eight months, the RPD was not persuaded that the Male Applicant was not dealt with leniently or that the penalty was increased due to his ethnicity.

> As for aggravating factors, the RPD found that the Male Applicant does not take responsibility for his actions, which he admitted actually involved 30 transactions. He deflected his involvement in the frauds (which he characterized as minimal), argued that others should have been charged along with him, argued that he was not the mastermind, argued that he should have been made to only pay a fine, and fled Hungary to avoid serving his sentence. The RPD found that leaving Hungary when he did was a deliberate act on the part of the Male Applicant and in doing so, he placed himself in the position of being a fugitive from justice. The RPD rejected the Male Applicant's argument that his conviction was vitiated/annulled or of no effect as a result of a verdict issued by the Secretary for Penal-Execution of the Court of Law of Miskolc in 2018. The RPD disagreed, finding that the verdict only stated that the Male Applicant would not be sent to prison because the limitation period within which the sentence ought to have commenced had passed. It did not erase the trial, conviction and sentence.

[21] The RPD concluding by citing paragraph 53 of *Febles*, where the Supreme Court of Canada addressed the dual purposes of Article 1F(b) being to prevent fugitives from avoiding punishment for their crimes and to protect the security of states, and approved the statement that Article 1F(b) cannot be read as confining exclusion to those who are fugitives from justice. In keeping with that *dicta*, the RPD found that, as a fugitive from justice, the Male Applicant was excluded from the Convention refugee protection.

[22] Having found that the Male Applicant was excluded from refugee protection, the RPD did not address the inclusion aspect of his claim.

B. *Female Applicant*

[23] The RPD noted that the Female Applicant relied on the allegations of persecution of the Male Applicant and she adopted his testimony at the hearing.

[24] The RPD found that the fraud and forgery charges of which she was convicted did not lead to serious reasons for considering that she had committed a serious non-political crime prior to coming to Canada. As such, the RPD found that she was not caught by Article 1F(b) of the Convention and no question of exclusion arose.

[25] The RPD identified the sole issue before it as whether the Female Applicant could credibly establish that there was a serious possibility that she would face persecution in Hungary.

[26] The Female Applicant alleged that her previous experiences (as noted above) gave rise to a well-founded fear of persecution in Hungary and that the situation for Roma in Hungary had worsened since she left Hungary in 2010.

[27] The RPD found that the Female Applicant's credibility was undermined by her actions in failing to disclose that she had been charged with, and convicted of, crimes in Hungary. The RPD found that she exhibited a willingness to mislead Canadian authorities, which tainted the whole of

her evidence. The RPD accepted that, while the Female Applicant (as a Roma person) likely experienced discrimination and harassment while she was at school, the RPD was not persuaded that any discrimination she experienced rose to the level of persecution.

[28] The RPD made the following findings with respect to the specific allegations of discrimination:

A. **Discrimination while attending school** – Based on the documentary evidence that recounts the generally disadvantaged conditions under which Roma children are educated, the panel accepted the Female Applicant's allegations of discrimination and harassment during her school years. However, the events of discrimination and harassment were now too remote to constitute persecution.

B. **Discrimination in employment** – The Female Applicant was gainfully employed from the time she left school until she arrived in Canada and accordingly, cannot be said to have been prevented from earning a living. For this reason, any discrimination that she may have experienced in respect of employment had not risen to the level of persecution.

C. **Discrimination in housing** – The various allegations of discrimination in housing were speculative and/or not credible and trustworthy and that, on a balance of probabilities, the reason the Applicants had to move repeatedly was not related to their Roma ethnicity. Moreover, if the Applicants were to be believed, their testimony and

evidence indicated that for at least a decade they lived in predominantly non-Roma neighbourhoods, which undermined their testimony that they were discriminated against in their choice of housing. The RPD found that the Applicants exaggerated their circumstances.

D. **Attack against the Male Applicant** – The Male Applicant's testimony regarding the attack in November 2009 and the second incident shortly thereafter was not reliable, as it was not plausible that in a town of 600,000 people and where the Male Applicant did not know his attackers and they did not follow him, that they would have known where he lived and tried to invade his home. The RPD thus rejected this aspect of his testimony. The Male Applicant's failure to disclose his criminal history demonstrated a willingness to mislead Canadian immigration authorities and thus undermined his credibility. However, even without rejecting his allegations that members of the Hungarian Guard attacked him on two occasions, the discrimination he experienced did not rise to the level of persecution as they lacked the element of frequency. As the Female Applicant relied mainly on the Male Applicant's narrative to establish her claim, the same finding applied to her claim vis-à-vis these allegations of discrimination.

E. **Incidents occurring after the Male Applicant left Hungary** - After noting the acts as described previously, the RPD noted that the Female Applicant filed a police report and exhibited a medical report that was taken the day after the alleged attack. The RPD found the medical report to be equivocal, as it was internally inconsistent in describing

her injuries. Therefore, little weight was given to the report. Ultimately, there was insufficient evidence before it to allow a finding that the Hungarian Guards attacked and beat the Female Applicant.

[29] On the issue of state protection, the Female Applicant asserted that state protection would not be forthcoming to her in Hungary and relied on the Male Applicant's testimony in relation to the police's response to the incident involving their fence. The RPD found that this was insufficient to establish a failure of state protection because it was apparent that the police did respond to the incident and opened an investigation. The RPD found that the Female Applicant had not displaced the presumption of state protection.

IV. Issues

[30] The following issues arise on this application:

A. Was the RPD's determination that the Male Applicant was excluded from Canada under Article 1F(b) of the Convention and section 98 of the IRPA unreasonable?

B. Was the RPD's section 96 analysis on the basis of the Applicants' profile as Roma persons unreasonable?

C. Was the RPD's assessment of the Applicants' claims of persecution on cumulative grounds unreasonable?

D. Was the RPD's section 97 analysis of the Applicants' claim unreasonable?

E. Was the RPD's determination that the Female Applicant had not rebutted the presumption of state protection unreasonable?

V. Standard of Review

[31] The parties agree that the standard of review applicable in this case is the reasonableness standard.

[32] A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and determine whether the decision "as a whole" is reasonable [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 68 at para 84-85]. To determine if a decision is reasonable, the Court must decide if the decision is justified, transparent and intelligible. A decision must thus be "based on an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker" [see *Vavilov*, *supra* at paras 85, 99]. Stated differently, a justified, transparent and intelligible decision is a decision that allows the Court to understand the reasons for which the decision was made and to determine whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" [see *Vavilov*, *supra* at para 86].

VI. Analysis

A. *Was the RPD's determination that the Male Applicant was excluded from Canada under Article 1F(b) of the Convention and section 98 of the IRPA unreasonable?*

[33] Subsection 107(1) of the IRPA requires the RPD to accept a claim for refugee protection "if it determines that the claimant is a Convention refugee or person in need of protection". Otherwise, the claim shall be rejected. A Convention refugee is defined at section 96 of the IRPA and a person in need of protection is defined at section 97 of the IRPA.

[34] However, the IRPA explicitly identifies certain classes of persons who are excluded from these definitions. Section 98 of the IRPA states that a person referred to in Article 1E or Article 1F of the Convention is not a Convention refugee or a person in need of protection. With this provision, Parliament incorporated the exclusion clauses of the Convention and, at the refugee status determination stage, specifically extended the exclusion clauses to a "person in need of protection" as defined in section 97 of the IRPA. The relevant exclusion clause in the case at bar is Article 1F(b) of the Convention, which reads as follows:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: … (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;…	1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser : … b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés…

[35] The Federal Court of Appeal has confirmed that, for an Article 1F(b) exclusion to apply, the Minister merely has to show, on a burden less than the civil standard of balance of probabilities, that there are serious reasons to consider that the applicant committed the alleged acts. In *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 at para 56, Nadon JA confirms the following principle:

> [56] The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is "less than the balance of probabilities"-that there are serious reasons for considering that the respondent is guilty.
>
> [Emphasis added.]

[36] As to what constitutes a "serious" crime, the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, instructs at para 62:

> [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded Article 1F(*b*) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a

> maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.
>
> [Emphasis added]

[37] The Federal Court of Appeal's decision of *Jayasekara* v Canada (Minister of Citizenship and Immigration), 2008 FCA 404 at para 44, identifies factors to evaluate whether a crime is "serious" for the purposes of Article 1F(b):

> I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(*b*) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S v. Refugee Status Appeals Authority*, (N.Z. C.A.), *supra*; *S and Others v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); *Miguel-Miguel v. Gonzales*, no. 05-15900, (U.S. Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors.
>
> [Emphasis added]

[38] Therefore, as recently summarized by Justice Strickland in *Okolo v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1100 at para 27, a non-political crime is presumptively serious where a maximum sentence of ten years or more could have been imposed had the act been committed in Canada. However, this presumption is rebuttable. When assessing the seriousness of an offence, the RPD must consider the elements of the offence, the mode of prosecution, the

penalty prescribed, the facts of the offence and the mitigating and aggravating circumstances underlying the conviction.

[39] The Applicants assert that the RPD took an unreasonably narrow approach to the rulings in *Febles* and *Jayasekara* as to what constitutes a serious crime for the purposes of the Convention. The Applicants' alleges that the RPD failed in its duty to properly assess the Male Applicant's claim for refugee protection as a result.

[40] Specifically, the Applicants assert that the RPD erred in law with respect to the finding that the Male Applicant was a fugitive from justice, as the evidence before the RPD demonstrated that the Male Applicant did not have to serve his sentence because it was expiated by the expiration of the limitation period. While the Male Applicant may have been a fugitive from justice at the time he left Hungary, the Applicants assert that he was no longer a fugitive at the time of the RPD's hearing. As such, the Applicants assert that the RPD's reliance on that portion of *Febles* related to fugitives from justice was moot. The Applicants assert that this is a reviewable error and ignores the jurisprudence of this Court in *Rihan v Canada (Minister of Citizenship and Immigration),* 2010 FC 123 at para 26.

[41] I reject the Applicants' assertion. First, the portion of *Rihan* relied upon by the Applicants was a summary of the applicant's position in that case and did not reflect the Court's determination. Moreover and more importantly, the Supreme Court of Canada in *Febles* expressly concluded at paragraph 41 that the Article 1F(b) exclusion is not limited to fugitives and that the seriousness of the crime is not to be balanced against factors extraneous to the crime, such as post-crime

expiation. As such, the fact that the Male Applicant's prison sentence expired by operation of Hungarian law is irrelevant to the RPD's consideration of whether the Male Applicant is excluded.

[42] Further, the Male Applicant admits that he fled Hungary to avoid serving his prison sentence and that he was a fugitive from justice at the time that he made his claim for refugee protection. The Applicants have provided the Court with no authorities that support their assertion that, in considering whether the Male Applicant is a fugitive from justice, the only relevant time period is as of the date of the RPD hearing. I find nothing wrong with the RPD's finding that the Male Applicant was a fugitive from justice when he entered Canada.

[43] Moreover, I find nothing wrong with the RPD's employment of that finding, which was considered as an aggravating factor pursuant to the RPD's *Jayasekara* analysis and referenced in the RPD's consideration of the recognized rationale behind the Article 1F(b) exclusion (which includes preventing fugitives from avoiding punishment for their crimes).

[44] The Applicants further assert that the RPD erred when assessing the crimes committed, the penalties, the aggravating and mitigating circumstances, and the comparable Canadian charges, as they misconstrued the evidence of the Male Applicant and his lawyer. According to the Applicants, the RPD misinterpreted the Supreme Court's decision in *Febles* by determining that the ten-year maximum sentence was sufficient to establish the seriousness of the crime. The Applicants argue that the RPD further erred in its application of the guidelines in *Jayasekara* as:

A. The RPD did not appropriately consider the short sentence imposed, relative to the number of convictions and maximum penalty, among other factors. The Applicants assert that despite the fact that the Male Applicant was charged with fourteen counts of fraud and that Hungarian prosecutors opted to treat these matters as felonies with a maximum sentence of ten years of imprisonment, the final sentence was only two years and eight months, which suggests that Hungarian court understood that the crimes were not serious and that there were many mitigating factors.

B. The RPD did not take into account that the Male Applicant's sentence fell at the low-end of the Canadian sentencing range for that crime.

C. The RPD unreasonably rejected the Male Applicant's evidence as to the mitigating factors, including the fact that he was the only one among his co-accused to have pleaded guilty, that he was not the mastermind of the crimes and that he was only found to have aided and abetted in five of the counts.

D. The RPD erred in ignoring the country conditions evidence establishing the additional difficulties for Roma in Hungary. Given the widespread discrimination, the Applicants assert that there was no reason to conclude that they did not also face such treatment in the criminal justice system. In view of the country condition evidence, the Applicants assert that there was no basis for the RPD to conclude that there was an absence of anti-Roma prejudice in the prosecution and sentencing of the Male Applicant.

E. The RPD lacked evidence to conclude that there was an absence of anti-Roma prejudice. The fact that the Hungarian court did not view the crimes as seriously and found significant mitigation does not mean that there is no anti-Roma prejudice within the judicial proceedings.

[45] I am unable to accept the Applicants' position. I find that the RPD properly considered the applicable legal principles as set out in *Febles* in concluding that the Male Applicants' fraud convictions in Hungary were presumptively serious, as a maximum sentence of ten years or more could have been imposed had the crimes been committed in Canada. The RPD then properly went on to the consider whether this presumption was rebutted by engaging in a detailed examination of each of the *Jayasekara* factors.

[46] While the Applicants may not agree with the outcome of the RPD's examination of the *Jayasekara* factors, this Court has recognized that the RPD has latitude in the assessment of the evidence presented by the Respondent and in ascertaining whether a particular conviction would constitute a serious non-political crime [see *Radi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 16 at para 22]. Moreover, it is clear that the RPD did in fact take into consideration the Male Applicant's short sentence and prescribed penalties, all potential mitigating factors raised by the Applicants and found that the Male Applicant's guilty plea was a mitigating factor. The RPD also considered the evidence before it regarding country conditions, noting the difficulties generally faced by people of Roma ethnicity. The Applicants have pointed to no evidence that was before, and overlooked by, the RPD that the Male Applicant was singled out for a harsher penalty or that he was otherwise dealt with unfairly in the criminal proceeding. In the

absence of such evidence, it was entirely reasonable for the RPD to find that his Roma ethnicity was not a mitigating factor.

[47] While the Applicants assert that the RPD erred in failing to take into account that the Male Applicant's sentence fell at the low-end of the Canadian sentencing range for that crime, I reject this assertion. The RPD noted the sentencing range in Canada for both fraud and forgery and properly considered the ultimate sentence imposed for the numerous convictions at issue (leaving aside the many other offences that the Male Applicant admitted to the RPD of having committed).

[48] At the hearing of the application, the Applicants asserted that the Male Applicant was indicted in Hungary on fraud charges for fraud valued at less than $5,000 (approximately $4,162), which is only subject to a maximum of two years of imprisonment in Canada pursuant to section 380(1)(b) of the *Criminal Code*, suggesting that the RPD's determination that the crimes were presumptively serious was flawed. This argument was not raised by the Applicants in their memorandum of argument nor their reply, nor did the Applicants avail themselves of the opportunity to serve and file a further memorandum of argument raising this issue. As such, this issue is not properly before the Court and will not be considered. That said, the Court notes that:

A. The Male Applicant volunteered to the RPD at the hearing that he in fact participated in a significant number of additional frauds for which he was not charged. It would therefore not have been unreasonable for the RPD to conclude that the value of the acts of fraud exceeded $5,000.00 in the circumstances.

B. Moreover, the Male Applicant's fraud convictions were not the only convictions that were considered by the RPD. The RPD also considered the Male Applicant's numerous forgery convictions and noted that the Canadian equivalent is an indictable offence that carries a maximum prescribed penalty upon conviction of 14 years of imprisonment. Thus even if it could be said that the RPD erred in finding that the fraud charges were presumptively serious based on a flawed Canadian equivalency, there is no similar flaw in relation to the forgery charges. In my view, any such error would not be sufficient to render the RPD's determination unreasonable, particularly given that the forgery charges alone would have engaged the presumption of seriousness.

[49] In conclusion, I find that the RPD's reasons for its determination that the Male Applicant is excluded from refugee protection pursuant to Article 1F(b) of the Convention are justified, intelligible and transparent. Accordingly, the application for judicial review as it relates to the Male Applicant is dismissed.

B. *Was the RPD's section 96 analysis on the basis of the Applicants' profile as Roma persons unreasonable?*

[50] Notwithstanding the RPD's credibility concerns with respect to the Female Applicant, the Applicants assert that the RPD was bound to conduct an analysis under section 96 of the IRPA with respect to the Female Applicant's profile when compared with the country conditions evidence before it as contained in the Immigration and Refugee Board's National Documentation Package [NDP] and as submitted by the Applicants. The Applicants assert that the country condition evidence before the RPD demonstrates that Roma in Hungary face incidents of

discrimination in nearly every aspect of their lives. In ignoring the objective evidence of the mistreatment faced by the Roma in Hungary, the Applicants assert that the RPD failed to properly assess the dangers faced by the Female Applicant should they be returned to Hungary.

[51] I reject the Applicants' submissions. It was well within the RPD's jurisdiction to commence its section 96 analysis by noting the Female Applicant's general lack of credibility as a result of her failure to disclose her criminal convictions [see *Cho v Canada (Minister of Citizenship and Immigration)*, 2019 FC 398 at para 9; *Gulabzada v Canada (Minister of Citizenship and Immigration)*, 2014 FC 547 at para 9].

[52] While the Applicants accurately note that the Federal Court's decision in *Jama v Canada (Minister of Citizenship and Immigratio*n), 2014 FC 668 supports the RPD's duty to address the information in the NDP when conducting its section 96 analysis, I reject the Applicants' assertion that the RPD did not address the country conditions and the anti-Roma discrimination when assessing the Female Applicant's section 96 claim. The RPD analyzed the merits of each specific allegation advanced by the Applicants (as detailed above), which included a consideration of the country condition documents. The conclusion reached by the RPD was open to it based on the evidence before the RPD and the RPD's findings regarding the Applicants' lack of credibility. Accordingly, I see no error in this aspect of the RPD's assessment of the section 96 claim.

C. *Was the RPD's assessment of the Applicants' claims of persecution on cumulative grounds unreasonable?*

[53] In cases where the evidence establishes a series of actions characterized to be discriminatory, but not persecutory, the RPD is required to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation of present fear [see *Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840 at para 5; *Retnem v Canada (Minister of Employment and Immigration)* (1991), 132 NR 53 (FCA)]. This Court has repeatedly held that a failure to provide any real explanation as to why the cumulative acts of discrimination do not amount to persecution is a reviewable error [see *Canada (Minister of Citizenship and Immigration) v Balogh*, 2014 FC 932 at para 32; *Hegedüs v Canada (Citizenship and Immigration)*, 2011 FC 1366 at para 2].

[54] The Applicants assert that the RPD failed to assess the treatment faced by the Female Applicant on cumulative grounds and instead, dispensed with each of the areas of persecution and found that they did not rise to that level. However, the Applicants do not identify what specific findings of discrimination should have been cumulatively considered by the RPD, such that the RPD erred.

[55] A fair reading of the RPD's decision reveals that the RPD found discrimination against the Female Applicant in relation to her education. However, no other findings of discrimination were actually made by the RPD. Rather, in relation to the other events, the RPD either expressly found no discrimination or found that the testimony regarding the events of alleged discrimination lacked credibility and thus the testimony was rejected. In a "belts and braces" approach, the RPD then went on to state that in relation to certain allegations, even if the testimony of the Applicants could be believed, the events of discrimination did not rise to the level of persecution. I find that such

"belts and braces" statements do not amount to findings of discrimination. In this case, there was only one finding of discrimination and thus no need for the RPD to conduct a cumulative assessment. Accordingly, I find that the RPD did not err as asserted by the Applicants.

D. *Was the RPD's section 97 analysis of the Applicants' claims unreasonable?*

[56] The Applicants assert that this Court's jurisprudence establishes that a claim under section 97 of the IRPA must be made with reference to the country conditions evidence relevant to the claimant, notwithstanding any credibility concerns. The Applicants thus argue that the RPD erred in failing to conduct a residual analysis of the Applicants' claim under section 97 based on their profile as Roma persons, notwithstanding the RPD's credibility findings.

[57] With respect to the Male Applicant, as the RPD determined that he was excluded from refugee protection due to his previous offences, the RPD was not required to proceed to conduct a section 97 analysis [see *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 at para 38]. As such, the RPD's failure to conduct a section 97 analysis for the Male Applicant was reasonable.

[58] With respect to the Female Applicant, I agree with her assertion that credibility concerns may not be dispositive of refugee claims under section 97 of the IRPA. Justice Blanchard best summarizes the considerations in analysing a claim under section 97 at paragraph 41 of *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, where he stated:

> A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country's human rights record. While the Board must assess the applicant's claim objectively, the analysis must still be individualized. I am satisfied that this interpretation is not only consistent with the United Nations CAT decisions considered above, but is also supported by the wording of paragraph 97(1)(*a*) of the Act, which refers to persons, "...whose removal ... would subject them personally...". There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founder fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (*a*) and (*b*) of the Act. Arguably, the Board may also be required to apply a different standard of proof, which is an issue that I will leave for another day, since it was not argued on this application. Whether a Board properly considered both claims is a matter to be determined in the circumstances of each individual case bearing in mind the different elements required to establish each claim.
>
> [Emphasis added]

[59] However, this Court and the Federal Court of Appeal have also recognized that a negative credibility finding is sufficient to dispose of a claim under both sections 96 and 97, unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim [see *Canada (Minister of Citizenship and Immigration) v Sellan*, 2008

FCA 381 at para 3; *Lopez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 102 at para 41; *Gutierrez v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 4 at para 59].

[60] I am not satisfied that, in the circumstances of this case, a separate section 97 analysis of the nature urged upon the Court by the Applicants and beyond the RPD's analysis of the question of state protection was required. The Female Applicant bears the onus to demonstrate that there is independent and credible evidence to support her section 97 claim [see *Sellan, supra* at para 3]. In support of the error now alleged, the Female Applicant has pointed the Court to no specific independent, credible evidence that she put before the RPD to support her section 97 claim, yet alone any such evidence that was overlooked or misconstrued by the RPD. It is not sufficient for an applicant to simply cite legal principles and then assert an error by the RPD. An applicant bears the onus of demonstrating to the Court how the application of those principles to the facts of their case reveals an error on the part of the RPD, which the Applicants in this case have simply not done. In the circumstances, I find it was reasonable for the RPD to not engage in the residual section 97 analysis suggested by the Applicants.

E. *Was the RPD's determination that the Female Applicant had not rebutted the presumption of state protection unreasonable?*

[61] Where a claimant seeks to rebut the presumption of adequate state protection, the claimant bears an evidentiary and a legal burden. The claimant must first introduce evidence of inadequate state protection and then must demonstrate that the evidence establishes, on a balance of probabilities, that state protection is inadequate [see *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paras 17-20]. Reliable evidence alone will not

satisfy a claimant's legal burden. The evidence must also have sufficient probative value to satisfy the standard of proof [see *Flores Carillo*, *supra* at paras 28 -30].

[62] The test for state protection is one of adequacy and is concerned with whether "the actual outcome of state protection exists" in the country in question [see *Harinarain v Canada (Minister of Citizenship and Immigration*), 2012 FC 1519 at para 27]. This Court has repeatedly held that "serious efforts" at state protection are not the same as actual, adequate state protection [see *Burai v Canada (Citizenship and Immigration)*, 2013 FC 565 at para 28].

[63] As was noted by Justice Manson in *Tanarki v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1337 at para. 48:

> This Court has repeatedly stated that the situation in Hungary is difficult to gauge and that the adequacy of state protection must be assessed based on the evidence in each specific case (*Ruszo II*, above at para 28). The issue of whether Hungary can and will provide adequate protection for its Roma citizens is controversial and highly problematic. The determination will depend on the evidence and submissions made before the administrative decision maker, and the issues raised on review before this Court (*Tar v Canada (Citizenship and Immigration)*, 2014 FC 767 at paras 75-76).
>
> [Emphasis added]

[64] In this case, the Female Applicant asserts that the RPD erred in finding that the Applicants had not rebutted the presumption of state protection, given the NDP evidence and the jurisprudence of the Federal Court. Moreover, the Applicants assert the RPD erred in determining that the Applicants' single interaction with the police was sufficient to demonstrate that there was state protection. Not only were the Applicants under no obligation to seek out state protection in the

first place, but the Applicants assert that a single investigation opened by police and closed without result cannot be understood as a reflection of the adequacy of state protection available to the Roma in Hungary, particularly in light of the spectrum of discrimination they face in their lives.

[65] However, the problem with the Applicants' position is that the burden rests on the Applicants to demonstrate to the Court the error alleged to have been made by the RPD. The Applicants have provided the Court with no evidence or submissions as to what was put before the RPD to attempt to rebut the presumption of state protection, nor what was allegedly overlooked or not properly considered by the RPD. While the Applicants generally assert that the NDP evidence before the RPD supports their position, their memorandum of argument and reply point to no specific NDP evidence. Moreover, the Applicants cannot rely on findings of inadequate state protection of persons of Roma ethnicity in Hungary from other decisions of this Court, as such determinations were based on the specific evidence that was put before the RPD in those cases [see *Tanarki*].

[66] As to the RPD's reasons on the issue of state protection in this case, in the absence of any clarity as to evidence and submissions made before the RPD and given the Applicants' own evidence about their interactions with the police in Hungary, I find that the RPD's rationale for finding that the Female Applicant had not rebutted the presumption of state protection was reasonable.

VII. Conclusion

[67] The application for judicial review as it relates to both Applicants is dismissed.

JUDGMENT in IMM-1652-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed in its entirety.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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