Federal Court  Cour fédérale

**Date: 20130626**

**Docket: IMM-7850-12**

**Citation: 2013 FC 710**

**Ottawa, Ontario, June 26, 2013**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**G.M.**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

### INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of a Senior Immigration Officer (Officer), dated 30 July 2012 (Decision), which refused the Applicant's application for a Pre-Removal Risk Assessment (PRRA).

**BACKGROUND**

[2] The Applicant is a Hungarian man of Roma ethnicity. In 2001, he entered Canada and made a claim for refugee protection. In 2003, his claim was denied, and the Applicant left Canada in 2004.

[3] After returning to Hungary, the Applicant began working for a prominent Roma rights activist and politician, who eventually became a Member of the European Parliament. They worked closely together and developed an intimate relationship, and are now married. After getting married, the Applicant took his wife's name.

[4] The Applicant's wife garnered a great deal of notoriety due to her work in investigating crimes against Romani and her political activism. The Applicant travelled everywhere with her, and would sometimes work directly on initiatives with which she was involved.

[5] On at least two occasions, the Applicant was threatened at events where neo-Nazi demonstrators were in attendance. The first incident occurred in 2008. A man pointed at the Applicant and told him that he would die at midnight. The second incident occurred later in 2008. On this second occasion, a group with ties to the Jobbik party was in attendance. The mayor of the town was an old classmate of the Applicant's, and the Applicant identified himself to the mayor not realizing he was a Jobbik supporter. This made the Applicant fear for his safety.

[6] On one occasion in 2009, the Applicant was alone at his home in Budapest. A group of neo-Nazis gathered at the home and began throwing glasses at the house. The police refused to help, and the Applicant's wife eventually called a connection she had with a police chief in another city. He

said he likely could not help with what was going on in Budapest, but soon after the Applicant heard a pub owner call the group back inside.

[7] Despite these incidents, the Applicant's wife wanted to remain in Hungary and continue her human rights work. However, by the summer of 2011 she felt that the situation had worsened for Roma in Hungary to such an extent that they ought to leave the country.

[8] The Applicant and his wife fled to Canada in 2011. His wife arrived first with her children, and they made a refugee claim upon arrival. The Applicant arrived three days later, and was given a six-month visitor's visa upon arrival. Ordinarily, the Applicant would have made a refugee claim that would have been joined with his wife's. However, his previous refugee claim made him ineligible to make another one.

[9] In June, 2012, the Applicant was ordered deported. He applied for a PRRA, which relied primarily on his wife's declaration (which is confidential). The Applicant's wife said that she was concerned the Applicant would be targeted because authorities in Hungary would assume she had shared state secrets with him, and that she was prepared to testify orally on this issue but did not want to give a written statement. The Applicant also requested an oral interview for himself.

[10] The Officer considered the Applicant's PRRA application and rejected it on 30 July 2012.

## DECISION UNDER REVIEW

### Oral Hearing

[11] Due to the fact that the Applicant spoke little English and was being held in immigration detention, no sworn statement was provided with his PRRA submissions. The Officer noted that the

purpose of an oral hearing is to assess the issue of credibility when it is a serious issue in the application. The Officer did not question the Applicant's credibility in this case, and so concluded that an oral hearing was not required.

**Country Conditions**

[12] The Officer reviewed country condition documents on the treatment of Roma in Hungary, paying specific attention to the United States Department of State's (US DOS) *Country Reports on Human Rights Practices for 2011*. This report stated that Roma are discriminated against in almost all areas of life, and that extreme right-wing political parties such as the Jobbik continue to incite violence against Roma. The report also discussed the mandate and function of the Independent Police Complaints Board, as well as the ombudsmen for ethnic minority rights.

[13] The Officer reviewed IRB document HUN103822.E, which reviewed incidents of demonstrations in Hungary by right-wing groups against Roma. The report noted that the police evacuated Roma from a village on one occasion, and installed barriers to keep Jobbik supporters away in another instance. This report also noted that the Hungarian Parliament has recently introduced stricter hate speech laws.

[14] Document HUN103232.E reported police brutality and racial profiling against Roma, and said that many victims remained fearful of seeking legal remedies or notifying NGOs. This document also discussed: police initiatives in 2009 to investigate crimes against Roma and to seek new ways of addressing discrimination and anti-Roma crime; the Equal Treatment Authority which is tasked with investigating complaints of discrimination against public authorities; and new laws that were passed to allow more minority self-governments.

[15] The Applicant also provided statements from two experts on Roma rights, Mr. Aladar Horvath and Ms. Gwendolyn Albert. Mr. Horvath discussed discrimination he had faced due to his work for Roma rights, but the Officer found that Mr. Horvath provided little documentary evidence to support his claims. Mr. Horvath also stated that the network that had once provided free legal assistance to Roma in Hungary has been eliminated, but again the Officer found there was little evidence to support this claim. Ms. Albert provided statements about the treatment that Roma have experienced in Hungary; the Officer accepted that Roma in Hungary continue to be discriminated against and are at times mistreated by the authorities.

[16] The Officer found that violence and racism against Roma in Hungary continues, but the state has put into place measures to combat these issues. The police have developed policies to better co-operate with the Roma community, and respond to problems. Hungary is a democratic state, with various agencies that the Applicant could turn to for assistance. Mr. Horvath stated that these institutions are ineffective, but the Officer thought there was little evidence that this experience is systemic for all Roma.

[17] The Officer noted that the Applicant had an obligation to seek protection from the state, and he had provided little evidence that the threats he experienced in 2008 and 2009 continued. Further, neither the Applicant nor his wife provided information about what transpired between 2009 and 2011 that made them decide to leave Hungary. They provided little evidence on what state protection was sought and refused after the Applicant's wife's term with the European Parliament ended in 2009.

[18] The Applicant's wife said that she was concerned the Applicant will be persecuted if returned to Hungary because authorities may believe he has been privy to state secrets that she

knows. She was not prepared to put these details in writing. The Officer noted that the Applicant has provided little evidence or information that he or his family have been targeted due to his wife's public profile. The onus was on the Applicant to provide all relevant information and, as discussed above, an oral hearing was not required because the Applicant's credibility was not being questioned.

[19] The Officer noted that the judiciary in Hungary remains free and independent, and should the Applicant be persecuted due to the presumption that he knows "state secrets" he will be able to turn to the judiciary and authorities for assistance. The Applicant provided little evidence that he would not be able to obtain help from the authorities should he require it upon his return to Hungary.

[20] Based on the above, the Officer concluded that the Applicant was not described by sections 96 or 97 of the Act, and rejected his application for protection.

**ISSUES**

[21] The issues raised by the Applicant are:

1. Did the Officer's failure to conduct an oral hearing breach the Applicant's right to procedural fairness?

2. Did the Officer fail to apply, or misapply, the test for persecution under section 96 of the Act?

3. Did the Officer err in assessing state protection by coming to an unreasonable conclusion on the evidence and/or by applying the wrong test?

**STANDARD OF REVIEW**

[22] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[23] In regards to a PRRA Officer's decision to hold an oral hearing, views have differed in the Federal Court as to whether the core of the issue is procedural fairness (see *Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253; *Sen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1435) or an evaluation of facts requiring deference (see *Puerta v Canada (Citizenship and Immigration)*, 2010 FC 464; *Marte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 930). Justice Judith Snider dealt with this issue in *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647, where she said at paragraph 9:

> In my view, the applicable standard of review is reasonableness. The Officer's task is to analyze the appropriateness of holding a hearing in light of the particular context of a file and to apply the facts at issue to the factors set out in s.167 of the Regulations. Thus, the question is one of mixed fact and law. As the Supreme Court held at paragraph 53 of *Dunsmuir v New Brunswick*, 2008 SCC 9, questions of mixed fact and law attract deference and are reviewable on the reasonableness standard.

This approach was followed in *Rajagopal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1277, *Adetunji v Canada (Minister of Citizenship and Immigration)*, 2012 FC 708, and *Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305.

[24] Although an officer's decision to conduct an oral hearing is usually evaluated on a reasonableness standard, the Applicant has raised issues in this application that fall outside the usual determination of whether the PRRA application involves issues of credibility. The Applicant's right to present his case in full is a matter of procedural fairness, and will be evaluated on a correctness standard (see *Xu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 718, *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817 [*Baker*] at paragraph 22).

[25] In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that it "is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty."

[26] The interpretation of the correct legal test for "persecution" is a question of law to which the correctness standard is applied (*Leshiba v Canada (Minister of Citizenship and Immigration)*, 2011 FC 442). However, a persecution analysis goes to the interpretation of evidence, and is reviewable on a reasonableness standard (*Alhayek v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1126 at paragraph 49).

[27] In *Pacasum v Canada (Minister of Citizenship and Immigration)*, 2008 FC 822 at paragraph 18, Justice Yves de Montigny held that state protection is a question of mixed fact and law to be evaluated on the standard of reasonableness (see also *Estrada v Canada (Minister of Citizenship and Immigration)*, 2012 FC 279; *Canada (Minister of Citizenship and Immigration) v Abboud*, 2012

FC 72). Further, the Federal Court of Appeal held in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 that the standard of review on a state protection finding is reasonableness. However, when examining whether the correct test for state protection was applied the appropriate standard of review is correctness (*Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at paragraph 30; *Koky v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1407 at paragraph 19).

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

**STATUTORY PROVISIONS**

[29] The following provisions of the Act are applicable in this proceeding:

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|---|---|
| **Convention refugee** | **Définition de « réfugié »** |
| **96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, | **96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions |

politiques :

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

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

[…]

[…]

**Person in Need of Protection**

**Personne à protéger**

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

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

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

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

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

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

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

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

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

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

(iii) the risk is not inherent or

(iii) la menace ou le risque ne

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| incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, |
| (iv) the risk is not caused by the inability of that country to provide adequate health or medical care | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |
| […] | […] |
| **112.** (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1). | **112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1). |
| […] | […] |
| **113.** Consideration of an application for protection shall be as follows: | **113.** Il est disposé de la demande comme il suit: |
| (*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection; | *a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet; |
| (*b*) a hearing may be held if the Minister, on the basis of | *b*) une audience peut être tenue si le ministre l'estime requis |

| | |
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| prescribed factors, is of the opinion that a hearing is required; | compte tenu des facteurs réglementaires; |
| (*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98; | *c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98; |
| […] | […] |

[30] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) are applicable in this proceeding:

| **Hearing – prescribed factors** | **Facteurs pour la tenue d'une audience** |
|---|---|
| **167.** For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following: | **167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise : |
| (*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; | *a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; |
| (*b*) whether the evidence is central to the decision with respect to the application for protection; and | *b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; |
| (*c*) whether the evidence, if accepted, would justify allowing the application for protection. | *c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection. |

**ARGUMENTS**

**The Applicant**

**The Certified Tribunal Record**

[31] The Applicant says that the Certified Tribunal Record (CTR) contains a detention review decision and about 85 pages of Field Operation Support System (FOSS). It is unclear whether these materials were considered by the Officer. The Applicant requests that pages 362-455 be excised from the CTR. In the alternative, the Applicant requests that these pages be sealed, as they contain personal information about him and his wife.

**Oral Hearing**

[32] The Applicant says that the Officer's failure to conduct an oral hearing breached his rights to procedural fairness which he is owed under section 7 of the *Canadian Charter of Rights and Freedoms* (*Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 [*Singh*] at paragraph 47). The Applicant is being detained at the Toronto East Detention Centre, and was not able to arrange a Hungarian interpreter within the PRRA application deadline. This meant that the Applicant relied on his wife's declaration in his application and requested an oral interview.

[33] The Applicant submits that, in the unique circumstances of this case, the Officer should have interviewed both him and his wife. The sensitive nature of the Applicant's wife's information, combined with his detention and language restrictions, meant that the Applicant was not able to submit an affidavit in support of his application or to properly present his case. The Applicant's wife has not even provided the details of her information in the Personal Information Form for her refugee claim, and it was unreasonable for the Officer to have expected her to do so.

[34] As the Supreme Court of Canada said in *Singh*, sometimes decisions based on written submissions will be enough to satisfy fundamental fairness, but written submissions will not always be satisfactory. Although *Singh* was concerned with adverse credibility findings in the absence of an oral hearing, it is clear that the unique circumstances of this case left the Applicant without an opportunity to meaningfully present his case. The Officer found that there was insufficient evidence to support the Applicant's experiences and threats in Hungary, and this is directly related to the Applicant's, and his wife's, limited ability to put forward their evidence.

[35] Section 167 of the Regulations focuses on issues of credibility, but the Officer's decision whether to hold an oral hearing is discretionary (*Ventura v Canada (Minister of Citizenship and Immigration)*, 2010 FC 871). The Officer's decision not to hold an oral hearing in this case was based on the fact that no adverse credibility findings were made; the Applicant submits that the Officer therefore erred by interpreting the Regulations as limiting her discretion to hold an oral hearing.

[36] In the alternative, the Applicant submits that if the Regulations do fetter the Officer's discretion to hold an oral hearing in circumstances such as the Applicant's, then those provisions improperly fettered the Officer's discretion to hold an oral hearing when one was required by the principles of fundamental justice. If fundamental justice requires an oral hearing to be held, then those sections which restrict it are inconsistent with section 7 of the Charter.

[37] In the case at bar, the Applicant did not have an opportunity to address the Officer's concerns about the lack of evidence. By failing to conduct an oral interview, in light of the Applicant and his wife's requests, as well as the Officer's apparent need for more information, the Officer breached the Applicant's right to procedural fairness.

**Persecution**

[38] The Applicant's PRRA application asserts that he faces persecution in Hungary on the grounds of his ethnicity, his political opinion, and his membership in a particular social group (his family). The Officer accepted that the attacks on the Applicant and his wife occurred in 2008 and 2009, but found there was insufficient evidence that the Applicant was threatened in 2010 and 2011. The Applicant submits that in so concluding the Officer erred by conflating the tests for sections 96 and 97 of the Act, focusing on whether the Applicant had been "personally" targeted, rather than whether his persecution is based on his ethnicity, his political opinion and his membership in a particular social group.

[39] Under a section 96 analysis, the perceived "gap" in threats during 2010 and 2011 is hardly dispositive of the case. The Officer is required to consider persecution against members of the group to which the Applicant belongs in determining whether there is more than a mere possibility, or a reasonable possibility, that he will face persecution. Section 96 does not require that the risk to the Applicant be personalized (*Voskova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1376 at paragraphs 30-34).

[40] There was much documentary evidence before the Officer that describes a context of escalating right-wing extremism, severe and systemic discrimination, racially motivated violence and police brutality against Roma in Hungary. Specific evidence of similarly situated persons was before the Officer, including attacks on higher profile Roma activists.

[41] In light of the test under section 96 and the evidence of similarly situated persons in the Applicant's supporting documentation, the Applicant submits that the Officer erred by focusing

only on whether the Applicant was targeted in 2010 and 2011. The Officer either failed to apply, or misapplied, the test for persecution under section 96.

[42] The Applicant further submits that the Officer did not properly consider whether discrimination of Roma in Hungary rises to the level of persecution, as is demonstrated overwhelmingly in the documentary evidence the Applicant submitted in support of his application. The Officer also concluded with reference to one of the expert reports that discrimination is not systemic, which is clearly contradicted by much of the documentary evidence. As such, the Applicant submits that the Officer's analysis in this regard is unreasonable.

**State Protection**

[43] The Applicant submits it was unreasonable for the Officer to find that the Applicant ought to have sought protection from human rights agencies and the judiciary in Hungary. Considering the documentary evidence, the Applicant further submits that it was unreasonable for the Officer to conclude that the Applicant can expect the police in Hungary to protect him.

[44] Federal Court jurisprudence states that only the police can be expected to offer protection (*Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at paragraphs 24-25). Thus, it was unreasonable for the Officer to expect the Applicant to approach human right agencies for protection.

[45] Furthermore, given that the Applicant may be targeted for a perceived knowledge of state secrets implicating the authorities in human rights abuses, the Officer's conclusion that he can expect protection from these same authorities is unreasonable. Firstly, the Applicant fears the same

people the Officer expects him to approach for protection. Secondly, documentary evidence such as a report from Human Rights Watch says that recent changes in the judicial system have significantly threatened judicial independence in Hungary.

[46] The documentary evidence shows that there is inadequate state protection for Roma in Hungary, and that the police continue to commit violence towards Roma. Discriminatory attitudes and racial profiling create significant obstacles for Roma seeking access to the justice system. The Applicant submits that the availability of state protection must be viewed within the context of the increasingly intolerant and racist attitudes towards Roma people in Hungary. As Ms. Alberts states in her affidavit, the targeting of Roma by political groups is becoming an increasingly serious problem.

[47] The isolated examples of police efforts cited by the Officer do not demonstrate that adequate protection exists for Roma in Hungary. To the contrary, examples of systematic problems for Roma indicate that adequate state protection likely does not exist. The Applicant states that the Officer failed to explain why he or she preferred the isolated examples cited to the other evidence.

[48] The Applicant further submits that the Officer erred by applying a "serious efforts" test to the state protection analysis. State protection is not determined by a state's willingness to provide protection; the state protection offered must be effective and reasonably forthcoming (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paragraphs 48-49; *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119 at paragraph 33). As the Court said at paragraph 17 in *Streanga v Canada (Minister of Citizenship and Immigration)*, 2007 FC 792:

> In *Garcia v. Canada (MCI)*, [2007] F.C.J. No. 118, 2007 FC 79, the Federal Court held that a state's "serious efforts" to protect women from the harm of domestic violence are not met by simply undertaking good faith initiatives. The Court stated at paragraph 14:
>
> > It cannot be said that a state is making "serious efforts" to protect women, merely by making due diligence preparations to do so, such as conducting commissions of inquiry into the reality of violence against women, the creation of ombudspersons to take women's complaints of police failure, or gender equality education seminars for police officers. Such efforts are not evidence of effective state protection which must be understood as the current ability of a state to protect women...

[49] The Officer makes several references to measures put into place by the Hungarian Government, and concludes that "the State has recognized the discrimination faced by Roma to be an issue and has made serious efforts to protect the Roma." The Applicant submits that the Officer's reliance on the state's efforts rather than on whether adequate protection exists at the operational level is an error of law.

**The Respondent**

**Certified Tribunal Record**

[50] The Respondent is opposed to the pages requested by the Applicant being excised from the CTR. The Respondent is amenable to the pages that relate to the Applicant's wife being sealed, in a manner consistent with the original confidentiality order, but states that very few of those pages relate to the Applicant's wife. The Respondent submits that only pages 362-365, 367, 400 and 408 need to be sealed.

**Oral Hearing**

[51] The decision to conduct an oral hearing lies solely in the discretion of the Officer; it is "a matter of discretion, not a matter of right" (*L.Y.B. v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1167 at paragraph 19). Oral hearings are intended to be held only in exceptional circumstances (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 89 at paragraph 38).

[52] The Applicant bears the onus to provide the Officer with the best evidence to support his PRRA application. In *Pareja v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1333, the Court said at paragraph 26:

> The applicant would have not gained anything from a hearing since he had ample opportunity to make his arguments and to submit all of the documentary evidence and written submissions deemed necessary to support his claims. The PRRA officer did not determine in her decision that the applicant lacked credibility, but rather that he had not satisfied his burden of proof establishing a personalized risk. This finding is perfectly justified and possible in terms of the evidence offered in this matter and the law. In short, it is once again a reasonable finding that does not justify the intervention of this Court.

[53] The Officer had no obligation to confront the Applicant with insufficiencies in his evidence. As the Court said in paragraph 22 of *I.I. v Canada (Minister of Citizenship and Immigration)*, 2009 FC 892 [*I.I.*], the "PRRA officer's role is to evaluate and weigh the evidence before him and make a reasonable finding not to set out, for the Applicant, what evidentiary elements he should provide in order to meet his burden."

[54] The Officer noted that the Applicant was detained and spoke little English, and so wished to rely on the facts asserted in the affidavit of his wife. The Officer acceded to this request. The Officer

noted that the purpose of an oral hearing is to address credibility concerns, and so declined to allow the Applicant's wife to testify at an oral hearing. Even where credibility concerns arise, this only creates a presumption of an oral hearing, as the matter remains wholly within the Officer's discretion (*Yakut v Canada (Minister of Citizenship and Immigration)*, 2010 FC 628). There is no reasonable expectation that an oral hearing would be granted simply because the Applicant requested one.

[55] An oral hearing is not intended to provide an opportunity for the Applicant to improve his evidence (*Iboude v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1316 at paragraph 14). This is essentially what the Applicant requested in this case; the Applicant argues that an oral hearing should have been convoked to allow his wife to provide additional testimony. The onus was on the Applicant to provide the best evidence available in the first instance, and the Officer made no error by noting the shortcomings of the evidence presented. The Respondent submits it was reasonable for the Officer to decline to conduct an interview.

[56] Where the Officer concludes that the evidence tendered does not have sufficient probative value, the officer is not making a determination about the credibility of the person providing the evidence, and therefore no interview is required (*Mosavat*, above). The Applicant has not established that an oral hearing was necessary, advisable or reasonably required in the circumstances of this case.

**Persecution**

[57] The Respondent further submits that the Officer's finding that the Applicant does not face a risk of persecution was reasonable. At the first two incidents in 2008 and 2009 the police attended

and prevented any violence, and there were no follow-up threats or persecutory acts that stemmed from these incidents. During the third incident, which involved things being thrown at the Applicant's home, nothing further happened after a bar owner called the attackers away. The Applicant and his wife lived in Hungary for two more years after this, during which time there were no more incidents and they never sought protection from the police. The Applicant did not provide evidence of any recent threats, and the threats he received in the past never materialized into persecution.

[58] The Applicant argues that the Officer "conflated" the tests for risk under section 96 and 97 by requiring the Applicant to show a personalized risk of persecution; however the Officer was entitled to assess the Applicant's personal situation to determine the risk of persecution he would face upon returning to Hungary. For the preceding two years prior to the Applicant's departure from Hungary neither he nor his wife was threatened. This is certainly relevant to the likelihood of whether the Applicant would face persecution upon his return.

[59] Furthermore, the Officer specifically considered the risk the Applicant faces as a Roma. The fact that the documentary evidence shows that Roma have been attacked in 2010 and 2011 does not necessarily mean that the Applicant faces a risk of attack. The Applicant argues that the Officer was required to look at individuals similarly-situated to the Applicant, but the Officer specifically considered the treatment of Roma and the availability of assistance in Hungary. In any event, any risk based on these factors was mitigated by the Officer's finding that state protection was available.

**State Protection**

[60] The Respondent states that the Applicant is essentially asking the Court to reweigh the evidence on state protection, and the Officer's finding in this regard is deserving of deference (*Diallo v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1063 at paragraph 17; *James v Canada (Minister of Citizenship and Immigration)*, 2010 FC 318 at paragraphs 16-17). A number of recent cases from the Court support the Officer's finding that state protection for Roma is available in Hungary (*Matte v Canada (Minister of Citizenship and Immigration)*, 2012 FC 761; *Horvath v Canada (Minister of Citizenship and Immigration)*, 2012 FC 253; *Balogh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 216; *Banya v Canada (Minister of Citizenship and Immigration)*, 2011 FC 313).

[61] The Applicant alleges that he will not be able to access state protection because he will be perceived as having access to "state secrets." However, there is no indication that these state secrets involve information that was recently obtained. The Applicant resided in Hungary until 2011, and was never targeted based on an alleged knowledge of state secrets. The Applicant opted not to put forth details of these alleged state secrets in his application, and without an evidentiary basis for this allegation the Applicant has not established that he would be a target of the authorities or that they would be unwilling to help him. The Applicant's assertions are vague, and do not undermine the reasonableness of the Officer's finding that state protection is available.

[62] The Applicant says that only the police can be expected to offer state protection, but other cases of this Court state that claimants are expected to access other sources of assistance (*Granados v Canada (Minister of Citizenship and Immigration)*, 2009 FC 210; *Romero v Canada (Minister of*

*Citizenship and Immigration)*, 2008 FC 977; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 134; *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 971).

[63] The Applicant also argues that the Officer wrongly applied the "serious efforts" test in assessing state protection. The Federal Court of Appeal said at paragraph 7 of *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 [*Villafranca*] that the test for state protection is whether the state has made "serious efforts to protect its citizens." The Applicant argues that the Court should import a standard of "effectiveness" into the state protection analysis, but the Respondent maintains that *Villafranca* remains good law.

[64] The Federal Court of Appeal restated the test in *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 30:

> …The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[65] This jurisprudence was applied by the Federal Court in *Flores v Canada (Minister of Citizenship and Immigration)*, 2008 FC 723 at paragraphs 8-11:

> The applicants argued in their written submissions that the legal test for a finding of state protection was whether that protection was effective, citing *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 320, [2008] 1 F.C.R. 3. In the interim between the filing of the representations and the hearing, that decision had been overturned by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Carrillo*, 2008 FCA 94, [2008] F.C.J. No. 399 which confirmed that the test is adequacy rather than effectiveness *per se*.

> The applicants contend, nonetheless, that it remains an error for an RPD panel to fail to consider whether the measures it deems adequate are at least minimally effective.
>
> While this is an attractive argument, it does not convey the current state of the law in Canada in my view. As noted by the Federal Court of Appeal in *Carillo*, the decision of the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 stressed that refugee protection is a surrogate for the protection of a claimant's own state. When that state is a democratic society, such as Mexico, albeit one facing significant challenges with corruption and other criminality, the quality of the evidence necessary to rebut the presumption will be higher. It is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation: *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).
>
> The serious efforts to provide protection noted by the panel member support the presumption set out in *Ward*. Requiring effectiveness of other countries' authorities would be to ask of them what our own country is not always able to provide.

[66] Other recent case law has also confirmed that the test is that of adequacy, not effectiveness (*Samuel v Canada (Minister of Citizenship and Immigration)*, 2008 FC 762 at paragraph 13; *Mendez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 584 at paragraph 23). As confirmed in *Molnar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 126 at paragraphs 26-28:

> The respondent argues that the jurisprudence also demonstrates that states are presumed to be able to protect their nationals, bar clear and convincing evidence, and particularly so when they are democratic. A claimant has to prove that he has exhausted all open courses of action (*Flores Carrillo v Canada (MCI)*, 2008 FCA 94 at para 38; *Park v Canada (MCI)*, 2010 FC 1269 at para 51; *Canada (MEI) v Villafranca*, [1992] FCJ No 1189 (QL) at para 7). As well, the Refugee Division may draw conclusions about the availability of state protection from organizations other than the police (*Hinzman v Canada (MCI)*, 2007 FCA 171 at para 57). The test for state protection is not effectiveness but adequacy and the Panel reasonably found that this had not been rebutted (*Samuel v Canada (MCI)*, 2008

> FC 762 at para 13; *Cosgun v Canada (MCI)*, 2010 FC 400 at paras 42-43).
>
> In my view, the Board Member both applied the correct test and made a reasonable finding. He addressed the problems of discrimination in Hungary and discussed whether the state was nonetheless willing and able to protect its citizens. He addressed and weighed the Amnesty International evidence to the contrary as well as other contrary evidence. He noted, however, that although the applicants had initially approached the police, they did not attempt to follow up with the police after filing their complaint about the horse theft. He concluded that they had not rebutted the presumption that the police would have furnished adequate protection if this had been sought.
>
> Overall, the Member's factual findings were transparent, intelligible and justified, and they fell within the range of acceptable outcomes. He applied the correct legal test for state protection. I find that he committed no reviewable errors.

[67] The Officer did not apply the wrong test for state protection. He conducted a thorough analysis of the documentary evidence before ultimately arriving at a reasonable conclusion. Furthermore, the Officer assessed both the serious efforts made by the state and the effects of those efforts.

**The Applicant's Reply**

[68] In the Applicant's Reply he challenges the constitutionality of subsection 113(b) of the Act and section 167 of the Regulations. The Respondent has simply stated that the Applicant has the obligation to prove his case in writing, but this does not provide an answer to the constraints on the Applicant's ability to present his evidence, and his ability to fully state his case. The Applicant points out that the Respondent has failed entirely to address the constitutionality of these sections.

[69] The Applicant further submits that an appropriate remedy to deal with the unconstitutionality of this provision would be to read in language that permits PRRA officers to convoke a hearing where one is required by the principles of fundamental justice. The PRRA application process is largely a paper process, but it complies with principles of fundamental justice because questions about an applicant's testimony can be resolved by conducting an oral interview. In the case at bar, the Applicant could not address the Officer's concerns.

[70] As to the Officer's assessment of persecution under section 96, the Applicant points out that while evidence of past persecution is a relevant consideration, it is not the determinative factor (*Voskova*, above, at paragraphs 30-34). The Applicant reiterates that the Officer was overly focused on the Applicant's personal risk, and this demonstrates a misunderstanding of the definition of a Convention refugee.

[71] The Respondent relies on the Court's findings in other Hungarian Roma cases, but there are many other cases which have deemed findings of state protection in Hungary unreasonable (see *Sebok v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1107; *Goman v Canada (Minister of Citizenship and Immigration)*, 2012 FC 643; *Rezmuves v Canada (Minister of Citizenship and Immigration)*, 2012 FC 334).

[72] Furthermore, the Officer did not even consider whether the discrimination suffered by the Applicant amounts to persecution, and this is an error (*Pinter v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1119 at paragraph 11). Nor did the Officer consider the recent erosion of democratic institutions in Hungary, which impacts the state protection analysis (*Capitaine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 98 at paragraph 22).

[73] Lastly, contrary to the Respondent's submissions, the test for state protection is not "serious efforts to provide adequate protection," it is the existence of adequate protection at the operational level. As the Court said in *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at paragraph 5:

> …It is not enough to say that steps are being taken that some day may result in adequate state protection. It is what state protection is *actually provided* at the *present time* that is relevant. In the present case, the evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens….

See also *E.Y.M.V. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364.

[74] The Applicant submits that he is not asking the Court to reweigh the evidence; the Officer's analysis was internally inconsistent and unreasonable.

**The Respondent's Further Arguments**

[75] The Applicant argues that the Act and Regulations are unconstitutional if they prevent an officer from conducting a hearing in the interests of fundamental justice. The Respondent points out that the Officer never indicated that her discretion to convoke a hearing was constrained by the legislation. The Officer said that an oral hearing was not required, not that an oral hearing was not permitted. She simply exercised her discretion not to hold a hearing because she felt that one was unnecessary on the facts.

[76] The Applicant cites no case law disputing the constitutionality of the PRRA legislation, and simply states *Singh* for the proposition that fundamental justice requires procedural fairness at a hearing. The Respondent does not dispute this, and points out that the PRRA legislation recognizes

that in some instances an oral hearing will be necessary for a fair hearing, and in other instances it will not be.

[77] In addition, this argument has already been considered in *Abdollahzadeh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1310 at paragraphs 36-41:

> As for the second point of the question, the applicant submits that paragraph 113(b) of the IRPA and section 167 of the IRPR limiting the right to be heard viva voce under certain very limited circumstances, breaches the right to be heard viva voce by the PRRA officer when the life, liberty and security of the person are in play, thereby breaching the rights protected under section 7 of the Charter.
>
> Paragraph 113(b) of the IRPA states clearly and precisely that the PRRA officer has no obligation to call a hearing, subject to what is provided in the regulations. This, at section 167 of the IRPR, opens the door to holding a hearing when the evidence relating to sections 96 and 97 of the IRPA raise an important question regarding the applicant's credibility. This evidence must be significant for the PRRA decision to the point that if this evidence is admitted it will have a determinative impact on the decision.
>
> With that said, it is important to note that the right to a hearing is not an absolute right. Parliament decides whether a procedure will include a hearing. It did so when the IRPA was enacted.
>
> It is also important to note that the PRRA procedure enables an interested party to make all the appropriate submissions in writing. This matter is proof of that. The PRRA officer reviews the application while taking into consideration the information as presented.
>
> Indeed, the Supreme Court in *Suresh v. Canada (MCI)*, [2002] 1 S.C.R. 3, stated that a hearing was not automatic when the case of a person facing removal to a country where the person was at risk of being tortured was under review and that the provisions of the IRPA satisfied the principles of natural justice guaranteed by section 7 of the Charter. Our Court, applying this approach to PRRA procedure, decided that section 113 of the IRPA and section 167 of the IRPR, while not conferring a hearing in every case, are consistent with the principles of fundamental justice and that they do not breach the fundamental rights provided under section 7 of the Charter (see *Sylla*

> *v*. *Canada (MCI)*, 2004 FC 475, at paragraph 6 and *Iboude v*. *Canada (MCI)*, 2005 FC 1316, at paragraphs 12 and 13).
>
> I make the same finding. For these reasons, section 113 of the IRPA and section 167 of the IRPR are consistent with the principles of natural justice protected by section 7 of the Charter.

[78] The Respondent submits that the Applicant has no meritious argument that undermines these findings.

[79] The Applicant also argues that the recent erosion of democratic institutions in Hungary presents a new context in which state protection ought to be assessed. However, these concerns were specifically addressed by the Officer in detail. Ultimately, the Officer concluded that the judiciary remains independent. A similar argument was rejected in *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1504.

[80] The level of democracy in Hungary was not shown to be so undemocratic as to justify lowering the threshold for rebutting the presumption of state protection, and the Office dealt with this issue in a reasonable way.

**ANALYSIS**

**Procedural Unfairness**

[81] Applicant's counsel requested an oral interview for the Applicant because circumstances prevented him from submitting a personal affidavit, as well as for the Applicant's wife so that she could "provide details that she was not prepared to put in writing in her declaration, but which are central to the risks faced by the applicant." (CTR, pages 38 – 39). Counsel also said that "at this

time, we rely upon the facts set out in the declaration of [V.M.], [G.M]'s wife, as well as the documentary evidence contained in Counsel's Country Conditions Package on Hungary."

[82] The Officer decided he was not required to convoke an oral hearing as requested because he was "not questioning the applicant's credibility."

[83] The Applicant says that this has led to procedural unfairness in this case, but there is little to support such an allegation. To begin with, the request for an interview simply alleges that the Applicant cannot provide a sworn statement in time. There is no evidence to this effect, and there is no indication as to why, if the Applicant had a problem complying with time restrictions, he could not have requested an extension of time in order to submit a full personal affidavit that contained all of the evidence he wished to place before the Officer. As regards the Applicant's wife, the Officer is merely told that "she was not prepared to put in writing" what she was prepared to say at an oral hearing.

[84] The Applicant is alleging that procedural unfairness occurred in this case because the Officer did not convoke an oral hearing for reasons that had nothing to do with credibility. However, the jurisprudence is clear that the onus is upon an applicant to place his or her case before the PRRA officer in full in writing. See *I.I.*, above. There is nothing before me to show that the Applicant could not have done this by simply requesting an extension of time. It was the Applicant's choice not to make written submissions and to request an oral hearing for which he provided very little by way of justification, other than counsel's brief request on point. If the recognized procedure — including extensions of time — does not allow an applicant to make his or her case, then something more is needed by way of evidence and explanation than was given in this case.

[85] For similar reasons, I do not think the Applicant can raise constitutional issues on the facts of this case. There was insufficient evidence before the Officer — and there is insufficient evidence before the Court — that the Applicant could not have provided all of his evidence in writing before the Officer by requesting an extension of time or asking the Officer not to release information of concern to the Applicant's wife. The Applicant may have preferred an oral hearing, but he has not demonstrated that he could not have otherwise stated his case in writing. Hence, in my view, the argument that subsection 113(b) of the Act and section 167 of the Regulations are inconsistent with section 7 of the Charter does not arise on the facts of this case.

**Persecution under Section 96**

[86] The Applicant says that the Officer failed to apply the correct test under section 96 of the Act in that she failed to take into account the evidence on similarly situated persons who face persecution in Hungary on account of their ethnicity, political opinion, and membership in a particular social group.

[87] My reading of the Decision, however, leads me to conclude that the Officer does consider and deal with the particular factors and allegations put forward by the Applicant that make up his profile and explains why the evidence does not support section 96 persecution. By and large, the conclusions are that the Applicant has not provided sufficient evidence to support the risks he claims to face or to rebut the presumption of state protection. The Officer also examined the documentary evidence and concludes that "while there had been criticism of the police response to protect the Roma, I find that based on country research that the police do respond."

[88] As is usual in Roma cases, the evidence on the police's willingness and ability to respond was mixed and there was significant controversy over the lessons to be drawn from particular events of police intervention. On the present facts, it may have been reasonably possible to find for the Applicant, but I cannot say that the RPD's analysis and conclusions were unreasonable and fall outside of the *Dunsmuir* range.

[89] Applicant's counsel has suggested two possible questions for certification:

1. Whether the Officer has authority to convoke an oral hearing, not only for reasons of credibility in accordance with section 113(b) of the Act and section 167 of the Regulations, but also for reasons of procedural fairness; and, if not,

2. Whether section 113(b) of the Act and section 167 of the Regulations are contrary to section 7 of the Charter.

[90] In my view, an answer to the question raised by the Applicant would not be dispositive of this case because I have found that the Applicant has not adequately demonstrated that procedural unfairness occurred, or how he was prevented from stating his case in writing in the usual way.

[91] The Applicant has also requested that pages 362 to 455 of the CTR, be excised from the record because they contain material that was not before the Officer, and are, in any event, irrelevant, and not referred to by the Officer. While I agree with the Applicant that these materials were not before the Officer and were not taken into account, I think it sufficient to rule that they are irrelevant for purposes of judicial review before me and I have not taken them into account in my reasons or conclusions. However, the pages referred to below shall be sealed.

[92] The Applicant has also requested that the following portions of the record be sealed:

a. CTR — pages 9 and 20;

b. Applicant's record — pages 10 and 21;

c. CTR — pages 44 and 289;

d. Applicant's record — page 61;

e. CTR — pages 361-365, 367, 400, and 408.

[93] The rationale for sealing is that these materials are private information related to the Applicant's wife, her psychological assessments, her knowledge of secret evidence, and personal secrets that are presently before the RPD in proceedings taking place *in camera* and which is the same as information that Justice Gagné ordered sealed when she considered the stay motion. The Respondent has raised little by way of objection and has agreed that some of the information should be sealed notwithstanding the importance of the open-court principal.

[94] Considering the importance of the RPD *in camera* process, Justice Gagné's prior consideration of these matters, and the risks to the Applicant's wife if this information remains public, the Court agrees that the information set out above should be sealed.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed.

2. There is no question for certification.

3. The following materials shall be sealed:

    a. CTR — pages 9 and 20;

    b. Applicant's record — pages 10 and 21;

    c. CTR — pages 44 and 289;

    d. Applicant's record — page 61;

    e. CTR — pages 361-365, 367, 400, and 408.

"James Russell"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-7850-12 |
| **STYLE OF CAUSE:** | **G.M.** |
| | - and - |
| | **THE MINISTER OF CITIZENSHIP AND IMMIGRATION** |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | April 15, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | HON. MR. JUSTICE RUSSELL |
| **DATED:** | June 26, 2013 |

**APPEARANCES:**

| | |
|---|---|
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