

Federal Court



Cour fédérale

**Date: 20140204**

**Docket: IMM-4020-13**

**Citation: 2014 FC 110**

**Ottawa, Ontario, February 4, 2014**

**PRESENT: The Honourable Mr. Justice Simon Noël**

**BETWEEN:**

**SANDOR ANDRAS RADICS,  
ANDREA KUNYU, LASZLONE RADICS,  
AND JAZMIN RADICS**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

**I. Introduction**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered by Mr. Harry Dortelus, of the Refugee Protection Division [RPD], finding that Sandor Andras Radics [the Principal Applicant], Andrea Kunyu, Laszlonge Radics and Jazmin Radics [together, the Applicants] were

neither refugees within the meaning of section 96 of the IRPA nor persons in need of protection under subsection 97(1) of the IRPA.

## **II. Facts**

[2] All four Applicants are citizens of Hungary. They claimed being refugees and people in need of protection on the basis of their Roma ethnicity, which has allegedly exposed them to a life of constant discrimination, racism and harassment.

[3] The Principal Applicant and his wife, Andrea Kunyu, have a daughter, Jazmin Radics. Laszloni Radics is the Principal Applicant's mother.

[4] They alleged having been denied job opportunities and having experienced several racist incidents because of their Roma origins in recent years. In particular, the Applicants submitted that they have been intercepted and fined by the police, injured by a neighbour, prevented from boarding a bus and assaulted by a gang while traveling by bus, and that a smoke bomb was thrown into their family home in November 2011.

[5] The Applicants left Hungary for Canada in May 2012 and claimed refugee status.

## **III. Decision under review**

[6] The RPD was satisfied as to the identity of the four Applicants.

[7] The Principal Applicant acted as the designated representative for his daughter, Jazmin Radics.

[8] The RPD rejected the refugee claim because the Applicants failed to give credible evidence and to rebut the presumption of state protection in their home country. The RPD was also of the opinion that the Applicants could benefit from an Internal Flight Alternative [IFA] in Budapest.

[9] The RPD found that the Applicants' story was not credible because they failed to adduce any corroborative evidence regarding the incidents of discrimination which they allegedly experienced in Hungary. The RPD also concluded to a lack of effort on the part of the Applicants to obtain such evidence.

[10] The Principal Applicant, his wife, and Mrs. Laszłone Radics, the Principal Applicant's mother, testified with respect to incidents they each went through. Both the Principal Applicant and his wife claimed having filed police reports at the time of the events. Questioned on the subject by the RPD, both of them stated that they tried to obtain their respective reports – whether the police reports or the hospitalization records – and that no documents were available because the authorities do not want to produce documents attesting of the difficulties of the Roma population. The RPD rejected this explanation based on its experience with Hungarian claimants, further stating that had this been a major incident, documents would have been available in Hungary, as it is a democratic country and a member of the European Union. Similarly, the RPD concluded that the Applicants did not provide any evidence regarding the November 2011 incident where a smoke bomb was allegedly thrown in their house. Once again,

when he was asked about the existence of a police report, the Principal Applicant answered that he filed a report but that he was not able to retrieve it from the police.

[11] The RPD then examined the notion of persecution as it relates to these incidents, which are at the basis of the refugee claim, but ultimately found that although serious problems of racism and discrimination against the Roma population exist in Hungary, it was unable, without any evidence, to determine that these incidents amounted to persecution.

[12] The RPD found that the Applicants have a stable life and live in a socially stable environment, as the Principal Applicant has lived in his mother's house all of his life, he has eight years of schooling and he was able to work for a period of 10 years, having lost his job in 2002. The Principal Applicant's wife has 12 years of schooling and was able to work occasionally. She claimed that working was too difficult for her, but she did not adduce any evidence that she was unable to work because of discrimination resulting from her Roma origins.

[13] Finally, the RPD examined the issue of state protection and considered mixed evidence regarding the efficiency of the judicial system in Hungary. In the end, the RPD found that the Applicants do not have a substantial ground to fear persecution, torture or a risk to their lives, or cruel and unusual treatment or punishment if they return to Hungary because, given the lack of evidence, they did not demonstrate, on a balance of probabilities, that their state would not be able to protect them.

#### **IV. Applicants' submissions**

[14] The Applicants argue that the RPD's decision denying their claims is unreasonable because the RPD misconstrued the evidence and erred in concluding to the existence of state protection in Hungary.

[15] First, the Applicants claim that the RPD erred in requiring corroborating evidence. The Applicants submit that negative inferences cannot be drawn solely from the failure to obtain corroborating evidence, and that the RPD cannot reject their explanations without referring to the evidentiary documentation. In fact, the RPD articulated no other reasons for which it doubted the Applicants' credibility and in the present case, the documentary evidence and their testimony actually supported their explanations for their inability to obtain police reports.

[16] The Applicants also allege that the RPD erred because it failed to consider evidence of persecution related to similarly-situated individuals. In fact, the Applicants did not have to prove past personal persecution, as the analysis needs to be forward-looking, and the RPD, by concluding that the lack of corroborating evidence made a finding of persecution impossible, failed to consider whether evidence concerning the Roma population of Hungary supported the well-foundedness of the Applicants' fear of persecution, e.g. the fact the RPD recently accepted the Principal Applicant's brother's refugee protection claim on similar facts. The Applicants' testimony and the documentary evidence actually indicate that the Roma population in Hungary is exposed to attacks, discrimination and harassment, but none of this evidence appears in the RPD's analysis on the well-foundedness of the fear of persecution.

[17] The Applicants further submit that the RPD misapprehended the evidence when it concluded that the Applicants have been able to work for a long period of time. The Principal

Applicant has not worked in over 10 years, his wife practically never worked and his mother has not had a job in over 30 years. They lived off welfare but had to work on public work projects to maintain their welfare benefits, and they argue that having access to state financial support does not address the question of whether there is discrimination in the employment. Further, these public work projects, themselves, are discriminatory against Roma. The Applicants testified that they have not been able to find work because of their Roma origins and documentary evidence submitted supports this assertion.

[18] Second, the Applicants argue that the RPD committed an error in concluding to the existence of state protection in Hungary. In its decision, the RPD stated a number of serious problems related to the ability of Hungary to protect its Roma citizens but nonetheless found that state protection was available to the Applicants without providing any reasons for this conclusion. Also, in its state protection analysis, the RPD should have concentrated on the operational adequacy of said protection. However, according to the documentary evidence, it is clear that the Hungarian government failed to protect its Roma citizens, and the RPD could not ignore such critical evidence.

#### **V. Respondent's submissions**

[19] The Respondent claims that the RPD's decision was reasonable and although the Applicants are clearly in disagreement with the RPD's findings, they do not indicate in what way the RPD's decision is unreasonable.

[20] First, the Applicants had the onus of adducing credible evidence in support of their claim and failed to produce corroborative evidence with regard to a central element of their claim, i.e. hospital documents, and as such, it was open to the RPD to consider this failure and the explanations given in its assessment of the claim. In these circumstances, the RPD was entitled to make adverse findings regarding the Applicants' credibility. The RPD rejected the Applicants' explanations for failing to produce the corroborative evidence because, in its specialized knowledge, this evidence could reasonably be expected to be available, especially considering the severity of the alleged incident. Also, the Principal Applicant showed reluctance in answering questions related to the smoke bomb incident, and credibility findings related to observations made by the RPD during the hearing must be shown significant judicial reserve as it is trite law that the RPD, having seen and heard the Applicants, is in a better position to appreciate the credibility.

[21] Second, the Respondent argues that the Applicants did not suffer discrimination which amounts to persecution. It was reasonable for the RPD to find that although the situation in Hungary is not perfect, the treatment of Roma citizens does not constitute persecution because measures were put into place by the government to deal with this situation. The RPD's findings related to the objective basis of the Applicants' claim is therefore reasonable as they are essentially fact-based. Further, the evidence submitted is insufficient to demonstrate that the Applicants' alleged inability to obtain employment constitutes persecution. Also, the RPD is not bound by decisions rendered by other panels as decisions are made on a case-by-case basis.

[22] Third, the Applicants failed to rebut the presumption of state protection in Hungary, a functioning democracy not in a state of complete breakdown that is presumed able to afford protection to its citizens. The situation there is not perfect, but measures were put into place to better protect the Roma citizens. Consequently, the Applicants had to adduce relevant, reliable and very convincing evidence, which they did not do. In fact, according to the evidence, when help was sought, help was given. Unfortunately for them, the Applicants did not provide the authorities with sufficient information for their investigations to go any further. As stated by case law, state protection should not be held too high a standard, as it would be unreasonable and unrealistic to expect the authorities to prevent every single random racist act.

[23] The Respondent ends by acknowledging that the RPD's decision could have been clearer and more detailed but that it nonetheless falls within the range of possible outcomes.

## **VI. Applicants' reply**

[24] In their Reply, the Applicants further claim that the RPD erred in requiring the corroborative evidence, especially as it failed to undertake any analysis of the relevant evidence. The RPD failed to acknowledge evidence that contradicts its own findings and its reasons are insufficient. Also, the Applicants reiterate that for the RPD to have failed to consider evidence of similarly-situated people is a reviewable error according to case law. They further submit having submitted vast testimonial evidence in this regard. With respect to the discrimination, they suffered in getting employment, they add that restrictions on their ability to pursue a livelihood should have been considered by the RPD. Finally, as for the finding of state protection, the



Applicants put forward that the RPD failed to indicate in what way they failed to rebut the presumption of state protection.

**VII. Issue**

[25] Was the RPD's decision to refuse the Applicants' claims reasonable? This issue entails the following two sub-questions:

1. Did the RPD err in assessing the Applicants' credibility or in appreciating the evidence?
2. Did the RPD err in concluding to the availability of state protection in Hungary?

**VIII. Standard of review**

[26] Both parties agree that the RPD's decision is to be reviewed under the standard of reasonableness. As they constitute questions of fact, the credibility findings and the appreciation of the evidence are to be reviewed under the standard of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) at para 4, 160 NR 315, see also *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*] and *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1147 at para 25, [2010] FCJ No 1418). State protection findings by the RPD are also reviewable against the standard of reasonableness (*Dunsmuir*, above, at para 47, see also *Paradi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 996 at para 40, [2013] FCJ No 1095).

[27] Therefore, this Court must afford great deference to the RPD's decision and shall intervene only if it determines that the findings are unreasonable or that they fall outside the

“range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[*Dunsmuir*, above, at para 47]

## **IX. Analysis**

[28] The RPD’s decision is reasonable for the following reasons and this Court’s intervention is not warranted.

A. *Did the RPD err in assessing the Applicants’ credibility or in its appreciation of the evidence?*

[29] This Court finds that the RPD did not commit an error in making findings of credibility with regard to the Applicants nor did it err in its appreciation of the evidence.

[30] The Applicants claim that the RPD committed a reviewable error when it concluded that the Applicants lacked credibility. Indeed, the RPD doubted the credibility of the Applicants’ story because it drew a significant negative inference from the fact that they failed to present any piece of corroborative evidence regarding the incidents of persecution that they allegedly experienced in Hungary. As rightly stated by the Applicants in their factum, “a failure to provide corroborating documentation is only a proper consideration for the [RPD] where there are valid reasons to doubt a claimant’s credibility or where the [RPD] does not accept the applicant’s explanation for failing to produce that evidence when it would reasonably be expected to be available.” [Emphasis added.] While this statement – no doubt a rewording of para 10 of *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12, [2004] FCJ No 62) [*Amarapala*] – is true, the issue in the case at bar seems to stem, however, from the underlined portion of this statement: the Applicants claim that their testimony and the

documentary evidence presented reasonably explain why they were not able to retrieve the various reports requested from the authorities, whereas the Respondent claims that the Applicants simply made no reasonable efforts to obtain said documents.

[31] In this regard, this Court is of the opinion that the RPD did not make an error in finding that the lack of corroborative evidence undermined the Applicants' credibility. On one hand, a plain reading of the impugned decision indicates that the RPD took issue with more than the fact that the Applicants did not adduce the various reports sought. Indeed, the RPD found the Principal Applicant to be "very reluctant" in his testimony regarding the events he experienced and even specified in its reasons that the Principal Applicant had to be asked a same question no less than three times before he gave an answer, answer which the RPD ultimately found not to be credible. With respect to this credibility finding, the RPD, who saw and heard the Applicants, is undoubtedly in a better position to assess the Applicants' credibility (see *Navaratnam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 856 at para 22, [2011] FCJ No 1066 [*Navaratnam*]), and as such this Court must afford significant judicial reserve (*Chen v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 551, 240 NR 376). I have read on a few occasions the pertinent part of the transcript on this matter, and although it is not as clear as what the findings found, there is a factual basis for this conclusion. In such a situation, a reviewing court must abstain from intervening in assessing the performance given in a testimony. Also, considering this finding, it cannot be said that the RPD made its credibility findings "solely" on the Applicants' failure to produce documents, as these findings also rely on testimonies. What is more, on the other hand, Justice Rennie, of this Court, more recently reiterated the principle relied upon by the Applicants and found in *Amarapala*, above, as follows:

6 Negative inferences cannot be drawn solely from the failure to produce corroborating documents: *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12. While it is possible that the Board sought to frame its analysis within the exception to this principle, namely that a failure to produce corroborative documentation is a proper consideration where it does not accept the applicant's explanation for failing to produce that evidence when it would reasonably be expected to be available. If that was the case, precision was required as to the nature of the documentation expected and a finding made to that effect. (*Rojas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 849 at para 6, [2011] FCJ No 1048 [*Rojas*])

[32] In the present matter, the RPD based its credibility findings on this above-mentioned "exception to the principle": it rejected the Applicants' explanation for failing to produce the evidence which it found could reasonably be expected to be available. The RPD found that the Applicants failed to produce documents corroborating a central element of their claims, i.e. hospital records resulting from Ms. Kunyu's alleged hospitalization. In addition, it found that based on its vast experience with Hungarian claimants, these documents could reasonably be expected to be available. With respect to the hospital records, the RPD specified that it has received, in numerous prior cases involving Hungarian claimants, documents which have been made readily available by the Hungarian hospitals to the claimants, meaning that at least some of the documents could have been available especially considering the severity of the alleged incident. The Applicants do not contest the findings related to the hospital records. These findings also impact on the credibility of the Principal Applicant. His story on this subject was not found to be credible (see Certified Tribunal Record, at pages 368, 369).

[33] It is also well-established that the burden of producing evidence in support of their claims lies with the Applicants (*El Jarjouhi v Canada (Minister of Employment and Immigration)*),

[1994] FCJ No 466 at para 7, 48 ACWS (3d) 790). Also, section 11 of the *Refugee Protection Division Rules*, SOR/2012-256, indicates that claimants who do not provide acceptable documents must explain why they did not provide the documents and what they did in order to obtain them. And so, keeping in mind that the Applicants submitted no personal evidence despite having the burden to do so, it was certainly open to the RPD to infer from such a failure and from these explanations a lack of credibility with respect to the Applicants' story (see, for example, *Castaneda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 393 at para 18, [2010] FCJ No 437).

[34] The Applicants also submit that the RPD should have considered the condition of similarly-situated individuals in assessing whether the events they experienced amounted to persecution. This Court finds that just because some people are of Roma ethnicity does not mean that they are automatically exposed to the same risks as similarly-situated people or that their situation systematically results in a finding of persecution (see *Sathivadivel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 863 at paras 20-28, [2010] FCJ No 1070), see also *Navaratnam*, above, at para 25). As previously mentioned in this decision, the Applicants did not submit any personal evidence that they have suffered persecution or that they would likely be persecuted. Rather, they relied on general statements and the documentary evidence pertaining to the general situation of Roma citizens in Hungary. However, the Applicants had to establish a personalized risk, and given the lack of evidence submitted, they simply failed to establish such a risk.

[35] More generally, as it concerns the determination of whether the discrimination amounts to persecution in the present case, this Court finds that the RPD recognized the difficulties experienced by the Applicants and undertook a valid analysis of mixed evidence – from documentary as well as testimonial sources – which was reflected in its reasons. Indeed, the RPD recognized the existence of serious problems of racism and discrimination against the Roma population in Hungary, but it also mentioned the efforts made by the government to protect Roma citizens from persecution. That said, however, what was fatal to the Applicants in their claims was the fact they failed to present any personal evidence which would tie these events of discrimination to their own persons. Such a determination is essentially fact-based and lies within the authority of the RPD. The same is to be said about the Applicants’ alleged inability to find work: they did not provide sufficient evidence. It was not factually right for the RPD to find that the Principal Applicant was able to have steady work for a period over 10 years when the evidence shows that it was only for seven years. This finding, although erroneous, is not such that it impacts on the remaining findings. It was therefore reasonable for the RPD to find that the incidents allegedly suffered by the Applicants did not amount to persecution.

B. *Did the RPD err in concluding to the availability of state protection in Hungary?*

[36] The RPD’s finding in this regard does not warrant the intervention of this Court as it was reasonable to find that the Applicants could have benefited from state protection in Hungary.

[37] It is well-known that a State is presumed to be able to afford protection to its citizens unless it is in a state of complete breakdown (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p. 709, 20 Imm LR (2d) 85 [*Ward*]), and that in order to rebut this presumption claimants

must “adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate” (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30, [2008] FCJ No 399). Also, the protection offered by a state needs not to be perfect, but it must be adequate (*Canada (Minister of Employment and Immigration) v Villafranca* (1992), 18 Imm LR (2d) 130, 99 DLR (4th) 334 (FCA)). The claimants have an even heavier burden in cases where they come from a democratic country (*Hinzman*, above, at para 57), such as it is the case in the present matter.

[38] In the case at bar, the Applicants argue that the RPD, having recognized in its reasons the serious shortcomings in the state authorities’ ability to protect the Roma population of Hungary, could not reasonably come to the conclusion that the Applicants could have sought protection from these authorities. They add that the RPD should have focused on the operational adequacy of this protection, if any, and not on the willingness of the authorities to deal with the problem. In particular, they suggest that the RPD ignored critical evidence pointing to the failure of the state to afford protection to its Roma citizen and that this is fatal to the decision.

[39] However, this Court finds that, as properly stated by the Respondent, the little evidence submitted by the Applicants indicate that when it was sought, protection was given. For example, the Principal Applicant testified that he was assaulted while riding the train with his daughter, adding that he filed a report with the police, who could not do anything because he was not able to describe the assailant. Moreover, one of the complaints made by the Applicants even went before a Court, which dismissed the case. In each of the three incidents presented by the Applicants, the evidence shows that the police were asked to intervene and they did. This is the

Applicants' evidence. This Court could hardly conclude to the absence of state protection when such protection was never denied to the Applicants when sought. In addition, with respect to state protection, the RPD refers to mixed evidence concerning the measures taken by the Hungarian government to protect Roma citizens and acknowledges that there is evidence of slow police intervention in cases related to Hungarian Roma citizens. This reference, albeit seemingly unimportant, is more than sufficient considering that the Applicants failed to produce any personal evidence which could demonstrate, by the preponderance of probabilities, that the Hungarian state would not be able to afford them protection. It was therefore reasonable for the RPD to conclude that the Applicants failed to rebut the state protection presumption.

[40] Finally, just a note to comment on the decision as written. It is one that is reasonable as *Dunsmuir*, above calls for at para 47. As noted by the Respondent, it would have been a better decision if it had dealt more explicitly with the credibility issues, the lack of corroborative police reports and the RPD's own knowledge that these documents are not easy to obtain ("the police can be slack, a little bit", see Certified Tribunal Record, at page 369) as well as the normality of their daily life in Hungary, and also if it had offered a better analysis of the state protection issue. Having said that, it is still a decision that falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[41] The parties were invited to submit questions for certification but none were proposed.



**ORDER**

**THIS COURT ORDERS that** the application for judicial review is denied. No question is certified.

“Simon Noël”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4020-13

**STYLE OF CAUSE:** RADICS et al v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** January 27, 2014

**REASONS FOR ORDER  
AND ORDER:** NOËL J.

**DATED:** February 4, 2014

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