Federal Court  Cour fédérale

Date: 20170710

Docket: IMM-5108-16

Citation: 2017 FC 667

Ottawa, Ontario, July 10, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ANITA HORVATHNE MAJOROS
GABOR MATE
REKA VALERIA RACZ
ATTILA HORVATH
ALEX HORVATH
LEILA MELANI HORVATH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of the Refugee Appeal Division of the

Immigration and Refugee Board of Canada [RAD], dated November 5, 2016 [Decision], wherein the RAD confirmed the decision of the Refugee Protection Division [RPD] and found that Anita Horvathne Majoros [Principal Applicant], Gabor Mate [Male Applicant], Reka Valerie Racz [Female Applicant], Attila Horvath, Alex Horvath, and Leila Melani Horvath [Minor Applicants] were not Convention refugees or persons in need of protection under ss 96 and 97 of the *IRPA*.

II. BACKGROUND

[2] The Applicants are citizens of Hungary. They are an ethnic Roma family consisting of the Principal Applicant, her adult son [Male Applicant] and daughter-in-law [Female Applicant], and her three minor children [Minor Applicants]. The Applicants entered Canada and sought refugee protection on February 27, 2015 on the basis that they faced persecution in Hungary due to their Roma ethnicity.

[3] The Applicants' refugee claim was initially rejected by the RPD on September 23, 2015, and was appealed and dismissed by the RAD on December 9, 2015. The Applicants sought judicial review of the appeal decision and the matter was sent back to the RAD for redetermination on May 2, 2016.

III. DECISION UNDER REVIEW

[4] On November 5, 2016, the RAD again denied the Applicants' claim for refugee protection.

A. *New Evidence*

[5] The RAD declined to admit the new evidence presented on appeal by the Applicants. The evidence concerning the positive decisions of other Roma refugee claimants was rejected on the basis that the RAD is not bound by RPD or RAD decisions. The evidence consisting of the National Documentation Package [NDP] and Federal Court decisions related to other Roma claimants was considered under counsel's submissions rather than admitted as new evidence.

B. *Credibility*

[6] The RAD found that the Principal Applicant was not credible due to inconsistencies between the basis of claim [BOC] submitted at the port of entry [POE] on February 27, 2015, her amended BOC submitted on March 9, 2015, and her oral testimony provided on April 14, 2015 and June 5, 2015. In particular, the RAD noted that she had been untruthful regarding her husband's cause of incarceration, which was material to the credibility of all the claims. Although the Principal Applicant had explained that the inaccuracies were due to medication she had been taking, the RAD did not accept this explanation because the effects of the medication should have been apparent prior to the hearings and a psychological assessment should have been ordered at the time.

[7] The RAD also found credibility issues regarding the Male Applicant's statements. The Male Applicant had answered in the negative to the question "Did you have any problems with the police in any country?" However, he stated in his BOC that he had been abused, fined, and harassed by the Hungarian police. The RAD rejected the Male Applicant's explanation that he

had misinterpreted the question as one concerning prior criminal convictions on the basis that the question was straight-forward. Moreover, even if the explanation were accepted, the RAD found that the explanation was not corroborated by supporting documentation. Consequently, the RAD found that the Male Applicant's allegations had not sufficiently established that he had been persecuted.

[8] The RAD also found that the Female Applicant lacked credibility. Her testimony was contradicted on two occasions, was not supported by corroborative evidence, and had been acknowledged as convoluted by her own counsel.

[9] The RAD then considered the corroborative evidence. With regard to the psychological reports of Natalie Riback, the RAD relied on *Molefe v Canada (Minister of Citizenship and Immigration)*, 2015 FC 317 to find that the reports were of minimal probative value and did not assist in establishing the Applicants' allegations of persecution and risk. Similarly, the RAD found that the medical and police reports submitted by the Male Applicant did not establish the allegations because they did not mention ethnicity as a cause of the incidents referred to. Combined with the credibility concerns, the RAD found that the corroborative evidence were insufficient to establish the Applicants were Convention Refugees or persons in need of protection.

C. *Discrimination vs. Persecution*

[10] Next, the RAD reviewed the incident in which Alex, one of the Minor Applicants, was taken into custody for "51 unjustified absences" from school. However, the RAD noted that the

situation was resolved because the teacher was fired and Alex was able to continue his education without further issues. The RAD found that the testimony concerning this incident was lacking in credibility because, in addition to other inconsistencies, the possibility of removal from his family was not mentioned in the 85-page BOC statement.

[11] On the issue of employment, the RAD concurred with the RPD that the Male Applicant's inability to secure full-time employment was due to a lack of effort on his part. Additionally, while the Principal Applicant was also unemployed, it was noted that she had a maternity benefit. Moreover, the RAD noted that unemployment was a reality and that efforts had been made in Hungary to assist Roma individuals in securing employment.

[12] The RAD also considered the Applicants' eviction from their residence which, according to the documentary evidence, was part of a state-initiated plan to "eliminate housing facilities in disadvantaged Roma neighborhoods." The Applicants claimed that they would not be able to find alternative housing due to their Roma heritage, and this would result in the loss of custody of the Minor Applicants. However, the RAD agreed with the RPD that the Applicants had not made efforts to seek alternative housing and explicitly rejected their explanation that they could not move to another part of the city because "the racists [were] everywhere."

[13] The RPD decision had determined that the incidents relied by the Applicants, while discriminatory, did not amount to persecution. The RAD agreed and also found that the discrimination experienced by the Applicants did not amount to persecution because it did not threaten their fundamental rights, but rather affected the quality of their existence in Hungary.

D. *State Protection*

[14] On the determinative issue of state protection, the RAD agreed with the RPD that the Applicants had not adduced credible evidence to establish persecution. Additionally, the RAD concurred with the RPD that the adduced evidence did not establish the Hungarian state was unwilling or unable to protect the Applicants.

[15] With regard to the investigations into attacks against the Applicants, the RAD concurred with the RPD that the Applicants had not adduced sufficient credible evidence of persecution. Although the Applicants alleged they had sought help from the police approximately 15 times, the RAD noted that they did not follow up on any of the investigations. The Applicants also did not adduce evidence that indicated the investigations were capable of being resolved by the police, such as the known identity of the perpetrators or any witnesses who could have assisted.

[16] The RAD found that the RPD had not erred in its state protection analysis. The documentary evidence, including the NDP for Hungary, contained very little empirical data or state security expert opinions as to whether state protection was adequate. The RAD found that although the Roma face discrimination in Hungary, there was evidence that Hungary had implemented sustained measures to improve the situation and that these efforts were effective.

[17] In particular, the RAD cited the Independent Police Complaints Board [IPCB], a board that investigates violations and omissions by the police, as an example of available recourse should the Applicants return to Hungary and encounter difficulties. The RAD also noted that

there was a number of organizations and agencies available in Hungary to assist Roma in obtaining services and protection from the government and authorities.

[18] The RAD also considered similarly situated persons, but was of the view that each Roma case must be examined on its own merits, as not every Roma in Hungary has experienced persecution. The RAD consulted a report by the European Roma Rights Centre [ERRC], in which the police had put perpetrators of violence against Roma on trial, to conclude that racial violence was neither sustained nor systemic in Hungary. Moreover, the RAD noted that Hungary was part of the European Union and had standards to uphold in order to maintain membership.

[19] In terms of racially-motivated police abuse, the RAD found that the efforts made to eradicate it were somewhat successful, citing the IPCB as an example. The RAD also examined efforts to improve the education, employment, health, and housing of Roma, which the RAD found to be demonstrative of Hungary's willingness to provide better protection for all its citizens, including the Roma.

[20] The RAD also examined the statutory declaration of Aladar Horvath, but gave little weight to his evidence because his allegations were not supported by sufficient empirical data. Similarly, the RAD did not give much weight to the affidavit of Gwendolyn Albert on the basis that the author simply repeated the findings of other publications.

[21] The RAD concluded that state protection for Roma in Hungary, while not perfect, is reasonably forthcoming and adequate. There was no evidence of a complete breakdown of the

state apparatus; rather, there was evidence of a serious effort to ensure state protection is available to the Roma. The RAD determined that the Applicants had not met the required burden of proof to show that Hungary was not able to protect them, which was fatal to their claim. Accordingly, the RAD confirmed the decision of the RPD and dismissed the appeal under s 111(1)(a) of the *IRPA*.

IV. ISSUES

[22] The Applicants submit that the following are at issue in this application:

(1) Did the RAD err by failing to accept into evidence and consider new evidence submitted by the Applicants?

(2) Did the RAD commit errors with respect to the issue of the availability of state protection?

(3) Did the RAD err with respect to the issue of discrimination versus persecution?

(4) Did the RAD err in the analysis of the credibility of the Applicants?

V. STANDARD OF REVIEW

[23] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be

inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[24] The standard of review for the RAD's determination of factual issues and issues of mixed fact and law is one of reasonableness. This includes determinations regarding the admissibility of new evidence, state protection, discrimination amounting to persecution, and credibility: *Canada (Minister of Citizenship and Immigration) v Ali*, 2016 FC 709 at para 29; *Tan v Canada (Minister of Citizenship and Immigration)*, 2016 FC 876 at para 14; *Deri v Canada (Citizenship and Immigration)*, 2015 FC 1042 at para 26; *Shabab v Canada (Minister of Citizenship and Immigration)*, 2016 FC 872 at para 16.

[25] 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 para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 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."

VI. STATUTORY PROVISIONS

[26] The following provisions of the *IRPA* are relevant in this proceeding:

Evidence that may be presented	**Éléments de preuve admissibles**
110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	110 (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
[…]	[…]
Decision	**Décision**
111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions: (a) confirm the determination of the Refugee Protection Division; (b) set aside the determination and substitute a determination that, in its opinion, should have been made; or (c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.	111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés

VII. ARGUMENTS

A. *Applicant*

(1) New Evidence

[27] The Applicants submit that the RAD erred by refusing to accept other positive RAD and RPD decisions of Roma claimants as new evidence. While the RAD is not bound by these prior decisions, neither can the RAD completely ignore them. The jurisprudence is clear that the RAD must provide clear and compelling reasons to depart from prior decisions dealing with similarly-situated persons as a failure to do so creates an aura of arbitrariness, particularly when the circumstances are identical and deal with family members: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 at para 10 [*Thanabalasingham*]; *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714 at para 12 [*Shafi*]; *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6 at para 19; *Mengesha v Canada (Citizenship and Immigration)*, 2009 FC 431 at para 5 [*Mengesha*]; *Mendoza v Canada (Citizenship and Immigration)*, 2015 FC 251 at para 25 [*Mendoza*]. The Applicants argue that this Court has determined that the RAD should be consistent in its decision-making: *Valeant Canada LP v Canada (Health)*, 2013 FC 1254 at para 26; *Eng v Canada (Citizenship and Immigration)*, 2014 FC 711 at para 29. Additionally, the Applicants submit that the Court has been clear in requiring reasons for departing from earlier findings, particularly in the determination of issues such as state protection: *Rusznyak v Canada (Citizenship and Immigration)*, 2014 FC 255 at para 57; *Burton v Canada (Citizenship and Immigration)*, 2014 FC 910 at para 42 [*Burton*].

[28] Consequently, the Applicants submit that the RAD's error in ignoring the decisions regarding Roma claimants as evidence is sufficient to set aside the Decision.

(2) State Protection

[29] The Applicants also claim that the RAD committed several errors with respect to the determinative issue of state protection.

[30] First, the RAD erred by emphasizing the availability of state programmes and policies intended to improve the situation for Roma in Hungary. The focus should be on whether such programmes and policies produce adequate protection from persecution, as there is a clear distinction between "adequate protection" and "serious efforts at protection": *Meza Verela v Canada (Citizenship and Immigration)*, 2011 FC 1364 at para 16 [*Meza*]; *Orgona v Canada (Citizenship and Immigration)*, 2012 FC 1438 at paras 11-12 [*Orgona*]; *Kumati v Canada (Citizenship and Immigration)*, 2012 FC 1519 at paras 27-28, 39. The Applicants argue that the jurisprudence of this Court demonstrates that serious efforts to provide protection are not sufficiently demonstrative of adequate state protection, and it is an error to focus on the former without examining the results of those efforts: *Burai v Canada (Citizenship and Immigration)*, 2013 FC 565 at para 28; *Juhasz v Canada (Citizenship and Immigration)*, 2015 FC 300 at para 41; *Antoine v Canada (Citizenship and Immigration)*, 2015 FC 795 at paras 14-15; *Camargo v Canada (Citizenship and Immigration)*, 2015 FC 1044 at para 26. Thus, the RAD erred when it found that "the documents contain very little in the way of empirical data or opinions of state security experts as to whether state protection is adequate or operational adequate in Hungary," yet concluded that state protection was adequate.

[31] Second, the RAD's reliance on the IPCB as an avenue of state protection is an error. The documentary evidence was clear that, in practice, the Police Commissioner has neglected 90% of the IPCB's decisions. Additionally, this Court has repeatedly found that the IPCB does not represent an avenue of state protection: *Katinszki v Canada (Citizenship and Immigration)*, 2012 FC 1326 at paras 14-15 [*Katinszki*]; *Orgona*, above, at para 14; *Balogh v Canada (Citizenship and Immigration)*, 2015 FC 76 at paras 31-32 [*Balogh*]; *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 1220 at para 23 [*Csoka*].

[32] Third, the RAD erred in its reliance on "organizations and agencies that assist Hungarians in obtaining the appropriate services and protections" as demonstrative of adequate state protection. The jurisprudence of this Court makes it clear that reliance on agencies other than the police to provide protection is an error, as such non-police sources do not substitute for state protection and individuals have no obligation to seek redress from them: *Katinszki*, above, at para 15; *Flores v Canada (Citizenship and Immigration)*, 2013 FC 938 at para 38 [*Flores*]; *Hindawi v Canada (Citizenship and Immigration)*, 2015 FC 589 at para 27 [*Hindawi*]; *Csoka*, above, at para 19.

[33] Fourth, the RAD's reliance on the ERRC report is an error. This Court has previously found that this report does not support a finding of adequate state protection; in fact, reliance on this report is a strong call for judicial intervention: *Hanko v Canada (Citizenship and Immigration)*, 2014 FC 474 at paras 13-14 [*Hanko*]; *Csoka*, above, at paras 24-25.

[34] Fifth, the RAD erred in finding that indications of prosecution and punishment of abuses by state officials was indicative of adequate state protection. Investigations of police corruption and abuse and the presence of infrastructure providing redress do not equate to adequate state protection: *Csoka*, above, at paras 17, 21.

(3) Discrimination versus Persecution

[35] The RAD also erred in the analysis of discrimination versus persecution. The RAD found that persecution was the "sustained or systemic violation of basic human rights." Yet, despite the extensive documentary evidence concerning the challenges faced by Roma in accessing education, employment, housing, and healthcare that are in violation of the United Nations' Universal Declaration of Human Rights, the RAD did not find evidence of persecution.

[36] Moreover, without providing reasons, the RAD erred in finding that discrimination did not amount to persecution when considered on a cumulative basis: *Mohammed v Canada (Citizenship and Immigration)*, 2009 FC 768 at paras 65-66; *Tetik v Canada (Citizenship and Immigration)*, 2009 FC 1240 at para 27; *Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210 at para 34; *Hegedüs v Canada (Citizenship and Immigration)*, 2011 FC 1366 at para 2; *Balogh*, above, at paras 30-32; *Mrda v Canada (Citizenship and Immigration)*, 2016 FC 49 at para 40.

(4) Credibility

[37] The Applicants also take issue with the RAD's credibility analysis of aspects of the Applicants' evidence of their past experiences in Hungary.

[38] First, the RAD should have considered whether there is a serious possibility of persecution upon a return to Hungary, not whether or not the Applicants have been previously persecuted. Thus, whether or not the Applicants' past experiences in Hungary are credible is immaterial: *Salibian v Canada (Minister of Employment and Immigration) (CA)*, [1990] 3 FC 250 [*Salibian*]; *Valère v Canada (Citizenship and Immigration)*, 2001 FCT 1200 at para 19 [*Valère*]; *Acevedo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 585 at paras 11-12 [*Acevedo*].

[39] Second, the RAD should have based its credibility determination on the factor that is central to the claim; that is, that the Applicants are Roma. Instead, the RAD identified negative credibility factors that relate to peripheral details regarding the Applicants' allegations of previous persecution.

B. *Respondent*

(1) New Evidence

[40] The Respondent submits that the RAD's refusal to admit positive decisions of the RPD regarding other Roma claimants as new evidence was reasonable and that the five errors alleged by the Applicants are not errors.

[41] First, the submitted decisions do not involve close family members or claims involving identical facts or circumstances. This distinguishes the present case from the jurisprudence cited by the Applicants. Consistency between decisions is only required if the decisions sought to be relied on meet the above circumstances.

[42] *Shafi*, above, for example, was a decision involving the applicant's sister and membership in a specific tribe; in the present case, there is no equivalent issue.

[43] Similarly, *Mengesha*, above, involved the acceptance of the applicant's biological father, mother, and sibling on the same factual circumstances that the applicant presented; however, in the present case, the closest relative is an unidentified cousin and there is no analysis of the factual circumstances in the relative's case. Additionally, the applicant in *Mengesha* was found to be credible and trustworthy, unlike the Applicants in the present case.

[44] Likewise, *Mendoza*, above, is distinguishable because the applicant's relative in that case had been accepted on a claim concerning the same facts, agents of persecution, and conduct in

seeking protection. Conversely, there is no indication that the Applicants in the current case are in a similar situation to their relatives in regards to the facts, agents of persecution, or conduct in seeking state protection.

[45] In *Burton*, above, reasons were required for a departure from a previous determination on the availability of state protection made on identical facts. In this case, there is no evidence that any of the submitted decisions involved identical facts.

[46] In *Djouah v Canada (Citizenship and Immigration)*, 2013 FC 884 at para 25, the Court found that the denial of an applicant's claim could not stand when seven of his colleagues had been accepted as refugees on the same facts and evidence. Again, that is not the situation in the present case.

[47] *Thanabalsingham*, above, is also distinguishable because it was a detention review, which is a fact-based decision that determines whether an individual should be detained. The requirement for clear and compelling reasons to depart from prior decisions in the context of judicial review is not applicable to decisions involving different individuals and tribunals, such as the RPD and the RAD.

[48] Second, the Applicant's argument that the RAD erred in failing to admit the decisions is moot because they do not meet the statutory requirements set out in s 110(4) of the *IRPA*, which requires that new evidence must arise after the rejection of the RPD claim and was not reasonably available, or could not reasonably have been presented, at the time of the RPD's

rejection of the claim. In contrast, the decisions that the Applicants sought to admit were rendered prior to the Applicants' RPD decision and could have been presented before the RPD. The jurisprudence is clear that s 110(4) of the *IRPA* should be narrowly interpreted and that claimants must present all the evidence that is reasonably available to the RPD: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 35*; Marin v Canada (Citizenship and Immigration)*, 2016 FC 847 at paras 26-27. In *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at paras 13-15, Justice Annis found that admitting evidence that could have reasonably been provided to the RPD would make the RPD process a monumental waste of time. Although the RAD did not rely on the criteria in s 110(4) of the *IRPA* in rejecting the new evidence, the refusal is consistent with the statutory requirement. As such, this argument on the admissibility of the new evidence is moot.

(2) State Protection

[49] The Respondent submits that the RAD was reasonable in finding that adequate state protection is available to the Applicants in Hungary.

[50] First, despite the Applicants' argument that the RAD focused on efforts rather than results, the Respondent notes that the Decision states: "…the evidence demonstrates that Hungary's efforts are actually having an impact operationally on the ground. The evidence also demonstrates that police do investigate crimes against Roma and that perpetrators are being held responsible when there is sufficient evidence…[S]tate protection, while not perfect, is adequate and that measures taken by the authorities have translated into operational success on the ground." These statements show that the RAD considered the real effects of state protection.

[51] Second, the Respondent disagrees with the Applicants' argument that the RAD relied on the IPCB as an avenue of state protection. The reference to the IPCB is just one factor considered, and the RAD provided 17 pages of reasons addressing state protection. Any reliance on the IPCB is minimal and insufficient to constitute a reviewable error.

[52] Third, while the RAD mentioned non-police agencies and organizations that assist the Roma in Hungary, it still concluded that the evidence demonstrated the police do investigate crimes against the Roma and that perpetrators are held responsible if there is sufficient evidence. Additionally, since the Applicants are from a functional democracy, they face a heavy burden to demonstrate that they should not be required to exhaust all of the recourses available, including police oversight agencies: *Mudrak v Canada (Citizenship and Immigration)*, 2015 FC 188 at paras 79, 81 [*Mudrak*].

[53] Fourth, the Applicants argue that the RAD erred in its reliance on the ERRC report that has been criticized by the Court. However, the report that has been the subject of criticism is from 2011, while the Decision relies on a report from 2016. Additionally, the conclusion drawn from the report is different from the conclusion that has been criticized by the Court. The conclusion relied on in this case, which is that racial violence is neither sustained nor systemic, is reasonable.

[54] Fifth, it was not an error for the RAD to note that Hungary has made efforts to hold police accountable when they fail to protect citizens, even if it is not directly related to providing protection. Such an observation does not undermine the finding that the evidence demonstrates

that the police investigate crimes against Roma and hold perpetrators responsible, which supports a conclusion that state protection is adequate and state initiatives have been successful.

(3) Discrimination

[55] The Respondent submits that the RAD addressed the discrimination faced by the Applicants in Hungary, but reasonably found that some of the allegations lacked credibility. Additionally, the RAD noted that state efforts to combat such discrimination have been effective.

[56] On the matter of employment, it was reasonable to consider the general problem of high unemployment and that the Male Applicant has never accessed state assistance programs. Similarly, with regard to one of the Minor Applicants' issues in school, it was reasonable to note that the teacher had been fired and the child was able to continue his education without incident.

[57] The RAD acknowledged the discrimination faced by the Applicants but concluded that it did not threaten fundamental rights nor reach the level of persecution. Moreover, since the determinative issue of state protection was found to be available, the Applicants do not need Canada's protection even if the discrimination faced by the Applicants amounts to persecution.

(4) Credibility

[58] The Applicants argue that their credibility is immaterial because they were not required to demonstrate past persecution. However, since the Applicants challenged the RPD's credibility in the appeal, the Respondent submits that it was appropriate for the RAD to address credibility.

C. *Applicants' Reply*

[59] The Applicants disagree with the Respondent's submission that the RAD considered whether or not the state's efforts were effective in providing state protection, that police investigated crimes against Roma, and that perpetrators are held responsible. In the Decision, the RAD states: "[i]n practice, [the Police Commissioner] "neglect[s]" 90 percent of the [IPCB]'s decisions."

[60] Moreover, the Applicants take issue with the Respondent's argument that the RAD's reliance on the IPCB as an avenue of state protection is "minimal and insufficient to give rise to a reviewable error." On the contrary, the Applicants argue that the RAD's error ignores the documentary evidence and jurisprudence of this Court, which should be reviewable errors: *Katinszki*, above, at paras 14-15; *Orgona*, above, at para 14; *Balogh*, above, at paras 31-32; *Csoka*, above, at para 23.

[61] The Applicants also reiterate their argument that reliance on non-police agencies in regards to state protection is against the jurisprudence of this Court: *Csoka*, above, at paras 19-21.

[62] Additionally, the Applicants submit that the RAD erred by ignoring the jurisprudence of this Court in relying on the ERRC report without distinguishing why the jurisprudence was not followed: *Hanko*, above, at paras 13-14; *Csoka*, above, at paras 24-25.

[63] In regards to the Respondent's submission that the Applicants' past experiences regarding discrimination lacked credibility, the Applicants argue that this is immaterial as the issue of persecution is prospective and not retrospective: *Salibian*, above; *Valère*, above, at para 19; *Acevedo*, above, at paras 11-12 [*Acevedo*].

[64] The Applicants point out that the Respondent is silent on several submitted errors. For example, the Applicants submitted that the RAD erred by failing to find that the situation awaiting the Applicants in Hungary amounts to persecution rather than discrimination. The Applicants also submitted that the RAD erred in failing to provide reasons for this conclusion. While the Respondent attempts to provide reasons on behalf of the RAD, the Applicants note that none of the reasons were referenced in the Decision.

D. *Respondent's Further Argument*

(1) The IPCB

[65] The Respondent disagrees that the RAD ignored the documentary evidence and jurisprudence by relying on the IPCB as an avenue of state protection.

[66] First, the jurisprudence does not dictate that the IPCB cannot be relied upon as an avenue of state protection. The decision of *Mudrak*, above, states that the requirement to complain to policing oversight agencies in a democratic agency is specific and multifactorial.

[67] Second, the RAD did not rely on the IPCB as a means of protection, but to find that the police in Hungary arrest and prosecute perpetrators of crimes against Roma. The statement that the Applicants could go to the IPCB if they were dissatisfied with the authorities does not amount to a finding that the IPCB is an avenue of state protection, given that protection is available directly through the Hungarian police. As noted by the RAD, the police took the Applicants' reports; although the investigations did not result in an arrest, the Respondent notes that there were no witnesses to corroborate or assist, no evidence that the identity of the perpetrators was known, and the Applicants did not follow up with the police.

[68] Following *Mudrak*, above, it is clear that the RAD found the police response to the Applicants' complaints to be adequate. Since the RAD did not find misconduct by the police on this ground, the reasons pertaining to the IPCB are *obiter dicta*.

(2) Refusal to Admit Other RPD Claims

[69] The Respondent also refutes the Applicants' claim that the Respondent attempts to provide reasons for refusing the additional evidence regarding successful RPD claims. The Respondent provided reasons as a response to the Applicants' arguments in their application for leave for judicial review. The RAD did not have to provide reasons; the RAD only needed to state that it was not bound by prior RPD decisions.

[70] In this application, the Applicants argue that the principle of consistency should apply because factual similarities existed between their circumstances and those of the other RPD claims. The Respondent disagrees because the adduced evidence did not involve close familial

relationships or claims with identical facts or circumstances. The Respondent is permitted to provide reasons not articulated by the RAD as a response to legal arguments made before this Court. Moreover, the RAD had no obligation to provide such reasons when it decided to refuse the admission of the documents.

VIII. ANALYSIS

[71] At the review hearing before me on May 30, 2017, counsel agreed that the determinative issue in the Decision was state protection so that, for review purposes, the Decision should stand or fall on the RAD's state protection analysis.

[72] The RAD points out that the Applicant's own experience in Hungary cannot be taken to be indicative of inadequate state protection (para 55):

> They allege that they went to the police approximately 15 times, but they acknowledge that reports were taken but nothing came out of the investigations. However, the RAD notes that the [Applicants] did not follow up in most cases either with the local police or higher authorities. Further, there was no evidence adduced to suggest that the identity of the perpetrators was known, nor were these incidents in which witnesses were described as being present to corroborate or assist with any investigations.

[73] It seems to me that if the Applicants' own experience with the police did not support a finding of inadequate state protection, nor did it suggest the availability of an adequate state response if the Applicants are returned to Hungary, and this is why the RAD turned to the documentary evidence to resolve this issue.

[74] In doing so, the RAD concluded that "the documents contain very little in the way of empirical data or opinions of state security experts as to whether state protection is adequate or operationally adequate in Hungary." After examining what evidence is available, the RAD comes to the following conclusion (para 78):

> Although not perfect, the RAD finds that the evidence demonstrates that Hungary's efforts are actually having an impact operationally on the ground. This evidence also demonstrates that police do investigate crimes against Roma and that perpetrators are being held responsible when there is sufficient evidence.

[75] In reaching this conclusion the RAD relies upon the following evidence:

a. Various programmes and policies adopted by the Hungarian government with a view to improving the situation of the Roma minority in Hungary;

b. The existence of the Independent Police Complaints Board (IPCB) as an avenue of state protection;

c. Organizations and agencies other than the police that assist Hungarians in obtaining appropriate services and protections;

d. A report of the European Roma Rights Centre with respect to 22 cases of violent attacks on Roma in which 6 convictions were obtained;

e. Indications that the government prosecutes and punishes officials who commit abuses, whether in security or elsewhere in the government.

[76] The Court has consistently warned against relying upon programmes and policies put in place by the government because this does not necessarily translate into adequate state protection (see, for example *Meza*, above, at para 16).

[77] The Court has consistently found that the existence of the IPCB is not an avenue of state protection. See, for example, *Katinszki*, above, *Orgona*, above, *Balogh*, above, *Csoka*, above.

[78] The Court has also warned against relying upon agencies other than the police for evidence of adequate state protection. See, for example, *Flores Zepeda v Canada (Citizenship and Immigration)*, 2008 FC 491; *Katinszki*, above; *Flores*, above; *Hindawi*, above; *Csoka*, above.

[79] The Court has also pointed out that investigations and punishment for abuse by the police and state officials do not equate with state protection. See, for example, *Csoka*, above.

[80] When I asked Respondent's counsel for advice on what the RAD was relying on for its assertion at paragraph 76 of the Decision that "the evidence demonstrates that Hungary's efforts are actually having an impact operationally on the ground" and that the "evidence also demonstrates that police do investigate crimes against Roma and that perpetrators are being held responsible when there is sufficient evidence" he directed me to paragraph 55 of the Decision which deals with the Applicants' own experience with the police, and paragraph 65 of the Decision which reads as follows:

> In Hungary, the European Roma Rights Centre examined the progress in 22 known cases of violence against Roma. In these incidents, seven people died, including a five-year-old boy, and a number of individuals were seriously injured. 10 Romani homes

> were set on fire with various levels of destruction. Guns were involved in 10 of the examined cases and in two cases, hand-grenades were used. Out of the 22 attacks, nine, resulting in six deaths, are believed by police to have been committed by the same four suspects who are currently on trial. Although disturbing, these incidents occurred within a population of 10 million people, up to 750,000 of whom are Roma. In light of this, the RAD finds that the racial violence is neither sustained nor systemic.

[81] In my view, paragraph 5 of the Decision says nothing more than that the Applicants' own experiences are not conclusive on the adequacy of state protection so that it is necessary to examine the documentary evidence on point.

[82] With regards to the European Roma Rights Centre report referred to in paragraph 65 of the Decision, the Court has commented upon a previous version of this report in the *Hanko*, above and in *Csoka*, above:

> [24] As to the ERRC report, this Court found it specifically flawed, in somewhat strong terms, in Hanko v Canada (Citizenship and Immigration), 2014 FC 474 [Hanko] at paras 12-14 and Marosi v Canada (Minister of Citizenship and Immigration), (November 26, 2013) IMM-1675-13 at paras 7-8. Contrary to the Minister's submission, this ERRC report was not one of many such reports considered by the RAD in its decision. It rather stands out as the only piece of evidence cited by the RAD in support of effective police protection.
>
> [25] What is even more troubling is that, in its reasons, the RAD parroted, word for word, the very passage criticized and jettisoned by the Court in Hanko. For the RAD to ignore this, and to remain deaf to this issue despite the fact that counsel for the Csoka family specifically drew the RAD's attention to it in its submissions, is beyond comprehension, and certainly well outside the boundaries of reasonableness. When a decision-maker disregards prior teachings of this Court in such an unbridled way and invokes as the main proof of adequate state protection by the police a report specifically discarded in previous decisions, this strongly calls for the Court's intervention.

[83] In the present case, the Respondent says that the RAD is referring to a 2016 ERRC report and makes a difference point from the issues rejected in *Hanko* and *Csoka*:

> 30. Fourth, the Applicants allege that the RAD erred by relying on a previously criticized report of convictions in 22 cases of violent attacks when the general message of the report is that the state authorities are not effective. What the RAD relies on however is not the 2011 report that had been criticized by this Court, but on a report or submission from 2016. The RAD also draws a different conclusion from the report than the conclusion that this Court has criticized. The RAD notes that these reports of only 22 violent attacks (between the period of 2008 to 2010) must be seen in the context of a population of up to 750,000 Roma in Hungary and concludes, "In light of this, the RAD finds that racial violence is neither sustained nor systemic". This conclusion is reasonable and fails to raise a serious issue for judicial review.
>
> *Respondent's Memorandum of Argument, para 30*

[84] The 2016 report references what appears to be the same 22 attacks in regards to the severity/injuries (e.g. seven people died, ten homes set on fire, gun involvement), but not the progress of the police investigations. *Hanko* specifically referred to the outcomes of police investigations into the 22 attacks (e.g. investigation was suspended, prosecution was pending, etc.). That said, the 2016 report says that: "In Hungary the European Roma Rights Centre examined the progress in 22 known cases of violence against Roma." The report also cites the 2011 ERRC report as a source, and *Hanko* refers to a 2011 ERRC report. So they are likely referring to the same attacks and, as previously pointed out by the Court in *Hanko*, evidence in these well-publicized cases is of little persuasive value in showing how the police function when it comes to the more common type of cases.

[85] The 2016 report states that "In the majority of the cases examined, the information provided by the State authorities was inadequate. Where information was provided, limited

results of investigation and prosecution were revealed. In several cases information was not provided by the authorities, who cited data protection and criminal procedure laws."

[86] So there is no real evidence in the 2016 report on how the police function when it comes to the more common types of cases, but it can be inferred that there is a lack of prosecution. The rest of the report goes on to say that there are no statistics on racially motivated crimes and the number of criminal investigations for such crimes is extremely low. Moreover, the report says that the authorities: do not monitor racist violence; are reluctant to consider racial bias as an aggravating circumstance to crimes; and have not included such bias as an aggravating circumstance to crimes in the Criminal Code. The inference is clear that the state response to violence against Roma is inadequate since there are no statistics demonstrating that prosecutions occur or that there are even statutory mechanisms to allow prosecution.

[87] The 2016 report does not support the RAD's conclusions on adequate state protection.

[88] All in all, I do not think that the evidence relied upon by the RAD for its conclusions that the Applicants have not established that adequate state protection for Roma people does not exist in Hungary stands up to scrutiny, and this renders the findings on this determinative issue unreasonable.

[89] Counsel concur there is no question for certification and the Court agrees.

[90] I note that the Applicants have named the Minister of Immigration, Refugees and Citizenship as the Respondent. The correct Respondent is the Minister of Citizenship and Immigration. Accordingly, the style of cause is amended to read the Minister of Citizenship and Immigration as the Respondent.

JUDGMENT IN IMM-5108-16

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and the matter is returned to the RAD for reconsideration by a different Member;
2. There is no question for certification;
3. The style of cause is amended to read the Minister of Citizenship and Immigration as the Respondent.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5108-16
STYLE OF CAUSE:	ANITA HORVATHNE MAJOROS, GABOR MATE, REKA VALERIA RACZ, ATTILA HORVATH, ALEX HORVATH, LEILA MELANI HORVATH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 30, 2017
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JULY 10, 2017

APPEARANCES:

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