

Federal Court



Cour fédérale

Date: 20200122

Docket: IMM-515-19

Citation: 2020 FC 102

Ottawa, Ontario, January 22, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

**NIKOLETTA VARGA, ATTILA BALOGH
AND ATTILA PATRIK BALOGH**

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 Protection Division of the Immigration and Refugee Board of Canada [RPD], dated January 4, 2019 [Decision],

denying the Applicants' refugee and person in need of protection claims under ss 96 and 97 of the *IRPA*.

II. BACKGROUND

[2] The Applicants, Nikoletta Varga, Attila Balogh and their son Attila Patrik Balogh, are Roma citizens of Hungary. Ms. Varga and her son arrived in Canada on April 3, 2012, a few months after Mr. Balogh, who arrived on December 30, 2011. The Applicants allege to have a well-founded fear of persecution in Hungary due to their Roma ethnicity.

A. *Nikoletta Varga*

[3] Upon first arriving in Canada, Ms. Varga was detained and interviewed in Montreal at the port of entry by the Canadian Border Service Agency [CBSA]. The interviewing officer's notes indicate that Ms. Varga claimed that she was entering Canada for 30 days to visit and stay with a friend, Fauriss Kabeya, and that she was not afraid to return to Hungary as she had no problems there despite being Roma. When contacted, Fauriss Kabeya denied inviting Ms. Varga to stay with him.

[4] A few days later, on April 13, 2012, Ms. Varga submitted a refugee claim in which she noted in Box 42 that she is afraid to return to her country due to "Racist Hungarian Guards and Skinheads." At Box 43, she indicated that she came to Canada because:

[...] I was persecuted. I have been abused and was 17 weeks pregnant and had a miscarriage. I don't want to go back and would rather die. I fear for the life of my child.

[5] In her refugee claim, Ms. Varga also states that her common-law partner, Mr. Attila Balogh, currently lives in Canada.

[6] Ms. Varga subsequently completed her Personal Information Form [PIF] on April 23, 2012. In her PIF, she confirms, once again, that she is Roma and states that she is claiming refugee status on racial, political, and social grounds. Attached to the PIF is a two-page narrative where she asserts that: (1) she has generally suffered discrimination since childhood due to her ethnicity; (2) she was attacked by a group of Hungarian nationalists on September 29, 1998, who left her unconscious and caused her to suffer a miscarriage; and (3) she was attacked by a group of Hungarian Guardists outside her brother's apartment building on August 25, 2009. She later amended her PIF to state that she was raped during this attack in 2009.

[7] Firstly, Ms. Varga alleges that, just like her parents, she has suffered discrimination her entire life. As a child, she notes that she was forced to leave primary school because she was ridiculed by her classmates and ignored by her teachers. As an adult, she states that discrimination is a part of her daily life as she is regularly refused employment due to her ethnicity and, if fortunate enough to obtain employment, is forced to work under discriminatory conditions. Ms. Varga notes as an example that, when she worked as a kitchen help, she was forbidden to enter the area where food was prepared.

[8] Secondly, Ms. Varga alleges that she was attacked by a group of Hungarian nationalists on September 29, 1998, causing her to miscarry the seventeen-week fetus she was carrying. She

provided a medical report from the Josa Andras Hospital Gynecology Department stating that: (1) she claimed that an unknown perpetrator assaulted her; (2) visible signs and examinations supported this; and (3) a spontaneous abortion was induced. The report notes that Ms. Varga was admitted on September 29, 1998 (the same day as the alleged incident) and that the surgical procedure took place on that day. However, it does not indicate when Ms. Varga was released from the hospital. The report indicates that it was forwarded to the relevant police authorities.

[9] Ms. Varga provided an additional medical report from the Josa Andras Hospital Neurology Department detailing her four-day hospital stay from October 22, 1998, to October 27, 1998. This report reiterates Ms. Varga's claim that she was attacked and suffered a miscarriage as a result. The report also outlines the head injuries sustained by Ms. Varga as a result of this attack and notes that she was unconscious for ten seconds following the attack.

[10] Despite the fact that the September 29, 1998 report was forwarded to the authorities, no police response was provided. Ms. Varga testified that she went to the police with her mother to file a report following the attack but was rebuffed.

[11] Thirdly, Ms. Varga asserts that she was attacked and raped by Hungarian Guardists on August 25, 2009, while taking out the garbage at her brother's apartment during a party. Ms. Varga asserts that the weather conditions were dusky and it took approximately 15-20 minutes for someone to come to her aid. She alleges that she screamed for help at first but her mouth was quickly covered by the assailants. Following this incident, her brother and Mr. Balogh heard her screams and found her in a fetal position. Ms. Varga asserts that she did

not tell Mr. Balogh that she had been raped. She testified that her mother went to the police station to report the incident but the police refused to act.

[12] Ms. Varga provided five letters authored by three individuals supporting her claim that she was assaulted and raped in 2009. In particular, the letter by Erzsabet Balogh, Ms. Varga's sister-in-law, states that she noticed through the window of the apartment five men attacking a "gypsy girl." As they went to the aid of the screaming woman, they noticed that it was Ms. Varga.

[13] Following the attack in 2009, Ms. Varga claims to have undergone psychiatric treatment in Hungary until 2012. She provided a medical letter signed by Dr. Alshahsoh Akeef in 2017 confirming this, and noting that Ms. Varga:

has been suffering from anxiety, restlessness, adjustment disorder, disorder in finding her identity in addition to being decompensated physically as a result of being raped by Hungarian skinhead boys in August 2009 and received psychiatric treatment until she was in Hungary, March 2012.

[14] Ms. Varga claims she continued to seek psychiatric treatment following her arrival in Canada. She provided several medical reports to support this claim, including:

- A letter from her general physician, Dr. Zaki, confirming that she has been under his care for the last five years due to severe depression and trauma and that "it [would] be safer and better for the well-being of [Ms. Varga] if [s]he remain[ed] in the country";

- A 2013 consultation report signed by Dr. Balci from the Centre for Addiction and Mental Health, which notes she exhibited symptoms of post-traumatic stress disorder [PTSD] and major depressive disorder;
- A 2017 consultation report from Dr. Abraham of the Centre for Addiction and Mental Health diagnosing her with “major depressive disorder” and PTSD; and
- A 2018 letter signed by a counselor at the Canadian Centre for Victims of Torture confirming that they have been assisting Ms. Varga with trauma counselling resulting from the incidents in Hungary.

B. *Attila Balogh*

[15] Nearly a month after arriving to Canada, Mr. Balogh filed a refugee claim on January 28, 2012. In this claim he notes, at Box 42, that he is “afraid of the Gardistas and other Hungarians who hate gypsies.” He also states at Box 43 that:

I fled Hungary after facing years of persecution based on my race or membership in a social group as a gypsy. I was physically abused by the Gardistas, threatened with death by people who sent anonymous letters, deprived of work and held back in school. All of this because I am a gypsy. My wife went to the police once but we were ignored. I am afraid of the police and they will not help.

[16] Mr. Balogh subsequently completed his PIF on February 2, 2012, in which he confirms, once again, that he is Roma and states that he is claiming refugee status on racial, national, and social grounds.

[17] At the hearing before the RPD, Mr. Balogh asserted that he: (1) received several threatening letters addressed to him from anonymous persecutors; (2) was attacked by a group of Hungarian Guardists in 2010 while walking home; and (3) was attacked and urinated on by a group of Hungarian Guardists in the fall of 2011. He also submitted a police report detailing that his sister's home was vandalized by an unknown perpetrator who painted a swastika on her wall and wrote, "You Gypsies, you will die."

[18] Firstly, Mr. Balogh alleges he received six to ten anonymous letters addressed to him, and threatening to harm him and his family for being Roma. Following his departure for Canada, he states that the letters were subsequently sent to his mother's home until approximately 2016.

[19] Secondly, Mr. Balogh claims that a group of Hungarian Guardists attacked him in 2010, uttering racial slurs at him and stomping on his hand during the incident. Mr. Balogh testified that he did not file a police report because his doctor advised him not to since the police would not believe him.

[20] Thirdly, Mr. Balogh testified that he was again attacked by a group of Hungarian Guardists in 2011. He alleges that they grabbed him, threw him to the ground, and began kicking him. He notes that they subsequently made him strip and urinated on him. Mr. Balogh stated that he went with Ms. Varga to the police to file a report but they were ridiculed and turned away by the police.

[21] Finally, Mr. Balogh alleges that Hungarian nationalists went to his sister's home, kicked out her family, and vandalized their home. The graffiti included a swastika as well as writing which said, "You Gypsies, you will die." The Applicants provided a police report filed by Mr. Balogh's sister confirming the graffiti and stated that the unknown perpetrator entered the empty home unlawfully by forcing the door. The report indicates that the investigation into an "offence against property" was terminated because the identity of the perpetrator could not be determined.

C. *Attila Patrik Balogh*

[22] Finally, the Applicants claim that their son, Attila Patrik Balogh, faced persecution at school because he was Roma. They claim that he was held back and misdiagnosed as having an "intelligence level of the mild mental retardation zone" due to his ethnicity. They assert that this is not the case and that he was not allowed to participate in class.

III. DECISION UNDER REVIEW

[23] On January 4, 2019, the RPD found that the Applicants did not qualify as refugees or persons in need of protection under ss 96 and 97 of the *IRPA*. The RPD found that the Applicants had failed to "credibly establish their allegations of persecution and lack of state protection" in Hungary.

A. *Credibility and Well-founded Fear*

[24] The RPD found the vast majority of the Applicants' claims not credible.

[25] Regarding Ms. Varga's claims, the RPD believed that she was Roma and has suffered general discrimination in Hungary. However, the RPD found that she had not credibly demonstrated that the discrimination she suffered rose to the level of persecution. Specifically, the RPD found Ms. Varga's claims not to be credible due to: (1) the inconsistencies arising from her statements at the port of entry; (2) the insufficiency of the medical reports regarding her mental health, their lack of impartiality, and Ms. Varga's gap in treatment; (3) the omissions in the hospital reports regarding the 1998 incident and the lack of follow-up by the police at the hospital; and (4) the inconsistencies and plausibility issues concerning the 2009 incident.

[26] First, the RPD asserts that Ms. Varga stated in her refugee claim at Box 42 that "I am not afraid of anyone, I just want to let you know that there are no resources to live there." The RPD noted she also indicated at Box 43 that:

Because in my country nothing exists, there is no food, there are no jobs, [...] I cannot work. How can I feed my family? I don't have shelter, I don't have a house and I don't have food. That is why I am here. I cannot support my family at all.

[27] The RPD also noted that Ms. Varga stated to the interviewing officer at the port of entry that she was not afraid of returning to Hungary and that she was in Canada to visit a friend, Fauriss Kabeya, who denied having invited her to stay with him.

[28] The RPD noted that these statements are in direct contradiction with her PIF which says that she is claiming refugee and person in need of protection status as a result of the persecution she has experienced in Hungary due to her ethnicity; notably the violent incidents in 1998 and 2009.

[29] Given that Ms. Varga simply denied making the statements at Box 42 and Box 43 of her refugee claim, and stated that she did not remember her answers at the port of entry interview, the RPD found her refugee and person in need claims not to be credible. The RPD highlights that the interviewing officer would not have been able to contact Fauriss Kabeya had Ms. Varga not provided his name and phone number. The RPD also stated that, given Ms. Varga's recall of other elements of the port of entry interview, it is unlikely that she did not remember making these statements. Consequently, the RPD found that, on a balance of probabilities, Ms. Varga does not have a well-founded fear of persecution and has instead come to Canada for economic reasons.

[30] Secondly, the RPD raised several issues with the sufficiency and credibility of the medical reports provided by the Applicants detailing Ms. Varga's mental health since 2009. The RPD found that the letter from Dr. Akeef, who Ms. Varga claims provided her psychological treatment in Hungary, was not reliable as it did not indicate his area of practice nor how many times he saw Ms. Varga. The RPD also found that the medical reports by Dr. Balci and Dr. Abraham of the Centre for Addiction and Mental Health were not convincing as they only saw Ms. Varga twice and the contents of the reports are largely based on the information she provided. The RPD also notes that the letter from Dr. Zaki, Ms. Varga's general physician, had crossed "that intangible line between medical care and advocacy" as it states that it would be better for her well-being if she remained in Canada.

[31] For these reasons, the RPD stated that it gave less weight to the medical evidence concerning Ms. Varga's mental health than it otherwise would have. With this in mind, the RPD

found that the medical documentation did not demonstrate that the alleged incidents took place. Moreover, the RPD noted that the three years it took Ms. Varga to seek the assistance of the Canadian Centre for Victims of Torture following the referral by Dr. Balci in 2013 undermines her claims.

[32] Thirdly, the RPD found that the omissions in the September 29, 1998 hospital report, as well as Ms. Varga's testimony that the police did not attend the hospital to speak with her, undermined the credibility of her claim that she was beaten by Hungarian nationalists and had a miscarriage as a result. The RPD stated that it is reasonable to expect the September 29, 1998 hospital report to mention that Ms. Varga had been transported by ambulance in an unconscious state and it is implausible, as per the RPD's specialized expertise, that the police would not have gone to the hospital to speak with Ms. Varga.

[33] Fourthly, the RPD found Ms. Varga's claim that she was attacked and raped by Hungarian Guardists to be inconsistent and implausible. In this regard, the RPD expressed four main concerns. First, it found it to be implausible that it took 15-20 minutes for someone to come to her aid when she would have been in close proximity to her brother's apartment building. Second, the RPD noted that Ms. Varga provided contradictory accounts as to whether she screamed for help during the incident. Though she noted in her PIF that she screamed for help during the attack, and provided several letters from witnesses who heard her screams, she testified at the hearing when asked why it took so long for someone to come to her aid that her mouth was covered for most of the incident. Third, the RPD noted several issues with the letter provided by Ms. Varga's sister who stated that she heard screams and saw through the window

five men attacking a “gypsy girl.” The RPD found it implausible that her sister does not refer to Ms. Varga by name, and would likely have recognized Ms. Varga’s voice when hearing her screams for help. Moreover, given the dusky weather conditions and the black clothing worn by the attackers, the sister would likely not have been able to see five men attacking Ms. Varga from the window. Fourth, regarding the claim that Ms. Varga did not disclose to Mr. Balogh that she had been raped, the RPD found that it was “not plausible that [Mr. Balogh] would have gone to her attendance, found her in the fetal position, and not come to know, if not immediately, that she had been raped.” In light of these issues, the RPD rejected Ms. Varga’s claim that she was attacked and raped by Hungarian Guardists.

[34] Regarding Mr. Balogh’s claims, the RPD acknowledged that he was Roma and has suffered general discrimination in Hungary. However, it found three of the incidents claimed by Mr. Balogh not to be credible, and found that the fourth, despite being credible, did not rise to the level of persecution.

[35] Firstly, the RPD found that Mr. Balogh’s claim that he received threatening letters in Hungary, which are now being sent to his mother following his move to Canada, was not credible as the letters were likely produced for the “sole purpose of bolstering his claim for refugee protection.” This is because Mr. Balogh testified that he did not know who wrote them, despite the fact that the letter writer(s) addressed him by name and knew him well enough to send the letters to his mother’s home following his departure.

[36] Secondly, the RPD deemed not credible Mr. Balogh's claim that he was a victim of a racially-motivated attack by a group of Hungarian Guardists in 2010. The RPD found that, as per its specialized expertise, it is unlikely that the doctor attending to his injuries would have advised him not to file a police report. Instead, the RPD notes that "medical personnel are required to notify the police" and that "reporting is not usually left to the patient."

[37] Thirdly, the RPD did not find credible Mr. Balogh's claim that his sister was kicked out of her home by Hungarian nationalists, who then proceeded to vandalize it by painting a swastika on the wall. Although Mr. Balogh provided a police report with pictures, the RPD noted that the report contradicts his account as it appears that the home was empty and locked at the time of the vandalism.

[38] Fourthly, the RPD found credible Mr. Balogh's claim that he was attacked and urinated on by a group of men in the fall of 2011, and subsequently ridiculed by the police when attempting to file a police report. However, the RPD found that it was not "persuaded that the police refusing to take [Mr. Balogh]'s statement, while discriminatory, raises the act of discrimination to one of persecution." This is because Mr. Balogh had other avenues of redress at his disposal, such as the many oversight bodies mandated to investigate complaints against the police.

[39] Finally, regarding Attila Patrik Balogh, Ms. Varga and Mr. Balogh's son, the RPD found that insufficient credible evidence was presented to demonstrate that the school's assessment of his learning abilities was racially motivated.

B. *State Protection*

[40] The RPD then proceeded to address the Applicants' argument that state protection was not, and would not, be available to them should they return to Hungary.

[41] The RPD came to the conclusion that the Applicants had not rebutted the presumption that state protection is available to them in Hungary. Besides finding the vast majority of the Applicants' claims were not credible, the RPD grounded this finding in Mr. Balogh's failure to exhaust the avenues of redress at his disposal when the police refused to take his statement following the 2011 incident, which the RPD found to be a random attack.

[42] The RPD noted that local failures by authorities to provide protection do not equate to a failure of the state as a whole to protect its citizens. In fact, the RPD cites Justice Annis' decision in *Mudrak v Canada (Citizenship and Immigration)*, 2015 FC 188 [*Mudrak*] where he notes that there is an obligation to complain to the applicable oversight agencies if the police do not provide adequate assistance. Therefore, since the Applicants did not avail themselves of all the resources available to them domestically in this case, they cannot qualify as refugees.

[43] Moreover, the RPD went on to consider Hungary's general ability to protect persons like the Applicants. As noted by the RPD, pursuant to s 96 of the *IRPA*, "personal targeting or past persecution is not required in order to establish a risk. Rather, persecution can be established by examining the situation of similarly situated individuals" citing *Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 at para 19.

[44] Following its analysis of the protection available to Roma in Hungary, the RPD concluded that “protection is operationally adequate.” Citing a BBC report in the National Documentation Package [NDP], which acknowledged that the Roma are still discriminated against in Hungary and that some police officers continue to hold anti-Roma attitudes, the RPD held that the dissolution of the Hungarian Guard in 2013 as well as the political shift by the right-wing Jobbik Party has significantly reduced the threat to Roma in Hungary. Beyond these actors, the RPD further noted that:

There is no documented evidence before the panel to suggest, or to establish, that other nationalist or right-wing groups have been targeting Roma today as they were in the years leading up to the claimants’ departure, or that these groups are supported by the State.

[45] The RPD was of the opinion that the Applicants had failed to discharge their onus to provide clear and compelling evidence of Hungary’s inability or unwillingness to protect them pursuant to the presumption of state protection as recognized by the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724-725. The RPD further specified that there is a heavy onus in cases such as the present where a refugee claimant alleges a failure of state protection in a “functioning democracy” such as Hungary, citing *Camacho v Canada (Citizenship and Immigration)*, 2007 FC 830 at para 10.

IV. ISSUES

[46] The issues to be determined in the present matter are the following:

1. Did the RPD err in its assessment of the credibility of the Applicants’ claims?

2. Did the RPD err in its analysis of the adequacy of the state protection available to the Applicants in Hungary?

V. STANDARD OF REVIEW

[47] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[48] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of

central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[49] There was no disagreement between the parties that the applicable standard of review in this matter was the standard of reasonableness.

[50] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Haastrup v Canada (Citizenship and Immigration)*, 2018 FC 711 at para 9; *Aissa v Canada (Citizenship and Immigration)*, 2014 FC 1156 at para 56 concerning the review of a decision-maker's credibility finding, and see *Pava v Canada (Citizenship and Immigration)*, 2019 FC 1239 at para 22; *Canada (Citizenship and Immigration) v Neubauer*, 2015 FC 260 at para 11 concerning the review of a decision-maker's assessment of state protection.

[51] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it “bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and “takes its colour from the context” (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints “dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt” (*Vavilov*, at para 90). Put in another way, the Court should

intervene only when “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker’s reasoning process; and (2) untenability “in light of the relevant factual and legal constraints that bear on it” (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[52] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

Convention refugee

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,

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

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that

Définition de réfugié

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) 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 ;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

country.

Person in need of protection

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

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

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

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

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or

Personne à protéger

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

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

(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) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé

medical care

adéquats.

VII. ARGUMENTS

A. *Applicants*

[53] The Applicants submit that the RPD unreasonably assessed: (1) their credibility claims by misstating and ignoring key evidence; and (2) the adequacy of the state protection available to them in Hungary by preferring general evidence over the specific evidence at bar and by finding that Hungary is a fully functional democracy. For these reasons, they submit that this Court should allow this judicial review and remit their case back for redetermination.

(1) Credibility of the Applicants' Claims

[54] The Applicants argue that the RPD unreasonably assessed the evidence at hand when evaluating the credibility of their claims. Notably, they argue that the RPD: (1) misstated Ms. Varga's statements at Box 42 and Box 43 of her refugee claim; (2) improperly rejected and ignored the psychological evidence at hand; (3) unreasonably assessed the medical reports concerning the 1998 incident; (4) unreasonably grounded its rejection of the 2009 incident on peripheral and circumstantial plausibility findings; and (5) failed to fully assess the evidence concerning the racial motivations behind the vandalization of the home of Mr. Balogh's sister.

[55] Firstly, the Applicants argue that the RPD "completely misstated" Ms. Varga's answers at Box 42 and 43 of her refugee claim. Indeed, the RPD claims that Ms. Varga stated at Box 42 that "I am not afraid of anyone, I just want to let you know that there are no resources to live

there,” and at Box 43 that she is here because “[...] in my country nothing exists there is no food, there are no jobs [...] I cannot work [...].” The Applicants point out that this is mentioned nowhere in Ms. Varga’s refugee claim. In fact, they note at Box 42 that she is afraid to return to her country due to “Racist Hungarian Guards and Skinheads” and at Box 43, that she came to Canada because:

[...] I was persecuted. I have been abused and was 17 weeks pregnant and had a miscarriage. I don’t want to go back and would rather die. I fear for the life of my child.

[56] The Applicants submit that this misstatement of the evidence alone justifies allowing this judicial review since this perceived inconsistency was a fundamental ground in the Decision concerning the credibility of the Applicants’ claims. The Applicants cite in support of their position this Court’s decision in *Cuevas Cornejo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1184 at para 6.

[57] Secondly, the Applicants argue that the RPD improperly rejected and ignored the abundance of psychological evidence at hand in this case. The Applicants state that it was improper for the RPD to ground its rejection of the psychological evidence largely on the basis that the trauma history came from Ms. Varga herself, as this is inconsistent with this Court’s jurisprudence. See *BC v Canada (Minister of Citizenship and Immigration)*, 2003 FC 826 at para 19. Moreover, the Applicants argue that the RPD erred by disregarding the psychological evidence largely for formalistic reasons; notably the report by Dr. Akeef which the RPD disregarded because it failed to clearly note his area of practice. The Applicants state that it is self-evident that Dr. Akeef administered the psychiatric treatment referred to in his report. Finally, the Applicants argue that the abundance of psychological evidence overwhelmingly

shows that Ms. Varga suffers from PTSD and severe depression as a result of the alleged persecution in Hungary.

[58] Thirdly, the Applicants argue that the RPD unreasonably found that the Applicants' claims concerning the violent attack on Ms. Varga in 1998 were implausible by focusing on what was not in the reports rather than what was. They argue that it is unreasonable for the RPD to completely ignore the fact that the reports confirm Ms. Varga's account of the 1998 incident and to, instead, arbitrarily focus on the fact that the reports do not mention that Ms. Varga was unconscious and transported by ambulance. The Applicants say that this failure to acknowledge the evidence that corroborates their claims is unreasonable. They submit that this Court has held that a failure to acknowledge vital and important evidence constitutes a reviewable error, citing *Johal v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1760 at para 10.

[59] Fourthly, the Applicants argue that the RPD unreasonably grounded its rejection of the 2009 incident on peripheral and circumstantial plausibility findings, notably the time it took for someone to come to Ms. Varga's aid and whether or not she screamed for help. The Applicants argue that the letters provided were not afforded proper weight, given the fact that they clearly corroborate Ms. Varga's account of the 2009 incident.

[60] The Applicants also say that the RPD failed to fully assess the evidence concerning the racial motivation behind the vandalization of Mr. Balogh's sister's home. Though it is clear that the vandalization was a racially motivated hate crime, given the swastika and writing stating "[y]ou Gypsies, you will die," the police report simply classified it as a property crime and

refused to investigate the matter further. As such, the Applicants argue that the RPD acted unreasonably by focusing on whether the house was inhabited or not, instead of the racial motivations behind the crime and the failure of the police to further investigate. This makes the RPD's credibility finding with regard to the vandalization incident unreasonable.

(2) State Protection Analysis

[61] The Applicants submit that the RPD's analysis of the adequacy of the state protection available to them was unreasonable given the systematic failure of the police to aid and protect them in this case. The RPD improperly focused on general evidence to assess whether the state protection in Hungary is sufficient to protect the Applicants from persecution, while ignoring specific evidence in this case directly contradicting its findings. In any event, the Applicants also submit that the RPD based its finding that adequate state protection exists in Hungary on the fact that Hungary is a fully functional democracy, which the Applicants state is an unreasonable conclusion given the overwhelming contradictory evidence.

[62] Firstly, the Applicants say that they presented several instances where the police refused to assist them for discriminatory reasons. The Applicants point to the police's ridicule of Mr. Balogh and their refusal to assist him following the 2011 incident where he was attacked and urinated on by Hungarian Guardists, which was accepted as credible by the RPD. This is direct evidence of the inadequacy of state protection available to them in Hungary and this Court has been clear that state efforts to ameliorate discrimination, such as oversight bodies, are not sufficient to establish the likelihood of state protection when the evidence demonstrates a pattern

of unwilling or problematic state protection. See *Elcock (Milkson) v Canada (Minister of Citizenship and Immigration)*, [1999] 175 FTR 116 at para 15.

[63] Moreover, the Applicants submit that the police report concerning the vandalism of the home of Mr. Balogh's sister - in which the police classified the vandalism as a property crime rather than a hate crime and refused to further investigate the matter - is further proof of inadequate state protection in Hungary. In fact, the Applicants note that it is entirely consistent with item 4.3 of the NDP, which recognizes that hate crimes against the Roma are rarely prosecuted.

[64] As such, the Applicants state that the RPD's assessment of the state protection available to them is unreasonable as it fails to properly address the critical specific evidence at hand, which contradicts the RPD's findings grounded in more generalized evidence about the state of affairs in Hungary.

[65] Finally, the Applicants argue that the RPD's finding that adequate state protection is available to them in Hungary because that country is a fully functional democracy is flawed. The Applicants argue that the evidence in the NDP, when taken as a whole, clearly demonstrates that democratic norms and the rule of law are not strong in Hungary. The Applicants cite the fact that the European Union has sanctioned Hungary for a regression in the rule of law, the lack of free and fair elections, the state's restriction of media and political speech, and inefficacy in protecting and fostering the Roma. Moreover, the Applicants cite the findings of the European

Court of Human Rights and the Venice Commission to the effect that Hungary's non-compliance with its obligations under international law has risen significantly in recent years.

B. *Respondent*

[66] The Respondent argues that the RPD's findings concerning the credibility of the Applicants' claims and the adequacy of the state protection in Hungary are reasonable and are owed considerable deference by this Court.

(1) Credibility of the Applicants' Claims

[67] The Respondent notes that the inconsistencies and implausibilities in the Applicants' claims could not be overcome by the medical evidence of Ms. Varga's psychological treatment. In essence, the Respondent argues that, once the main incidents in the Applicants' claims were found not to be credible, there was no substance left to support Ms. Varga's psychological diagnosis.

[68] Though the Respondent acknowledges that there is some confusion in the Decision concerning Ms. Varga's statements at Box 42 and Box 43 of her refugee claim, the Respondent notes that there is still clear evidence of inconsistencies between Ms. Varga's statements at the port of entry, and her PIF and refugee claim. In fact, regardless of the contents of her statements at Box 42 and Box 43 of her refugee claim, the Respondent notes that it remains clear that Ms. Varga stated that she was entering Canada to visit a friend named Fauriss Kabeya and she

had no fear of returning to Hungary because she had no problems there despite being Roma. These clear inconsistencies in the Applicants' narrative undermine the credibility of their claims.

[69] Furthermore, the Respondent states that the Applicants have the onus of demonstrating that certain effects are caused by the alleged persecution. They have failed to do so in this case. The Respondent notes that the medical evidence fails to show the cause of the cited trauma. Similarly, the Respondent states that the medical reports concerning Ms. Varga's alleged miscarriage in 1998 fail to demonstrate that it was caused by a group of Hungarian nationalists.

(2) State Protection Analysis

[70] The Respondent argues that, since the RPD found that most of the Applicants' claims, and the specific evidence related to those claims, were not credible, the RPD had to rely mostly on evidence concerning the general situation for Roma in Hungary.

[71] The Respondent notes that the Applicants have the onus of demonstrating that they exhausted all reasonable avenues of protection in their country and that state protection was subsequently inadequate. The Respondent highlights that this is a high onus, notably in cases of democratic countries like Hungary. As such, given the Applicants' failure to demonstrate that all reasonable avenues of state protection were exhausted, the RPD's finding was reasonable.

[72] Moreover, the Respondent points to the fact that the RPD based its Decision concerning the adequacy of the state protection in Hungary on this Court's jurisprudence, notably citing: *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004; *Mudrak*, above; *Balogh v*

Canada (Citizenship and Immigration), 2018 FC 426; and *Venter v Canada (Citizenship and Immigration)*, 2018 FC 674.

[73] In sum, given the serious inconsistencies and implausibilities in the Applicants' claims, their failure to demonstrate that they exhausted all reasonable avenues of state protection in Hungary, and the significant amount of jurisprudence recognizing the adequacy of state protection in Hungary for Roma, the Respondent submits that this application for judicial review should be dismissed.

VIII. ANALYSIS

[74] Roma cases, inevitably, continue to be problematic for the RPD and the Court. There is agreement that Roma face general discrimination in Hungary. However, general discrimination is not sufficient to establish the need for ss 96 and 97 protection in Canada. In the present case, the RPD made it clear that:

it is not in dispute that Roma face discrimination in Hungary. However, what was at issue in these claims, was whether the claimants could credibly establish their allegations of persecution, and a lack of state protection.

[75] In the case of Ms. Varga, the RPD found that she was unable to establish that the central event in her claim had occurred:

[61] Thus, on the basis of its credibility finding, that the testimony was inconsistent, contradictory and implausible, the panel finds that the credibility of the principal claimant's allegation, that she was raped by Hungarian Guards on August 25, 2009, is seriously undermined. Accordingly, the panel finds that there is valid reason, to doubt, and to reject the principal claimant's allegation, that on August 25, 2009, members

of the Hungarian Guard attacked her outside of the building where her brother and sister-in-law lived. The panel also doubts, and rejects, the principal claimant's allegation that a member, or members, of the Hungarian Guard raped her during the attack.

[76] In addition, the RPD found that Ms. Varga was unable to establish that any other incidents she had experienced rose to the level of persecution:

[64] The panel has no doubt, that the principal claimant has experienced the type of discrimination, and likely, harassment that the documentary evidence indicates many Roma are subjected to. She, herself, described the discrimination she received as being of the type that Roma generally face. The panel is not persuaded, that the principal claimant has presented sufficient credible evidence to establish that the discriminatory incidents she experienced, had risen to the level of persecution.

[77] In the case of Mr. Balogh, the RPD found that he was able to establish that a single attack in the fall of 2011 was credible:

[70] The second time he was attacked, the adult male claimant testified, that he did go to the police, however, they laughed at him and refused to take a report. This time, his attackers had urinated on him. Counsel for the claimants described the adult male claimant as being appropriately emotional, when recounting the experience. He testified, that the cavalier reaction of the police to his experience caused him such distress, that he cried for two days. It was the turning point for him, and the impetus for the decision to come to Canada. The panel accepts that, if true, this would be a clear incident of discrimination, as the police would have treated the adult male claimant differently because of his ethnicity. This, in the panel's view, is likely the single credible incident of the incidents alleged by the adult male claimant.

[78] Notwithstanding these findings, the RPD concluded that neither Ms. Varga or Mr. Balogh had rebutted the presumption of adequate state protection:

[111] It is in the context of these divergent views on state protection that the panel must attempt to decide the question of whether the claimants have displaced the presumption of state protection. In the instant case, the panel finds, on a balance of probabilities that the claimants have not credibly established that they have met their evidentiary burden, with regard to their attempts to obtain state protection. The principal claimant claimed that she went to the police to report the beating, after which she miscarried, but was rebuffed. She claimed that her mother tried to report the August 25, 2009, incident, but she too was rebuffed. Given the panel's finding, concerning that first police report and its credibility findings regarding the rape, the panel finds that there is little credible and trustworthy evidence before it to support a conclusion that the principal claimant made attempts to obtain state protection, but was unsuccessful.

[112] While the panel accepts that the adult male claimant did likely seek to obtain state protection after the second attack, it is also clear, that he did nothing further about enforcing his rights. He did not complain to any of the bodies set up for that purpose. He simply decided to come to Canada, which he did.

[113] Thus, in the case of the principal claimant, it is not clear to the panel that she made any attempt to obtain state protection. Accordingly, she does not meet the stipulation set out in Ruszo, namely, that a claimant must take reasonable steps to exhaust all courses of action reasonably available in the home state, prior to seeking refugee protection abroad.

[114] With respect to the adult male claimant, the question is whether the refusal of the police to investigate the incident, when he was urinated on, constitutes a failure of state protection, such that it can be said, that he could have no prospect of obtaining state protection in the future.

...

[117] The panel concludes, after careful consideration of all of the evidence, that the claimants have not rebutted the presumption of state protection. Indeed, the principal claimant has not reliably established that she made any effort to obtain it, and the adult male claimant has not taken advantage of the existing police oversight agencies to further his complaint. It was open to him, to take his complaint to one of the existing bodies, he did not.

[Citations omitted.]

[79] With regards to the minor Applicant, the Applicants were not able to establish any ss 96 or 97 risk:

[73] The claimants may well be correct in their assertions. However, it does appear from the report that there was a comprehensive testing of Patrick's abilities across a spectrum of tasks. The assessment reveals that Patrick functioned adequately at some tasks, and less so in many cognitive areas. There also appears to be the complicating factor of age, as he appeared to have been older, and bigger, than the students who were in his class.

[74] Notwithstanding the views of the claimants, without a comparator assessment, the panel is not prepared to find that the Hungarian assessment demonstrates the inherent racism of Hungarians towards Roma children, and Patrick in particular.

A. *Nikoletta Varga*

[80] The credibility findings of the RPD with respect to Ms. Varga are unreasonable, *inter alia*, for the following reasons.

(1) Misstatement of Evidence at Box 42 and Box 43

[81] The RPD seriously misstates Ms. Varga's evidence in Box 42 and Box 43 of her refugee claim form. Ms. Varga did not allege that she had no fear of persecution in Hungary and no fear of returning to Hungary. Instead, she made it clear in her Box 42 and Box 43 responses that she was afraid of "Racist Hungarian Guards and Skinheads" and that she came to Canada "because [she] was persecuted," was "abused," and "was 17 weeks pregnant and [she] had a miscarriage." She also said that she did not "want to go back and would rather die."

[82] In my view, the RPD's serious misstatement of the evidence on a matter central to its Decision vitiates its whole credibility finding with regard to Ms. Varga because it bleeds into the remainder of the Decision. The fact that the CBSA officer at the port of entry noted that Ms. Varga said she had no problems in Hungary and was not afraid to return does not cure the RPD's strong reliance on the misstated answers in Box 42 or Box 43 that were not made by Ms. Varga; nor does it provide sufficient context to allow the Court to determine if she truly understood what she was being asked by the officer.

[83] In any event, the RPD does not address this sharp discrepancy between the officer's notes and Ms. Varga's Box 42 and Box 43 answers. The Court also has no way of knowing if the RPD's general conclusions on Ms. Varga's credibility would have been the same if it had not misstated what she had written in Box 42 and Box 43 of her refugee form.

(2) Application of the Gender Guidelines

[84] Ms. Varga did not initially disclose her rape to CBSA, or in her first PIF. However, she amended her narrative, and there is evidence that she discussed the sexual abuse she had experienced with her medical professionals. Ms. Varga's initial reluctance and failure to disclose her rape at the port of entry and otherwise was not reasonably dealt with in accordance with the Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution, issued November 13, 1996 [Gender Guidelines] and Court jurisprudence. See *Lumaj v Canada (Citizenship and Immigration)*, 2012 FC 763 at paras 65-66:

[65] Second, the RPD failed to adequately take into account the Principal Applicant's testimony that in Albania rape is shameful and brings dishonour to the victim's family. [...] The RPD has, in

my view, only paid lip service to the Gender Guidelines which specifically note that

Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their "shame" to themselves and not dishonour their family.

[66] This is not to say the RPD could not have found the account of the rape not credible. However, it was required to give more than passing consideration to the Applicant's explanation with reference to the Gender Guidelines. See *Khon*, above, at paragraph 20.

(3) Failure to Address the Evidence of Counselling and Medical Help

[85] The RPD faults Ms. Varga for not seeking psychiatric treatment from the Canadian Centre for Victims of Torture after she was advised of its existence at her 2013 psychiatric assessment, and draws a negative inference from this failure. Nevertheless, the RPD failed to adequately address the counselling and medical help that Ms. Varga did seek and obtain from other organizations between 2013 and 2017.

(4) Analysis of Letter from Dr. Akeef

[86] The RPD unreasonably discounted the letter from Dr. Akeef (Ms. Varga's Hungarian doctor) on the basis that it does not state how Ms. Varga was referred to him nor his specialty. This approach neglects that the letter solidly confirms the 2009 rape incident.

(5) Failure to Mention 2017 Report from the Centre for Addiction and Mental Health

[87] The RPD discounts the 2013 Centre for Addiction and Mental Health assessment because it does not contain evidence of a clinical workup nor a diagnostic methodology, and because Ms. Varga did not disclose her rape at her first encounter with a medical professional in Canada. In doing so, the RPD failed to mention the 2017 report that addresses the RPD's concerns.

(6) Analysis of the Failure to Disclose Rape

[88] The RPD is generally dismissive of the mental health reports and diagnoses because they fail to consider why Ms. Varga did not disclose that she had been raped to the CBSA officer at the port of entry. Ms. Varga gave clear testimony that she had problems disclosing her rape to anyone, except her mother. In fact, the medical health diagnoses confirm that Ms. Varga has suffered from PTSD and depression since she was attacked in Hungary in 2009, that she has sought psychiatric help in Hungary and Canada, and has been taking medication prescribed for her condition.

(7) Medical Reports Concerning 1998 Incident

[89] The RPD ignores evidence from Hungarian medical experts who examined her physically on the day after the 1998 attack (as well as a few weeks later). This evidence confirms her account that she had been beaten and was hit in the head.

(8) Assessment of Rape Incident

[90] The RPD's assessment of the central rape incident is based upon circumstantial implausibilities that have no basis in evidence or otherwise and ignores the evidence in the reports that substantiate her claim.

B. *Attila Balogh*

[91] Mr. Balogh based his claim upon a series of letters that threatened him with physical harm as well as two incidents of violence, one in August 2010 when five men dressed in black beat him, and another in the fall of 2011 when several men in a car harassed and beat him.

[92] The RPD found Mr. Balogh's testimony about the letters "to be convoluted and implausible, and not in accord with what might reasonably be expected in the circumstances."

The RPD noted at para 67:

The panel assessed the plausibility of the adult male claimant's testimony and explanation about the letters. For the following reasons, the panel finds, that the testimony is not plausible. The adult male claimant testified, that he last lived with his mother sometime before 2011. He lived an hour away with his family, his sister, and her family. He testified that his mother began to receive

letters addressed to him, after he had come to Canada, and has continued to receive them for five years. As the claimant was already in Canada, when his mother began to receive letters, the panel finds that it is not plausible that the letter-writer(s) would address him by name. The panel infers, that if [the] letter-writer(s) knew him well enough to know his name, then they also likely knew that he had left Hungary, therefore, it is unlikely, that they would have begun to send letters addressed to him at his mother's home. The panel concludes that, on a balance of probabilities, the adult male claimant and his mother did not receive harassing letters, and that the letters were produced for the sole purpose of bolstering his claim for refugee protection.

[93] As regards the violent attack in 2010, Mr. Balogh testified that he did not report the incident to the police because his doctor advised him not to. The RPD found this explanation improbable:

[68] The adult male claimant described two violent incidents that he alleged took place in August 2010, and in the fall of 2011. In the first incident, he was walking home when he saw four or five people in black. Hoping to avoid them, he crossed the street, but they too crossed the street. One attacker stomped on his hand, damaging a finger. The assailants uttered racial slurs as they beat him. The adult male claimant testified that he did not report the incident to the police, because the doctor who attended to him advised him not to. He testified that when he told the doctor what had happened to him, the doctor told him that the police would not believe him. So the adult male claimant went home without filing a police report.

[69] The panel considered his testimony, in light of its specialised knowledge gleaned from hearing claims against Hungary. The panel is aware that in instances of physical assaults on patients, medical personnel are required to notify the police. The reporting is not usually left to the patient. Whether the police respond (it appears that it is usual for them to do so) or take further action, is a different matter. In light of its understanding of the practice attendant upon circumstances that the claimant described, the panel concluded, that while it is possible that the doctor might have attempted to deter the adult male claimant from filing a police report, it is not probable that he did. The panel finds that the credibility of the adult male claimant is, therefore, undermined by his claim that the doctor told him not to file a police report.

[94] As regards the 2011 attack, however, the RPD accepted that this had been established, but rejected that it amounted to persecution on the following grounds:

[70] The second time he was attacked, the adult male claimant testified, that he did go to the police, however, they laughed at him and refused to take a report. This time, his attackers had urinated on him. Counsel for the claimants described the adult male claimant as being appropriately emotional, when recounting the experience. He testified, that the cavalier reaction of the police to his experience caused him such distress, that he cried for two days. It was the turning point for him, and the impetus for the decision to come to Canada. The panel accepts that, if true, this would be a clear incident of discrimination, as the police would have treated the adult male claimant differently because of his ethnicity. This, in the panel's view, is likely the single credible incident of the incidents alleged by the adult male claimant.

[71] The panel is aware, that a single incident may well give rise to persecution. However, the panel is not persuaded that the police refusing to take the adult male claimant's statement, while discriminatory, raises the act of discrimination to one of persecution. The adult male claimant lived in Budapest, and there were other avenues of redress available to him, such as the Independent Police Complaints Board, the Parliamentary Commissioners' Office, the Equal Treatment Authority, the Roma Police Association, the Complaints Office at the National Police Headquarters; all of which bodies are mandated to investigate complaints against the police that he seemed not to have considered.

[95] As regards the first violent attack in 2010, the RPD's logic appears to be that because doctors are supposed to notify the police, it is unlikely that the doctor who treated Mr. Balogh would have deterred him from going to the police because they would not believe him. In my view, I see no connection, or contradiction, between a doctor telling a Roma patient that there is no point in him filing a report as a Roma because the police would not believe him and the doctor's own obligation to file a police report. Indeed, the doctor's view was confirmed by the second incident when Mr. Balogh went to the police and was rebuffed and ridiculed, an incident

that the RPD found credible. In my view, this is not a reasonable ground to question Mr. Balogh's account of the 2010 incident. It is notable that the RPD does not examine or discuss Mr. Balogh's account of the incident itself and, instead, opts to disbelieve him because a doctor told him the police would not believe him, which given Mr. Balogh's other evidence about the police reaction to the second incident, is a reasonable assumption.

[96] This makes no sense to me and amounts to a plausibility finding based upon spurious reasoning. See *Shabab v Canada (Citizenship and Immigration)*, 2016 FC 872 at para 41; *Saeedi v Canada (Citizenship and Immigration)*, 2013 FC 146 at para 30. Had both violent events been accepted, a different conclusion on persecution might have been made.

C. *State Protection*

[97] In relation to both Ms. Varga and Mr. Balogh, the RPD found that they had failed to rebut the presentation of state protection in Hungary.

[98] The RPD's state protection analysis can be faulted in several ways, but it seems to me that the following are the most serious concerns that arise in this case.

(1) Evidence of Police Inaction in this Case

[99] There is no suggestion here that the Applicants have not turned to the police in Hungary for help. The evidence is clear that, when they have, the police have not responded with appropriate investigations into what were clearly racially motivated hate crimes against the

Applicants. In the case of Mr. Balogh, the police simply laughed at him when he reported a violent, race-based attack.

(2) Corroboration of Claims by NDP Evidence

[100] Reports in the NDP before the RPD show that Hungarian police regularly ignore hate crime and skinhead attacks against Roma. NDP Item 4.3 informs as follows:

Although civil rights are protected and regulated by law, there are problems with the enforcement of these provisions. Perpetrators of hate crimes committed against vulnerable groups (primarily the Roma, the LGBTQ community, refugees, immigrants and Jews) are often not prosecuted at all, or they are convicted of lesser crimes. In contrast, perpetrators of Roma origin are frequently accused of committing a hate crime against Hungarians. These cases are launched and finished with striking efficiency compared to procedures involving a racist crime committed against the Roma.

[101] This corroborates the Applicants' evidence on their experience with the police.

NDP Item 2.7 – the UNHCR Committee observations – confirms the same picture, as does the most recent ECRI Report. The RPD simply ignores evidence before it that contradicts its own conclusions. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35 at paras 14-17.

(3) Existence of Oversight Bodies

[102] The RPD relies heavily upon the existence of oversight bodies that have been rejected by this Court in the past. Indeed, the RPD concluded at paras 71 and 117, that:

[71] [...] The adult male claimant lived in Budapest, and there were other avenues of redress available to him, such as the

Independent Police Complaints Board, the Parliamentary Commissioners' Office, the Equal Treatment Authority, the Roma Police Association, the Complaints Office at the National Police Headquarters; all of which bodies are mandated to investigate complaints against the police that he seemed not to have considered.

...

[117] The panel concludes, after careful consideration of all of the evidence, that the claimants have not rebutted the presumption of state protection. Indeed, [...] the adult male claimant has not taken advantage of the existing police oversight agencies to further his complaint. It was open to him, to take his complaint to one of the existing bodies, he did not.

[103] This kind of reliance on oversight bodies has been regularly rejected by this Court. See, for example, *Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 at paras 76-79; *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 1220 at paras 18-21; and *Katinszki v Canada (Citizenship and Immigration)*, 2012 FC 1326 at paras 14-15.

(4) Democratic Institutions in Hungary and Presumption of State Protection

[104] The RPD, in concluding that Hungary is a fully-functioning democracy so that the presumption of adequate state protection must be given full force in this case, ignores all recent evidence that Hungary is no such thing, as the RPD's own NDP package makes clear. Item 4.3 advises as following:

Although leaders of hybrid regimes do not necessarily aim to dismantle the framework of democratic institutions in their country, they do seek to place constraints on liberal democracy. Aiming to depict their state order and its institutions as functioning democracies, in reality, they are merely maintaining the spectacle of pluralist competition. The case of Hungary where, under Viktor Orbán's leadership, checks and balances are under threat as is horizontal accountability, is representative of this phenomenon.

Rampant clientelism, growing anti-Western sentiments and the ongoing assault of civil society are also characteristic of the trend toward illiberalism.

As a result of Prime Minister Orbán's illiberal leadership, Hungary's democratic deficits have become even more entrenched during the period under review. By 2014, the reorganization of the country's constitutional order had been completed, and key positions throughout government institutions had been filled by Orbán loyalists. The government weakened and in some cases destroyed the autonomy of the judiciary, the Constitutional Court, the Office of the Prosecutor General, the National Bank of Hungary and local self-governments. The expansion of government influence over the media shifted into high gear as well. Elections are free but not fair. After its overwhelming victory in the 2010 elections Fidesz has introduced a new electoral system, since then the elections are free but not fair.

[105] In addition, NDP Item 2.2, a Freedom House, Nations in Transit Report makes it clear that the European Court of Human Rights and the Venice Commission report as follows:

Hungary's noncompliance with its obligations under international law has risen significantly during the past years, and implementation of several important judgments by the European Court of Human Rights (ECtHR) is still pending.

...

Recent developments confirm the existence of a "reverse state capture" in Hungary, where politics and a strong state set up corruption networks and use public power and resources to reward friendly oligarchs. While in 2017 several court decisions contributed to an increased transparency around corruption allegations, high-level corruption remains uninvestigated and unpunished due to political control over the State Prosecutor's Office.

...

With the governing parties' ever-growing media dominance, an increasingly uneven political playing field, and the misuse of public resources for political and private purposes, Hungary's political system inches further away from constitutional and liberal democracies and closer toward hybrid regimes in the region.

[Citations omitted.]

[106] These highly relevant and important matters that contradict the RPD's conclusions on this issue are entirely overlooked by the RPD in its state protection analysis. That analysis and the RPD's conclusions are unreasonable.

IX. CERTIFICATION

[107] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-515-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-515-19

STYLE OF CAUSE: NIKOLETTA VARGA ET AL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 13, 2019

JUDGMENT AND REASONS: RUSSELL J.

DATED: JANUARY 22, 2020

APPEARANCES:

James Gildiner FOR THE APPLICANTS

Sally Thomas FOR THE RESPONDENT

SOLICITORS OF RECORD:

James Gildiner FOR THE APPLICANTS
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario