Federal Court  Cour fédérale

Date: 20101012

Docket: IMM-1899-10

Citation: 2010 FC 1004

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 12, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KAROLYNE BORS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] Jurisprudence is evaluated throughout history in the manner it treats the human condition, as is a country judged in the manner it treats its minorities (summary of the writings of Emile Zola (1840-1902) on the system of justice and his cry of conscience for a voice of the voiceless).

La jurisprudence est évaluée à travers l'histoire par la manière qu'elle traite la condition humaine, comme un pays est jugé par la manière qu'il traite ses minorités (résumé de l'œuvre

d'Émile Zola (1840-1902) à l'égard du système de justice et son cri de conscience qui évoque la voix de ceux qui sont sans voix).

II. Introduction

[2] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of the decision by the pre-removal risk assessment (PRRA) officer, rendered on February 17, 2010, that the applicant would not be subject to a risk of persecution or to a risk to her life if she were to be removed to her country of nationality within the meaning of sections 96 and 97 of the IRPA.

[3] The applicant and her family members are Roma and their ethnicity and their credibility were not disputed.

Situation of the Roma - History

> (Prior to the 21st century – based in large part on an article from the *Courrier international*, entitled [TRANSLATION] "Abandoned on the side of the road," dated November 12, 2009, as quoted by the respondent before the PRRA officer)

[4] It was approximately in the year 1000 that the Roma left India, where they were from originally, to go to Persia. (And, in a number of countries, as a result of a historical error, they were called gypsies because they were thought to have come from Egypt. This is as incorrect as the Aboriginal people of Canada being called Indians as a result of Christopher Columbus's error.) In the Balkans, the Roma were called by a name originally given to a sect of Manichean monks, Athiganoi or Atsiganos, from which came another group of names - Zingaro (in Italian), Tsigane (in French), Zigeuner (in German), Ciganie (in Slavic languages) and Cikani (in Czech).

[5] The question “who are the Roma?” was answered by chance in 1763 by a Hungarian theology student named Stefan Vali, who met several Indians, Malabars, in Leyden, Holland, where they were studying medicine. Vali was intrigued by their similarity to the Roma he had known in Hungary. He continued beyond these external similarities, writing down more than a thousand Malabar words they used, along with their meanings. When he returned to Hungary and discovered the meanings of the words among the Roma, he was surprised at the similarity of the two languages. Afterwards, linguists, historians and ethnologists confirmed the Indian origins of the Roma.

[6] The Roma reached the Balkans in around the 14th century. In dispersing throughout Europe, they adopted the religion of the majority of the European population. It was in Western Europe that their largest wave of migration occurred in the 16th century, from where some countries deported them to the African and American colonies.

[7] Up until the 19th century, the Roma were considered, in the Eastern European countries, to be people without freedom, often treated as slaves.

[8] Starting in 1930, they were victims of the racial policies of the Nazis by extermination and genocide. Of the 700,000 Roma living in Europe, 250,000 to 500,000 were deported and killed in gas chambers. For the Roma, this period is called Samudaripen, i.e. “the murder of all” in the Romani language.

[9] In 1982, Germany officially recognized its responsibilities toward the Roma. In France, in 1997, the President of the Republic referred to their situation in a ceremony in memory of the victims of the deportation.

[10] The documents, directly quoted in the list of 19 documents submitted to the PRRA officer, as listed by the respondent in his supplementary memorandum, show whether the situation has changed over recent years (this evidence is quoted by the Court below, as part of the analysis of the evidence).

[11] A *Macleans* article from September 10, 2009, elaborates:

> Hungary's Roma population is so afraid of attacks by right-wing groups that they have started protecting their neighbourhoods through nighttime patrols. Their fear is justified: six Roma have been murdered in violent assaults since last November. After a huge police investigation, four men, alleged Roma haters who carefully planned their crimes, were detained for the deadly attacks in late August.
>
> One of the worst attacks occurred in Tatárszentgyörgy last February. Erzsebet Csorba woke up to the sound of gunfire outside her house. She discovered her mortally wounded son not far from his firebombed house. Her grandson was nearby. "His whole small body was full with holes from the bullets," she told Voice of America. The child soon died.
>
> Many fear the violence directed at the nation's 660.000 Roma will continue, despite the arrests. For the poor ethnic minority, segregation and discrimination increased after the fall of Communism when unskilled and unemployed Roma tended to concentrate in rural villages. Life was cheaper than the cities, but with little chance of work.
>
> Tomás Polgár, a popular right-wing blogger, voices a common refrain among Hungarians: "They are criminals and they are a threat to us, the majority. They make more children, they're taking over." Ominously, he states, "It's a war." In June, Jobbik, a far-right party with a platform of getting tough on "Gypsy criminality," captured 15 per cent of the vote in European elections.

> The intimidation can be frightening. Viktória Mohácsi, a former Roma European politician, receives countless email threats. “I feel like I’m in a war,” she told a Dutch newspaper. While she isn’t sure if patrols of Roma areas are a good idea, she concedes there are few alternatives: “We can either set up an army or flee.”

[12] A *Reuters* article, entitled “As crisis deepens, Roma a powderkeg in Hungary,” from Wednesday, August 12, 2009, reports:

> …
>
> But in Hungary, both the crisis and the violence are particularly drastic. The country was the first nation in the European Union to turn to the IMF for help last year, and faces deep recession and mounting unemployment.
>
> The economic slowdown has especially hurt the Roma, who account for 6 to 7 percent of the population and find it hard getting jobs even in prosperous times.
>
> The crisis has reinforced social tensions, and the recent brutal attacks on the Roma have brought the country to the brink of open conflict, according to its president.
>
> "We know that the situation is tense to the point of explosion," Laszlo Solyom told a news conference this week, urging Hungarians to feel compassion for Roma, or gypsies: more than half a dozen, including children, have died in recent violent attacks.
>
> …
>
> “Employers seal the gates,” said Istvan Szirmai, an official at Hungary’s Labour Ministry. "They have the right to choose ... and they do not accept Gypsies."
>
> …
>
> [Emphasis added.]

[13] As regards state protection for the Roma in Hungary, it was reported as ineffective throughout the documentation submitted; according to the “Amnesty International Report 2009 – Hungary”:

> **Legal, constitutional or institutional developments**
>
> In June, the Constitutional Court rejected amendments to the civil code and penal code passed by parliament in November 2007 and February 2008 respectively. The amendments represented the fourth attempt by parliament since 1992 to change the law on hate speech. They would have criminalized incitement targeted against a minority group and allowed a maximum two-year prison sentence for anyone using inflammatory expressions about specific ethnic groups or offending their dignity. The Court considered these amendments to be unconstitutional as they would curtail freedom of expression.

[14] Furthermore, the article entitled “Racist Crime Wave - Hungary’s Roma Bear Brunt of Downturn,” dated February 24, 2009, explains:

> …
>
> ERRC director Kushen says that while the Hungarian government has made some efforts to address the issues of the social marginalization suffered by the Roma, not enough has been done and whatever programs are in place are not sufficiently funded. "It is a failure of political will to introduce programs that require a higher level of investment," he says, adding that officials are often unwilling to take the heat for supporting unpopular measures.
>
> On Tuesday Hungary's ombudsman on minority affairs, Erno Kallai, took the unprecedented step of addressing the national parliament about the spate of attacks on Roma families. "I strongly urge you to come up with an ethnic peace plan," he said. "Not hollow statements but concrete measures that can be implemented immediately and understood by the whole of society." He also criticized the police for failing to catch the perpetrators of Monday's murders.
>
> …

III. Facts

[15] The applicant, Karolyne Bors, was born on February 18, 1943, and is a citizen of Hungary.

[16] She is a widow with four children, one of whom died in 1987 and the other three live in Hungary. Two of her children have tried to obtain refugee status in Canada, namely, her daughter Erzsébet Kalànyos and her son Jànos Bors. Her grandsons are Christopher Rolland Nagy, Reno Nico Nagy and Gabor Kovacs.

[17] The applicant and her family are members of the Roma ethnic group.

[18] The applicant arrived in Canada with her family in February 2001. At that time she claimed refugee status with her family members.

[19] In October 2001, she returned to Hungary with her family members.

[20] In December 2001, the applicant returned to Canada and the family re-submitted their refugee claim.

[21] On July 17, 2002, the Refugee Protection Division (RPD) allowed the refugee claim of the applicant and her family.

[22] On February 10, 2004, the applicant and her family appeared before Citizenship and Immigration Canada (CIC) to show their intention of leaving Canada. Her daughter, Erzsébet Kalànyos, explained that her son, Reno Nico Nagy, was ill and that she wanted to have him treated in Hungary.

[23] On February 23, 2004, the applicant returned to Hungary. Also, the applicant alleges that her family had decided to return to Hungary to accompany her son, Jànos Bors, whose refugee claim had been rejected. Mr. Bors was gravely ill and, according to the family, he needed urgent care.

[24] On April 7, 2004, an application to cease refugee protection was filed with the RPD. The basis of the application was that the applicant and her family had again returned to Hungary.

[25] On June 28, 2004, the RPD allowed the application, resulting in the loss of refugee status for the applicant and her family members.

[26] Since their return to Hungary in 2004, the applicant alleges that she and her family have been the victims of violent physical attacks and insults from skinheads.

[27] The skinheads allegedly beat Jànos Bors a number of times. He purportedly fell into a coma after an attack by skinheads who allegedly set fire to his house by throwing Molotov cocktails at it. They also apparently shot at the house.

[28] The applicant was also apparently injured when the skinheads allegedly broke into her home and beat her. She was allegedly seriously injured while trying to defend her son. She was then purportedly hospitalized and had to have surgery.

[29] The applicant alleged that she could not return to Canada earlier because of her precarious state of health following the attacks by skinheads and because of financial difficulties.

[30] On October 29, 2009, the applicant returned to Canada with her grandson, Gabor Kovacs, her grandson's spouse and their minor child. She filed a refugee claim.

[31] The same day, the applicant's claim for refugee protection was determined to be ineligible under paragraph 101(1)(*c*) of the IRPA because of her prior claim with the RPD. The applicant and her grandson had to file a PRRA application.

[32] The negative PRRA decision was rendered on February 17, 2010. The officer found that the applicant had not discharged her burden of establishing that the state of Hungary was unable to protect her.

[33] The applicant filed a motion to stay her removal, which was scheduled for April 15, 2010. The motion was stapled to the application for leave and judicial review. The motion for a stay was granted by Justice Danièle Tremblay-Lamer on April 12, 2010.

IV. The impugned decision

[34] After analyzing all of the evidence, the PRRA officer found that there was no reasonable possibility of the applicant's persecution were she to return to Hungary.

[35] The PRRA officer found that the applicant had not discharged her burden of rebutting the presumption of state protection in her country. On this point, part of the PRRA officer's decision reads as follows:

[TRANSLATION]

> In this case, the significance of the discrimination against the "Roma," the presence of an extreme right group called the "Hungarian guards" and the marked increase of violence toward this community between January 2008 and September 2009 are not in dispute. The objective and recent documentary evidence such as was submitted by the applicant's representative shows the existence of these problems within Hungarian society. Despite the lack of evidence to establish that the applicant was a victim of violence and attacks because of her "Roma" ethnicity, the documentary evidence shows that, even so, she could have obtained state protection, although this protection may be imperfect. As set out in *Ward*, except in situations of complete breakdown of the state apparatus, the claimant must provide clear and convincing evidence that the state is unable to protect her. The applicant has not discharged her burden of proof. Hungary is a democratic country, a member of the European Union, which has a functioning judicial system and takes the necessary measures to protect its citizens, including its "Roma" minority.

(PRRA officer's decision, p. 5)

V. Issues

[36] (1) Did the PRRA officer err in her assessment of the documentary evidence on the protection of people from the Roma ethnic group in Hungary?

(2) Did the PRRA officer err in ignoring the evidence or failing to properly assess it?

(3) In the circumstances, does the discrimination against the applicant amount to persecution?

VI. The relevant legislative provisions and their interpretation

[37] The UN High Commissioner for Refugees (HCR) published a book entitled *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Reedited, Geneva, January 1992) (Handbook). This Handbook provides, among other things, guidance on the interpretation of section 96 of the IRPA. The Supreme Court itself emphasized the importance of the Handbook as an instrument for interpreting the Convention:

> [27] ...While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states. …

(*Canada* (*Attorney General*) *v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1)

[38] In *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, 128 D.L.R. (4th) 213, the Supreme Court referred to the Handbook in its analysis relating to the admission of a refugee:

> [46] ... Instead, as I noted, I believe the appellant is entitled to have his claim reheard before a Refugee Board in accordance with the guidelines of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*, the "UNHCR Handbook." As I noted in *Ward*, at pp. 713-14, while not formally binding upon signatory states such as Canada, the UNHCR Handbook has been formed from the cumulative knowledge available concerning the refugee admission procedures and criteria of signatory states. This much-cited guide has been endorsed by the Executive Committee of the UNHCR, including Canada, and has been relied upon for guidance by the courts of signatory nations. Accordingly, the UNHCR Handbook must be treated as a highly relevant authority in considering refugee admission practices. This, of course, applies not only to the Board but also to a reviewing court. [Emphasis added.]

[39] Recently, the Handbook was adopted and used formally by the Federal Court in *Gorzsas v. Canada (Minister of Employment and Immigration)*, 2009 FC 458, 346 F.T.R. 169.

[40] The following paragraphs of the Handbook are relevant:

> Persecution
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> …
>
> 52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.
>
> 53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.
>
> (c) Discrimination
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> 54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

> 55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved. [Emphasis added.]

VII. Parties' allegations

[41] The respondent submits that the applicant did not show that the PRRA officer erred in fact or in law. He submits that the decision is reasonable and that the documents filed by the applicant in support of her application do not raise any serious grounds that would warrant this Court's intervention in this case so as to set aside the PRRA officer's decision.

[42] The applicant submits that the PRRA officer erred in finding that there was insufficient evidence without giving weight to the testimonial evidence and without considering all the documentary evidence submitted for her attention to the effect that the Hungarian state does not provide effective protection to the Romani people.

VIII. Standard of review

[43] The standard of review applicable in this case is reasonableness. As explained by Justice Maurice Lagacé in *Pareja v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1333, [2008] F.C.J. No. 1705 (QL), the PRRA officer, in determining his or her findings on the pre-removal risks, essentially conducts an analysis of the facts submitted to him or her. Great deference is owed to these findings of fact:

> [12] The pre-removal risk assessment of the PRRA officer rests essentially on an assessment of the facts to which this Court must afford great deference. Accordingly, the standard of "unreasonableness" applies to the PRRA officer's findings of fact, and indeed the applicant does not dispute the appropriate standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[44] Therefore, this Court cannot intervene unless the PRRA officer's decision is unreasonable.

IX. Analysis

[45] The PRRA officer's decision involved two specific points: the lack of corroborative evidence in the record and the effectiveness of state protection in Hungary. On this basis, the PRRA officer found that there was no risk if the applicant were to return to her country of nationality.

(1) Did the PRRA officer err in her assessment of the documentary evidence on the protection of people from the Roma ethnic group in Hungary?

Portrait of the Roma in Hungary

> (The following five paragraphs, including the contents as seen in the document submitted to the PRRA officer "Hungary: Treatment of Roma; state protection efforts (2006–September 2009)" dated October 15, 2009, shows the official data describing the prevailing climate toward the Roma, supported by the 19 documents submitted directly and also for the attention of the PRRA officer by the applicant, as quoted by the respondent in his supplementary memorandum.)

[46] The Roma ethnic community is a large ethnic minority in Hungary:

> According to the Director of the Autonómia Foundation, NGOs such as the Roma Civil Rights Foundation (RPA), the Legal Defence Bureau for National and Ethnic Minorities (NEKI) and the Legal Counselling Office of the Roma Parliament have a better reputation than government organizations for assisting Romani victims of discrimination (22 Aug. 2009).). NGOs with legal expertise also provide anti-discrimination training for members of the judiciary (UN 4 Jan. para. 49). According to the HHC, organizations like NEKI and the RPA have "limited financial and human resources," which restricts the number of cases that

> they can take per year (HHC June 2009, 3). As of June 2009, a coalition of NGOs funded by the OSI was reportedly in the process of establishing a legal aid program for victims of hate crimes (*ibid.*). …

[47] Hungarian data protection laws prohibit the gathering of data disaggregated on an ethnic basis. Thus, concrete statistics on racially motivated violence specifically targeting the Roma are unavailable. According to Amnesty International (quoted in the document above), the increasing number of attacks against Romani individuals and their homes has created a climate of fear and intimidation in that community.

The Roma and the police

[48] According to a report from the European Commission Against Racism and Intolerance (ECRI) of the Council of Europe, Romani victims of violence are reluctant to report attacks directed against them for a variety of reasons, such as shame, fear of retribution or the perception that their complaint will not lead to positive action.

[49] Reports from the Council of Europe noted that there have been a number of cases of police brutality against the Roma. In 2008, an independent board of five legal experts was created by the Hungarian Parliament to provide recommendations to improve the work of the police.

[50] Similarly, the Hungarian government has taken a number of legal and institutional measures to improve the situation of the Roma. However, a May 2008 document published by the State Audit Office of Hungary indicated that resources "routinely failed to reach the groups with the greatest

needs." It is in this climate that the incidents involving the Roma occurred, which were revealed in the evidence given to the PRRA officer.

Standard of state protection

[51] In her decision, the PRRA officer found that even in the event that the applicant had been persecuted, [TRANSLATION] "she could have obtained state protection, although this protection may be imperfect" (PRRA officer's decision, p. 5). The officer pointed out that there are a number of measures in the Hungarian system to specifically protect the Romani community. The measures outlined by the officer include the arrest of four suspects following murders committed in the Romani community, the state of Hungary's general awareness of the climate of violence, the increasing number of police investigations, and police involvement in relation to the violence toward the Roma.

[52] As set out in *Ward*, above, the burden is on the applicant to rebut the presumption of the state's protection of its nationals by demonstrating that the applicant could not have obtained state protection. In *Carrillo v. Canada* (*Minister of Citizenship and Immigration*), 2008 FCA 94, 165 A.C.W.S. (3d) 146, the Federal Court of Appeal explained that evidence of an allegation that the state's protection of one of its citizens is inadequate or non-existent requires that the refugee:

> [38] … bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

[53] In support of her allegation that the state protection is inadequate, the PRRA officer had considerable documentary evidence filed, including a letter signed by Dezsö Nömös, Vice Chair of the Roma minority council of Szigetvár, dated October 27, 2009, which attests to the violent incidents that the Roma were victims of at that time.

[54] The PRRA officer has no obligation to mention or rebut each piece of evidence in her decision. It is within the PRRA officer's jurisdiction to give more weight to one part of the documentary evidence than to another. The decision must nevertheless reflect that this evidence was considered. In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), 157 F.T.R. 35, the Federal Court states that:

> [15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. …
>
> …
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada* (*Minister of Employment and Immigration*) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion; it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[55] In her review of the documentary evidence in relation to the actions taken by the authorities to protect the Roma, the PRRA officer selectively cited the following evidence only: an article from *Macleans* magazine, a short excerpt from a 2009 Amnesty International report, along with an article that appeared in *Time* magazine, and a BBC News article. The PRRA officer relied only on this evidence, comprising selective excerpts, to find on two occasions that after the arrest of suspects in August 2009, [TRANSLATION] "the attacks have apparently stopped" (PRRA officer's decision, p. 5) and that [TRANSLATION] "since these arrests in August 2009, the documentary evidence does not mention that such attacks took place" (PRRA officer's decision, p. 6).

[56] This finding, reiterated twice by the PRRA officer, shows an error in her review of the contradictory documentary evidence in the record.

[57] In light of the scope of the evidence as a whole, the PRRA officer could not have reasonably found that no other attack was committed against the Roma in Hungary after the period of January 2008 to August 2009. Nor does she explain why she rejected or failed to consider the contents of the letter from Mr. Nömös, dated October 2009, which states that [TRANSLATION] "… the Gypsies live in terror, they are afraid of attacks and murder. They no longer dare to go out" (Letter, translated from Hungarian, p. 2). On the date of the decision, it seemed premature, on the basis of the documentary evidence, to find that the incidents from January 2008 to August 2009 were a momentary and temporary increase in violence against the Roma.

[58] The PRRA officer must at least assess the meaningful evidence concerning the deterioration of living conditions for the Romani people. It was unreasonable for the PRRA officer to find that the attacks against the Roma have stopped in Hungary without explaining how she reached that finding. This finding is pivotal to making the decision, because a PRRA decision is used to determine whether there is a risk in removing an individual to his or her country of nationality and not whether there was a risk at the time he or she left for Canada.

Change in circumstances

[59] The PRRA officer stated that the applicant could have obtained state protection, even if this protection is imperfect. In listing the desired changes in the state of Hungary during the past few years, the PRRA officer seems to find that the circumstances in Hungary had changed. In his book, *The Law of Refugee Status*, Professor James Hathaway sets out the three conditions for there to be a finding of change in circumstances in a given country: the change in circumstances must be substantial, effective and durable, as specified by the applicant in his memorandum (James Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991, pp. 199 and following).

[60] In *Streanga v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 792, 2007 CarswellNat 2342, this Court dealt with state protection in the context of a PRRA application and the standard to meet for there to be effective protection in a given state:

> [15] The Applicant submits that the PRRA Officer has erred in viewing the legal test as one of "serious measures". The Federal Court in *Elcock v. Canada* (*MCI*), [1999] F.C.J. No. 1438 (T.D.) (QL), at paragraph 15, established, that for adequate state protection to exist, a government must have both the will and the capacity to effectively implement its legislation and programs:

> … Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.
>
> [Emphasis added.]

[61] In a context similar to the situation facing the Roma in Hungary, Justice Yvon Pinard, in *Balogh v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 809, 221 F.T.R. 203, pointed out that the evidence of improvement and progress made by the state is not proof that the current measures amount to effective protection:

> [37] … I am of the view the tribunal erred when it suggested a willingness to address the situation of the Roma minority in Hungary can be equated to adequate state protection. ...

[62] In *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35, Justice Luc Martineau also addressed the issue of state protection:

> [27] In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that he is "unable or, because of that risk, unwilling to avail [himself] of the protection" of his country of nationality or habitual residence (paragraphs 96(*a*) and (*b*) and subparagraph 97(1)(*b*)(i) of the *Act*). The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada* (*Minister of Citizenship and Immigration*), 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.). [Emphasis added.]

[63] Thus, it cannot be sufficient to show the changes and improvements in the Hungarian state, including a number of options for recourse and the possibility to obtain state protection. It still remains to be proven that the changes have been effectively implemented in practice. Proof of the state's willingness to improve and its progress should not be, for the decision-maker, a decisive indication that the potential measures amount to effective protection in the country under consideration. As the case law above shows, willingness, as sincere as it may be, does not amount to action.

[64] In *Babai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1341, 2004 CarswellNat 3439, the decision-maker was required to assess the contradictory documentary evidence that indicated a risk for the applicant:

> [22] The applicant submits that it is open to the PRRA Officer to make her own assessment of state protection. However, the PRRA Officer erred by ignoring voluminous documentary evidence that is highly corroborative of the applicant's claim that he will face persecution without hope of state protection should he be forced to return to Hungary. …

[65] In this case, the documentary evidence shows that the finding that Hungary's state protection of the Roma is effective is not unanimous among international organizations. For example, in 2009, the article "Racist Crime Wave – Hungary's Roma Bear Brunt of Downturn," above, quoted the director of the European Roma Rights Center (ERRC):

> ERRC director Kushen says that while the Hungarian government has made some efforts to address the issues of the social marginalization suffered by the Roma, not enough has been done and whatever programs are in place are not sufficiently funded. "It is a failure of political will to introduce programs that require a higher level of investment," he says, adding that officials are often unwilling to take the heat for supporting unpopular measures.

[66] In *Ward*, above, Justice Gerard V. La Forest stated that “it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection from a state, merely to demonstrate that ineffectiveness.” (para. 55)

[67] The fact that the Hungarian state is making efforts to head toward improving the situation of the Roma is clear from the evidence. Nevertheless, in this case, the seriousness of the danger and the incidents of violence that the applicant and his family have had to face, the extremes to which the family has had to reduce itself by hiding, in addition to the frequency or continuation of the incidents and the span of time over which the incidents had to have taken place show that the state does not seem to have shown that it can effectively protect them.

[68] The Court understands that, according to the evidence, the applicant or her family did not directly request police protection. Following uncontradicted incidents, including a house burned down by a Molotov cocktail, the use of firearms and the hospitalization of the applicant and her son with serious injuries, the applicant and her family could have considered that the police, or at least the state authorities in question, would have been aware of her family’s distress and their crisis situation. In addition, as discussed above, the documentary evidence shows how precarious the relationship of trust is between the police authorities and the Romani communities. As explained in the Handbook, fear of authorities may cause a lack of faith in the state apparatus as a result of past experiences that affected the individuals concerned (see para. 198 of the Handbook: “198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel

apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.”).

(2) Did the PRRA officer err in ignoring the evidence or failing to properly assess it?

[69] The PRRA officer deplored the lack of evidence in the record establishing the facts underlying the risk of returning the applicant to Hungary. In the PRRA decision, the only passage that deals with insufficient evidence is the following:

[TRANSLATION]

> First, the absence of evidence in the record establishing the facts underlying the risk of return is noted. Thus, the applicant, who claims to have been the victim of a number of attacks following her return to Hungary and to have been hospitalized and had surgery as the result of the after-effects of these attacks, has not submitted any evidence establishing these facts. Other than the very brief mention that she and her family members were the victims of several attacks, we note the absence in the record of personal evidence such as a medical certificate or other health services evidence mentioning the type of injuries sustained, their seriousness and the medical care required. There is also an absence of evidence in the record, police reports or other documents, indicating that the applicant tried to obtain protection from the Hungarian authorities.

(PRRA officer’s decision, p. 4)

[70] The Court is mindful of the fact that cases of police brutality toward the Roma have been so significant that the Hungarian authorities themselves have noted the seriousness of the situation. Therefore, in this particular case of the applicant, was it likely that she would have reported her difficulties to the authorities rather than to deal with the entire family’s fear?

[71] The applicant submitted testimony on the incidents of violence against her and her family in Hungary. She bases her application on her statement contained in her Personal Information Form

(PIF) and on the statement by her grandson, Gabor Kovacs, whose testimony corroborates the incidents of violence her family has been a victim of.

[72] The subjective evidence in the applicant's testimony is consistent with the objective documentary evidence as a whole, filed in the record, pertaining to the protection provided by Hungary. In this regard, the documentary evidence could corroborate the applicant's narrative if the facts of this narrative had been considered as a whole by the decision-maker. The PRRA officer erred by not at least considering the facts in the applicant's testimony.

[73] The applicant's deposition describing the abuse suffered by her and her family when they were in Hungary should have at least been considered by the PRRA officer. The PRRA officer does not provide any justification for ignoring the testimony other than to say that the applicant could have sought state protection, without having satisfactorily shown her assessment of the evidence in its entirety.

(3) <u>In the circumstances, does the discrimination against the applicant amount to persecution?</u>

[74] Given that the PRRA officer's decision deals mainly with the issue of the state's ability to protect the applicant, the PRRA officer's analysis in relation to persecution appears to be non-existent considering the burned-down house and the serious physical attacks against the applicant and her son and their hospitalization; even following these uncontradicted events, there was no mention of action demonstrated by the authorities following the serious events. The documentary evidence gives an in-depth account of the background of the treatment of the Romani people and the

circumstances they have experienced; the PRRA officer herself did not doubt [TRANSLATION] “the significance of the discrimination against the ‘Roma’” (PRRA decision, p. 5).

[75] As for what constitutes persecution within the meaning of section 96 of the IRPA, the Handbook provides that adverse circumstances added to various measures, such as discrimination, can result in an applicant having a “fear of persecution on ‘cumulative grounds’” (para. 53 of the Handbook). Discrimination amounts to persecution when “measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned” (para. 54 of the Handbook), which, cumulatively, become persecution.

[76] The evidence as a whole highlights all the circumstances of the case, such as the geographical, historical and ethnological context; the allegations of fear of persecution expressed by the applicant must be assessed by ensuring that the decision-maker has considered the documentary evidence. For that, the in-depth review of the documentary evidence, in itself, would have to demonstrate whether a possibility of persecution exists in this case.

[77] The triers of fact are required to conduct an individual analysis, since state protection depends on the possibility for the state to provide effective protection to the person claiming protection in the case under review, according to the evidence, the legislation and the case law, on a case-by-case basis.

[78] In *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429, [2003] 4 F.C. 771 (F.C.T.D.), the application for judicial review of the Roma in question was allowed by the Court:

> [56] It is also wrong in law for the Board to adopt a "systemic" approach which may have the net effect of denying individual refugee claims on the sole ground that the documentary evidence generally shows the Hungarian government is making some efforts to protect Romas from persecution or discrimination by police authorities, housing authorities and other groups that have historically persecuted them. The existence of anti-discrimination provisions in itself is not proof that state protection is available in practice. … Therefore, a "reality check" with the claimants' own experiences appears necessary in all cases. [Emphasis added.]

[79] As with state protection, which had to be analyzed based on the existing facts, the risks to the applicant must also be assessed based on the evidence as a whole submitted to the decision-maker. In this case, the uncontradicted evidence shows that the recurring acts reportedly targeted the applicant's family with extreme violence, to the point where she was put in the hospital and the privacy of applicant's family home had been seriously breached. The applicant's testimony reflects that these are repeated incidents that put the lives of the applicant and her son in danger.

[80] The officer should have analyzed and assessed the concept of persecution in the reasons for her decision. The situation experienced by the Roma as supported in documentary evidence must be weighed with the evidence of the applicant's personal situation. In this case, the PRRA officer did not assess the applicant's evidence in conjunction with the documentary evidence to determine whether the facts established that she was persecuted because of her race and whether the Hungarian state was able to protect her.

X. Conclusion

[81] In light of these facts, the applicant seems to have shown that, in her situation, she is not protected and, therefore, the PRRA decision cannot be reasonable without a more in-depth analysis of the evidence as a whole. This case requires completely new consideration with a more carefully thought-out analysis to reach a conclusion in which the subjective evidence accorded with the objective evidence.

JUDGMENT

THE COURT ALLOWS the application for judicial review and refers the matter to another immigration officer for reconsideration. No question is certified.

OBITER

The history of the Romani people's past, even their recent past, is rife with ostracism, exclusion, marginalization, discrimination and, in some cases, persecution because of their race. The situation of the Roma requires that the decision-maker assess protection for each individual who claims protection based on the evidence of treatment suffered by nationals who claim state protection.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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