Date: 20030411

Docket: IMM-1298-02

Citation: 2003 FCT 429

OTTAWA, ONTARIO, THIS 11th DAY OF APRIL, 2003

PRESENT: THE HONOURABLE MR. JUSTICE LUC MARTINEAU

BETWEEN:

JANOS MOHACSI, JANOSNE MOHACSI,

ZOLTAN MOHACSI, JANOS MOHACSI

Applicants

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board, Convention Refugee Determination Division (the "Board"), dated February 26, 2002, wherein it concluded that the applicants were not Convention refugees pursuant to subsection 2(1) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the "Act").

BACKGROUND

[2] All four applicants made individual refugee claims and are citizens of Hungary. They allege a well-founded fear of persecution by reason of their ethnic background, Roma. Mr. Janos Mohacsi, Sr. (the "principal applicant") was born in Hungary in 1969 and is of Romani origin. He has two children from a first marriage with a Hungarian woman. He alleges that his first wife hated him so much that she started beating the children because they were "dirty gypsies". A divorce was declared between the two in September 2000 and an agreement was reached where the principal applicant received legal custody of the two children. The principal applicant, who has only a sixth grade education and can hardly read, raised conflicts with his ex-wife and her brother as the reason why they were seeking refugee status in Canada in their Port of Entry declaration (the "POE"). However, in their Personal Information

Forms (the "PIF"), the applicants also allege persecution because they were victims of discrimination by school and housing authorities as well as being the targets of skinheads (nationalists) who would beat them. They also allege they were harassed, beaten and detained by the police, and therefore, fear persecution by the authorities if they were to return to Hungary.

[3] Their claims were heard by a one member-panel of the Board on February 4, 2002. The principal applicant and his wife, Mrs. Janosne Mohacsi, testified on that occasion. The principal applicant acted as the representative of their minor children, Zoltan and Janos (the "minor applicants").

[4] The principal applicant testified that the main reason they left Hungary was because his nephew had been killed in June 2001 by skinheads simply because he had been fishing without a licence. He explained that "[t]he nationalists are the skinheads, they don't want to see gypsies in Hungary, they want that the gypsies disappear from Hungary" (transcript, certified record, at page 212). He sought redress along with other gypsies from the police but it was to no avail. They also sought help from the public, the State and the media, also to no avail. The Association for Gypsy Minorities was also informed of this murder, but according to the principal applicant "they can not help us with the police, they are not attached to them" (transcript, certified record, at page 213). He also testified that five days after the murder, skinheads vandalised their home. His wife and he were also beaten and threatened (transcript, certified record, at pages 216 and 219). Shortly afterwards they decided to leave the country.

[5] The principal applicant also testified that nationalism is rising very much in Hungary, and that in the past, skinheads had attacked them. He related some of the difficulties they encountered with his Hungarian ex-wife and her brother who was a member of a skinhead group: "... they was screaming on me and they... sometime they make ... spit on my wife because she's living with gypsy ..." (transcript, certified record, at page 231, reproduced as is). He also testified that they were forced to live in a gypsy ghetto without running water, sewage facilities, paved road and any telephone facilities and that his son was obliged to go to school for the underprivileged because there were no schools in the area. He testified that his son was beaten and threatened by Hungarian nationalists at school; so much that he stopped going to school. He also explained that he had managed to save enough money (he had worked at a railway station for 14 years) to make an offer on an apartment in the city in September 2000. However, the municipal authorities refused to give him the necessary permission because "gypsy is not allowed to buy a house anywhere" (transcript, certified record, at page 223). In fact, they called the police and as a result, he was arrested and detained by the police for 24 hours. Regarding his detention the principal applicant declared that "[a]fter they... after 24 hours, they took me to the room, they beat me, and they was screaming on me, "Disappear from here, dirty gypsy. You have to go to your... your houses, and you have to be there, because you have nothing to do with... here, and you are not allowed to buy a house here" (transcript, certified record, at page 235, reproduced as is). Shortly after his release, his wife and he were attacked at a bus station by skinheads who told them "[g]o to India, because you came from India" (transcript, certified record, at page 224). He was hospitalised. According to his testimony, in December 2000, the principal applicant, who spoke in the name of other gypsy co-workers, complained to his employer that recently hired Hungarians doing

the same work earned more. He had not gotten a raise in salary in 14 years. He was asked by his employer to leave and did not return to work. He alleges that he was in fact "fired" by his employer. While leaving his work, he was beaten by skinheads and was hospitalised as a result of that attack.

[6] The principal applicant's wife corroborated his testimony. She also testified that people spit on her and called her "whore" and that she could not even go out on the street for a walk as she can here in Canada without being yelled at and screamed at. The applicants also provided medical evidence and a police report corroborating the principal applicant's detention and the hospitalisation of the applicants on two occasions, as well as a letter of a Roma organisation and other documentary evidence supporting their claim of persecution by reason of their ethnic background.

BOARD'S DECISION

[7] The Board determined that the applicants were not Convention refugees. The reasons given by the Board are very succinct. It is useful to reproduce the Board's reasoning in its entirety:

> The claimants spoke of discrimination and persecution but in the POE notes they spoke of no future for the children and of abuse by the brothers of Mr. Mohacsi former spouse. When asked to explain the discrepancy, Mr. Mohacsi testified that he had 6th grade and that he was afraid. The question asked in the POE is simple, it asks about the nature of the persecution and details related thereto. The question is elementary, the claimants testified that their was an interpreter present by telephone, as such the panel does not find the claimant's explanation satisfactory.
>
> Mr. Mohacsi was also questioned about his passport that he obtained in February 2001. He claimed that he obtained it after he lost his job and that his intentions were to go to Austria to gain employment. The panel finds Mr. Mohacsi's behaviour strange and inconsistent with someone who fears persecution.
>
> Mr. Mohacsi was also questioned regarding his employment. The evidence showed that he was gainfully employed for 14 years at the Koeskemet railway station. The evidence also showed that contrary to the allegations contained in the PIF, the claimant did not participate in a strike but rather went to see his employer to complain about the salaries paid to gypsies. The panel finds that the claimant embellished this part of the story in order to enhance his claim. The evidence also showed that the claimant was never actually fired. The claimant testified that he never returned to work because he was made to understand that he was no longer wanted. The claimant's behaviour and his allegations of discrimination in Hungary are contradicted by the fact that he had a job for 14 years and managed to save enough money to make an offer on an apartment.
>
> The claimants allege that Skinheads targeted them. It is true that during the early 1990's there was a problem but the present country conditions have

changed and the documentary evidence speaks of a decrease in the Skinhead movement. More importantly, the exhibit A-7 speaks of actions by the government and police to prosecute anyone who perpetuated a crime against Romas.

The claimants were also confronted with an abundance of documentary evidence that speaks of the government's efforts to fight discrimination towards gypsies. It mentions the creation of autonomous governments and Roma Self-governments. The documentary evidence also talks of a vast number of international Roma and human rights organisations. The claimants had no opinion other to say that these organisations do not help Romas.

The panel has no reason to doubt the documentary evidence showing that the government has gone to great lengths to protect the rights and lives of Romas. The claimants filed exhibit P-2, a letter from the Association of National Ethnic Gypsy Association corroborating their claims but in light of the documentary evidence, the panel is not convinced that they have discharged their burden to seek protection from their country of origin.

The panel also concluded that the alleged discrimination does not amount to persecution.

[8] For the above reasons, the Board denied the applicants' refugee claims.

ISSUES

[9] The case at bar raises four issues:

1. Did the Board err by failing to specifically address the claims of the principal applicant's wife and his minor children?

2. Did the Board err by making adverse findings of credibility in an arbitrary or capricious manner or without regard to the evidence before it?

3. Did the Board err in reaching its conclusion that the discrimination faced by the applicants did not amount to persecution and by failing to consider whether the cumulative effect of the incidents related by the applicants amounted to persecution?

4. Did the Board err in holding that the applicants had not discharged their burden to seek protection from their country of origin?

[10] My answer to each of these questions is affirmative. The rationale that permits me to reach this conclusion is expressed in the following analysis.

ANALYSIS

1- Did the Board err by failing to specifically address the claims of the principal applicant's wife and his minor children?

[11] The claims of his wife and his minor children were specifically addressed at the hearing. At page 241 of the certified record, applicants' counsel specifically addressed the children's claim. Counsel asked the principal applicant:

...

Q. You have been designated as representative for your two (2) sons and they are, in fact, refugee claimants. What is their situation in the country? What is your concern for them?

A. In Hungary, children and us, they are scared of skinheads because the skinhead came to school and beat them, and after the child was scared to go to school.

Q. Which child?

A. Janos.

Q. Janos? How old is Janos now?

A. Nine (9).

...

Q. Pas d'avenir pour ces enfants. Enfants terrorisés par frère de l'ex-femme.

A. Yes, I wrote that one, it was true. But I.. after I said that it was by skinheads too.

Q. Okay.

A. Even his mother... their mother was terrorizing them.

Q. In your testimony, your earlier testimony, you stated that you didn't have any problems after your divorce. You didn't have any problems with... you didn't have any problems with your ex-wife's family. When I read this I get a little bit of a different picture.

A. (inaudible). I have six (6) classes at school, and I... maybe I don't... don't have a proper way to think. Maybe I have a problem to explain.

Q. Madame, you wanted to say something?

- She has to translate.

- Give her a chance to translate.

A. I would like to just mention that when we get married it was in 2001, March. I had a problem with his ex-wife because we... we had a fight. And she didn't like because I am half-gypsy, and the kids would like to stay with me... stay with me... we were fighting, and even her brothers came and they were beating me up. So

probably that's what my husband would like to explain you, that what we said, that was the thing, when... what we said when we came to Canada because really we didn't want to accuse Hungary.

- Okay.

...

A. When we start to live with my wife, we try to keep distance from them, so it was like less. And when... but when she came to pick up kids, because she... she want to take them for a... for few days, so for... with her. The children, when they came back, they... they were crying and they said, "I don't want to be with my mother, I don't want to go with her."

Q. Now, why would she even be interested in picking up the children if she wanted to throw them in the river, and she beat them, and she told you to take your kids and move out?

A. She is not normal. She... she was hospitalized also with mental problem, and I went to the court with my wife to apply for interdiction to see the children, and they said. "Yes, from now, she's not allowed to come to pick up the children," but they didn't give me the paper. They said, "Well, we don't give a paper, but she's not allowed to come to see the children."

A. We... we didn't have a good relationship with his ex-wife, and if she came to pick up children just because to do the problem with me, to make some problems with my husband, to make a problem with a... mess in the family.

Q. I can understand all that. But why would you even give her the children?

A. Because when, that time, when I (inaudible), she have arrived to see the children. And after, I went to see the court, and she been convocated, I went there too, and we signed the paper that she can not come to see the children. And because she was working on the street. She was...

- I will finish first one, then I'll remember what she said. "She was on the street, like... pauper." And he said, "I was scared that they will catch some illness from her." And the lay said that, "When the kids were with her, she kept them, but they went on the street, she didn't give them to eat. And I said to her, 'Well, you don't take the children, because you don't take care of them, why you take them?'"

...

There is also the issue of the concerns with regards to his two (2) children, vis-à-vis his wife... his former wife, and his wife's family. Should the Claimants' concerns with regards to authorities paying little heed to... the police authorities paying little heed to... for the concerns of gypsies, then indeed the children could be faced with... or be placed in a precarious situation along with their father.

(my emphasis)

[12] Furthermore, at page 242 of the certified record, counsel asked Mrs. Mohacsi:

...

Q. Mrs. Mohasci, what about you? How do you feel about Hungary?

A. It's a fear. I'm scared.

Q. What are you afraid of?

A. They came all the time to the house. They... they scream on me, yell on me, and they called me whore. And they... even like my cousin's situation, they've been beaten up, it was our case too. And I couldn't go out to the street to... just for a walk, like here in Canada. They were humiliating me, screaming me, and threaten me, and I was living in fear.

Q. Do you confirm the testimony of your husband as you've heard it related today?

A. Yes.

Q. Is it true that his brother Zoltan's son was killed, purportedly while he was fishing?

A. Yes.

...

(my emphasis)

[13] The respondent maintains that, considering the co-applicants relied on the principal applicant's story, as shown in their PIF, this evidence was implicitly considered by the Board and included in its decision. I disagree with such reasoning. Unless express reasons are provided by the Board, in view of the evidence on record, the Court cannot simply infer that the particular treatment received in Hungary by the principal applicant means that his wife and minor children, who also allege other acts of persecution - such as their fear of being beaten at school, or of being killed by skinheads like the principal applicant's nephew - cannot reasonably justify a claim of a well-founded fear of persecution on one of the grounds enumerated by the Convention.

[14] In *Seevaratnam* v. *Canada (Minister of Citizenship and Immigration)* (1999), 167 F.T.R. 130, Tremblay-Lamer J. confirmed that the omission of addressing the minor applicant's claim is a reviewable error. In that case, just as in the case at bar, the child's claim was rejected without giving additional reasons based on the failure of the principal applicant's claim. Tremblay-Lamer J. relied on *Chehar* v. *Canada*

(Minister of Citizenship and Immigration), [1997] F.C.J. No. 1698, where Wetston J. stated as follows at paragraph 5:

While the Board did not err in making its findings concerning the female applicant, it nonetheless failed to expressly state why it rejected the claim of the minor applicant. As such, the Board erred, either in failing to consider the minor applicant's individual claim, or in failing to provide specific reasons for why it determined that her claim should be rejected.

(my emphasis)

[15] Another relevant case is *Iruthayathas* v. *Canada (Minister of Citizenship and Immigration)* (1994), 82 F.T.R. 154, where Reed J. ruled that the Board must consider the child's risk of persecution and not simply focus on the position of the principal applicant. She states as follows at paragraph 10:

> ... The Board in reaching its decision that the applicant was not likely to be persecuted in Colombo focussed almost exclusively on the applicant's situation. It made the statement that she did not fit into the profile of a young Tamil female LTTE member but did not explain what that profile was. The Board focussed its attention on the position of the applicant, particularly her age, and did not assess the likelihood of the children being the subject of persecution. I think this was an error which dictates that the Board's decision must be set aside. (my emphasis)

[16] It is apparent after reading the impugned decision that the Board either ignored the evidence or failed to give additional reasons why it rejected the wife's and minor children's applications for refugee status. In this case, it is clear from the transcript, as stated above, that the claims were specifically addressed at the hearing by the applicants' counsel. It was not satisfactory for the Board to simply address in its decision the principal applicant's claim and to assume that the same reasons applied to the other applicants. Therefore, this omission alone constitutes a reviewable error of law that justifies this Court to return the matter back to the Board. However, I will still examine the other issues further below.

2- Did the Board err by making adverse findings of credibility in an arbitrary or capricious manner or without regard to the evidence before it?

[17] The second issue concerns the adverse credibility findings made by the Board. This issue has been analysed numerous times by the Court. A summary of the applicable principles can be found in *Lubana* v. *The Minister of Citizenship and Immigration*, 2003 FCT 116 (F.C.T.D). I will again recite some of the general principles summarized in the former case.

[18] First, the determination of a claimant's credibility is the heartland of the Board's jurisdiction. It has a well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility and the subjective fear of persecution of a claimant. No decision-maker, however, can act arbitrarily or in a capricious manner.

[19] Second, the Board is entitled to conclude that a claimant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms". Furthermore, the Board is entitled to make reasonable findings based on implausibilities, common sense and rationality. It may reject uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence.

[20] Third, not every kind of inconsistency or implausibility in a claimant's evidence will reasonably support the Board's negative findings on overall credibility. It would not be proper for the Board to base its findings on an extensive "microscopic" examination of issues irrelevant or peripheral to the claim. Furthermore, the claimant's credibility and the plausibility of her or his testimony should also be assessed in the context of her or his country's conditions and other documentary evidence available to the Board. Minor or peripheral inconsistencies in the claimant's evidence should not lead to a finding of general lack of credibility where documentary evidence supports the plausibility of the claimant's story.

[21] Fourth, a claimant's first story is usually the most genuine and, therefore, the one to be most believed. That being said, although the failure to report a fact can be a cause for concern, it should not always be so. That, again, depends on all the circumstances. There is no doubt that a failure to mention a key event on which the refugee claim is based in a written statement to immigration authorities, or an inconsistency between such statement and the PIF or the claimant's subsequent testimony are very serious matters which can potentially sustain a negative credibility finding. However, the omission or inconsistency must be real. Besides, explanations given by the claimant, which are not obviously implausible, must be taken into account.

[22] Fifth, the Board should not be quick to apply North American logic and reasoning to the claimant's behaviour: consideration should be given to the claimant's age, education, cultural background, previous social experiences and psychological condition. Therefore, in evaluating the claimant's first encounters with Canadian immigration authorities or referring to the claimant's POE, the Board should be mindful of the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority.

[23] In the case at bar, after having closely read the transcript and the evidence on record, I find that the Board has failed to analyse important aspects of the oral evidence submitted by the applicants, or otherwise ignored reliable documentary evidence corroborating the applicants' story. It also appears from the decision and the record that the discrepancies and negative inferences mentioned in the impugned decision relate to minor or peripheral issues. Moreover, the Board's reasons, taken as a whole, are capricious, inadequate and do not support a general non-credibility finding.

[24] I note that the Board does not point to any distinct or articulable contradiction between the statements made by the applicants in their PIF and their oral testimonies at the hearing, except with respect to the "strike" incident which I will discuss below, and which does not relate to a central element of the principal applicant's claim. It is noteworthy that at no point in its decision does the Board

expressly mention that the applicants are not credible. Speaking of the principal applicant's intentions in February 2001 to go to Austria to find employment, the Board barely mentions his "behaviour [was] strange and inconsistent with someone who fears persecution". Furthermore, the Board does not specifically comment on the manner in which the principal applicant and his wife testified nor does it mention it did not believe their testimony. At best, the Board's difficulties with the applicants' stories are described in ambivalent terms and must be inferred from its very succinct reasons.

[25] Most importantly, the Board never discusses nor questions the occurrence of the immediate incidents indicated by the principal applicant in his PIF and related at the hearing that led to the applicants' decision to leave Hungary in June 2001. According to the evidence, nationalists killed the principal applicant's nephew, skinheads vandalized the applicants' home, threatened and beat the principal applicant and his wife. Right after the murder, the principal applicant and other gypsies sought redress from the police, but to no avail. This made the principal applicant very afraid for his two sons. He also testified that his elder son had been previously beaten and threatened by nationalists at school, so much that he stopped going to school. Therefore, the Board should have asked itself whether these central elements of the applicants' claims were persecutory in nature and caused a reasonable fear of persecution.

[26] In the case at bar, the Board first draws a negative inference from the fact that "[t]he claimants spoke of discrimination and persecution but in the POE notes they spoke of no future for the children and of abuse by the brothers of Mr. Mohacsi [*sic*] former spouse". Second, the Board also finds that the principal applicant's behaviour in obtaining a passport in February 2001 to go and work in Austria was "strange and inconsistent with someone who fears persecution". Third, the Board also questions the fact that in December 2000, the principal applicant was "fired" by his former employer because he participated in a "strike", noting that there was a discrepancy between his PIF and his testimony. I appreciate that the Court on judicial review should not engage in a microscopic analysis of the Board's credibility finding (*Sarkozi* v. *Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 973, at para. 17). In the present case, however, these three credibility findings were the only aspects of the evidence identified by the Board and, in my view, they are perverse and capricious considering the particular circumstances of this case and the evidence on record.

[27] As I stated earlier, an alleged discrepancy in an omission to report a relevant fact at the time of arrival should be considered in light of the particular situation and special characteristics of a claimant. The principal applicant was on more than one occasion threatened, beaten and detained by the police and other groups. He is a Roma who lived in a gypsy ghetto. He attended school for only six years and he can hardly read. The POE was in French, a language he is not familiar with, and the interpreter was translating over the phone which certainly is not an ideal situation. This Court in *Singh* v. *Canada (Minister of Citizenship and Immigration*, [1996] F.C.J. No. 963 (F.C.T.D.), cautioned that it is "poor practice" for the Board to find the notes to be accurate on "pure faith". The Court added that the Board should inquire into such matters as the context of the interview and the degree to which the claimant understood the questions.

[28] As the principal applicant explained well during the hearing, he did not fully understand the questions. Furthermore, he also explained that he was afraid that if he said or wrote negative comments about the State of Hungary, Canada would send him back to Hungary, and that if his country found out what he had said, the situation would be even worse than before: "... they will bring us at home. [...] and after, if I come back, they will punish me because I accuse Hungary" (transcript, certified record, at page 235). This is, in my view, a reasonable reason. In its decision, the Board only mentions the first part of the explanation given by the principal applicant and ignores the second part of his explanation. This is clearly a reviewable error. As stated by the Court in *Veres* v. *Canada (Minister of Citizenship and Immigration) (T.D.)*, [2001] 2 F.C. 124: "... it was not within its [the Board's] mandate to ignore reasonable explanations and to treat the evidence as though the explanations had never been given". Therefore, the first credibility finding is perverse and capricious.

[29] The Board also mentions that the principal applicant's behaviour in obtaining a passport in February 2001 to go and work in Austria was "strange and inconsistent with someone who fears persecution". However, the principal applicant testified that he had lost his job in December 2000 and wanted to go to Austria to look for work: "... I lost my job and I... I knew that I can not [*sic*] find job so probably I would go to Austria or somewhere to find the work... Austria is not far from Hungary, I would be working around 400 kilometer from us, so I could come home to... to visit" (transcript, certified record, at pages 220-21, reproduced as is). The Board fails to explain why it inferred that the principal applicant's behaviour was strange and inconsistent with his fear of persecution. The Board's reasons are inadequate on this point. Furthermore, I note that the immediate incidents (the murder of the principal applicant's nephew and the vandalism of their home) that prompted the applicants' departure from Hungary happened in June 2001, which is some four months after the principal applicant obtained a passport in February 2001. The applicants' fear of persecution had to be addressed by the Board in view of all the relevant incidents. Therefore, this second credibility finding is also perverse and capricious.

[30] At the hearing, the principal applicant testified that he met his employer in December 2000 with other gypsy co-workers to complain about the salaries paid to the gypsies. Since the principal applicant had made reference in his PIF to his participation in a "strike", the Board considered that he "embellished this part of the story in order to enhance his claim" (Board's decision, at page 2). However, a close reading of the transcript shows that the principal applicant was straightforward in his answers and immediately clarified to the presiding member that "[i]t's not like a strike. It's not the big thing, because it was me and six (6) gypsies" (transcript, certified record, at page 251). Moreover, the Board also mentions that the evidence showed that the principal applicant "was never actually fired". Whether the principal applicant voluntarily resigned or was dismissed by his employer raises mixed questions of fact and law which the Board is not in the position to make in a refugee claim. The principal applicant's testimony on this point was not contradicted. After close reading of the transcript, if there are any contradictions in the answers given by the principal applicant, they are more apparent than real. The principal applicant stated at the hearing (transcript, certified record, at page 251):

...

Q. What did you guys do? Did you go and complain to your boss? Is this how it happened?

A. I was the oldest, so it was me who talked to the boss. "I'm sorry..." and I told him, "How it could be that that guy, he came after me, and I'm working more than him, and I got less?"

Q. Okay. And then what happened?

A. He told me to... to leave.

Q. He said if you don't like it leave it?

A. Yes. Exactly.

Q. Okay. And you said?

A. I didn't know what to say. I couldn't go anywhere, so I have to leave, so I left. No gypsies have no... lot of rights, in Hungary.

Q. Okay. But did you actually leave your work?

A. Yes. Yes.

Q. Did you go back the next day?

A. No.

Q. Because here you say you were fired.

A. If they tell you to leave, so you don't go back, because it's like final. You don't go back. But you have your tools, and that's it.

Q. Do you have any official documents stating that you left, or that you were fired, or...?

A. They don't give you the paper. Now, in Hungary, it's like that. They don't give you paper that it's finished.

...

(my emphasis)

[31] It is apparent that the Board made a questionable and distorted reading of the evidence to come to the conclusion that the applicant was not actually fired. The explanations given by the principal applicant appear reasonable and could not be

outright rejected by the Board. I have no doubt that it is certainly a case where the applicants should have been given the benefit of the doubt. I also note that the presiding member assumed in the above questioning that the principal applicant was told by his employer that "...if you don't like it, leave it", when the principal applicant actually said in the first place "[h]e told me to... to leave". Considering the fact that the principal applicant's testimony was being translated, it was highly inappropriate for the presiding member to put different words in the principal applicant's mouth. Nevertheless, considering the principal applicant's particular situation, it is not implausible that he would have taken the presiding member's suggestion as meaning that he was fired and therefore, he should not come back to work. Therefore, the third credibility finding is also perverse and capricious.

[32] Consequently, I conclude that the Board based its credibility findings without considering the principal applicant's particular situation and on trivial discrepancies. This renders the Board's factual conclusion patently unreasonable.

3- Did the Board err in reaching its conclusion that the discrimination faced by the applicants did not amount to persecution and by failing to consider whether the cumulative effect of the incidents related by the applicants amounted to persecution?

[33] The third issue raised is whether or not the Board properly analyses the evidence so as to determine whether the prejudicial discriminatory actions related by the applicants, if taken together, may have produced a well-founded fear of persecution on "cumulative grounds".

[34] The Office of the United Nations High Commission for Refugees has published a book entitled "*Handbook on Procedures and Criteria for Determining Refugee Status"*, (Reedited Geneva, January 1992) (the "Handbook") which provides guidance for the consideration of claims of persecution based on the cumulative effects of discrimination. The relevant paragraphs are paragraphs 53 through 55. Paragraph 52 is also quoted below to provide context to the discussion of what should be factored into a cumulative analysis in light of the broader goal of determining whether persecution exists:

> (b) Persecution
>
> [...]
>
> 52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case [...]. 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

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 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.

(Headings in original) (my emphasis)

[35] The Federal Court of Appeal has held that an analysis in which events occurring within a particular time frame are examined in isolation defeats the purpose of a cumulative determination (*Madelat* v. *Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 49 (F.C.A.)). Furthermore, in *Wickramasinghe* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 601 (F.C.T.D.) the Court ruled that the interpretation of the term "persecution" is a question of mixed fact and law, and that the identification of persecution behind incidents of discrimination or harassment is a question of mixed law and fact and therefore subject to a reasonableness *simpliciter* standard of review. Based on this standard of review, I must conclude that the decision of the Board on this issue was unreasonable. Even if a patent unreasonableness standard of review were to be applied, the evident errors on the face of the decision would lead me to find that the decision was patently unreasonable.

[36] First, the Board never really addresses the discrimination issue in light of the evidence on record apart from its finding that: "[t]he [principal] claimant's behaviour and his allegations of discrimination in Hungary are contradicted by the fact that he had a job for 14 years and managed to save enough money to make an offer on an apartment" (Board's decision, at page 2). At the end of its reasons, the Board makes this final statement: "[t]he panel also concluded that the alleged

discrimination does not amount to persecution" (my emphasis), but provides no indication of the reasoning leading to such a conclusion.

[37] Second, as I have already noted above, the Board mentions that "[t]he claimant's behaviour and his allegations of discrimination in Hungary are contradicted by the fact that he had a job for 14 years and managed to save enough money to make an offer on an apartment." (Board's decision at page 2). This is clearly a perverse and capricious finding. What the Board fails to consider and mention in its decision is the fact that even if the principal applicant managed to save the money to make an offer, he still had to apply to the authorities in order to get an apartment in town. He was ultimately told that: "[y]ou know, the gypsies are not allowed to buy a house in downtown, like..." (transcript, certified record, at page 217). Consequently, it is irrelevant to mention that the principal applicant was able to save money to make an offer on an apartment if he could not ultimately buy it because of his ethnicity. Moreover, the Board also failed to mention that following this rejection, the principal applicant was arrested by the police, beaten and detained. A police report mentioning that the principal applicant was arrested and detained for 24 hours for violation of the public order, therefore corroborating in part his testimony, can be found at page 56 of the certified record. The failure to at least address this evidence is, in my view, a sign of the perfunctory analysis made by the Board and is serious enough, in view of the particular circumstances of this case, to raise concerns on the Board member's judgment or impartiality.

[38] Third, in their PIF and at the hearing, the applicants maintained that they were victims of extensive discrimination. The principal applicant testified amongst other events that:

1. His son was obliged to attend a school for underdeveloped children as he was not permitted to go to normal school;

2. He mentioned that he and his family were obliged to live in a gypsy ghetto with no sewers or telephone because they were not permitted to buy an apartment in the city;

3. The principal applicant also testified that when his application for an apartment was rejected, mainly because of his ethnicity, he protested against the injustice. He was arrested, beaten by the police and humiliated;

4. He also submitted that he and his family were beaten by skinheads at a bus station;

5. He was fired after 14 years because he complained of the inequity of treatment between Roma and Hungarian workers;

6. They were attacked when leaving Church one day;

7. His son was beaten and threatened by Hungarian nationalists at school to the extent that he stopped going to school;

8. His nephew was killed by skinheads for fishing without a licence;

9. His house was attacked by skinheads and the applicants were beaten and threatened on that occasion; and

10. His wife testified that she was regularly spit on and called a "whore" after she married the principal applicant, to the point that she was afraid to go out.

[39] In focussing its attention on only one incident (the offer on an apartment), the Board omitted to consider the cumulative nature of the discriminatory acts suffered by the applicants.

[40] Fourth, the certified record also contains two medical reports attesting that the applicants were admitted to the hospital on two separate occasions after being attacked by several men (transcript, certified record, at pages 58 and 60). Finally, the certified record includes a letter from the Association of the National Ethnical Gypsy Minority confirming that the Mohacsi family were members of said Association and that they were victims of discrimination because of their Gypsy nationality. The medical reports certainly corroborate in part their allegations of persecution and should at least have been mentioned in the Board's decision and the reasons for disregarding it set out. Furthermore, even though the Board mentioned the letter from the Association (exhibit P-2), it did not give it any weight after considering the "documentary evidence" without providing any further explanation or reference to a particular source. The inadequacy of the reasons given by the Board can only lead this Court to conclude that the Board ignored relevant portions of the evidence and omitted to consider the cumulative nature of the discriminatory acts suffered by the applicants.

4- Did the Board err in holding that the applicants had not discharged their burden to seek protection from their country of origin?

[41] The Handbook, at paragraph 65, states as follows:

> Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. [...] Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection. (my emphasis)

[42] The principle governing state protection was established by the Supreme Court of Canada in *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689 ("Ward") where the Court held that the ability of a state to protect its citizens is simply an assumption which can be defeated when the claimants provide clear and convincing evidence that the state cannot protect them. The evidence that could help making this determination has been suggested by LaForest J. who stated at paragraph 50 that "... [f]or example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or [...] testimony of past personal incidents in which state protection did not materialize. [...]" (my emphasis).

[43] In the case at bar, the principal applicant's evidence was that he had sought help from the police, but was beaten by same when he complained. In his PIF, he also states that he wrote to the Ministry of Justice after he and his family were beaten by skinheads at a bus station but received no reply (application record, at page 25, 5th para.). He also complained to the City authorities after his house was attacked. He was threatened of being killed if he continued to complain. He also applied to the police but received no protection after his son was threatened. In the year of 2001, when the applicants protested against the death of the principal applicant's nephew, they were met by the police with rubber batons and tear gas. They applied to many public and state organisations for help but the authorities and media tried to cover up the event (application record, at page 26).

[44] Here, the Board bases its finding of the availability of state protection solely on part of the documentary evidence. The Board states that "exhibit A-7 speaks of actions by the government and police to prosecute anyone who perpetuated a crime against Romas", that "[t]he claimants were ... confronted with an abundance of documentary evidence that speaks of the government's efforts to fight discrimination towards gypsies", that "the government has gone to great lengths to protect the rights and lives of Romas", and that "[t]he documentary evidence also talks of a vast number of international Roma and human rights organisations". Therefore, the Board summarily concludes that the applicants have not discharged their burden to seek protection from their country of origin.

[45] Clearly, the analysis made by the Board was perfunctory and renders its finding on the issue of state protection unreasonable. First, the Board has completely failed to consider the contradictory documentary evidence concerning state protection, the applicants' efforts to obtain state protection and the refusal of the authorities at various levels to act. Second, the Board also errs in implying that since Romas can seek help from international Roma and human rights organisations for wrongs done to them, the applicants cannot claim that they are persecuted or that they do not benefit from effective state protection.

[46] First, the Board finds that the documentary evidence showed that the government has gone to "great lengths to protect the rights and lives of Romas" and cites the documentary evidence in support of its conclusion, namely exhibit A-7. However, the Board fails to consider and to mention in its decision the contradictory documentary evidence indicating that despite the efforts of the government on this point, there were still major problems with the implementation of these programmes, so much so that Romas were still denied entry to the European Union.

[47] This contradictory documentary evidence was mentioned in a 1999 document entitled *The Roma in Hungary: Government Policies, Minority Expectations, and the International Community* (Budapest, Hungary, December 6, 1999), but is not even mentioned by the Board. While acknowledging the government's efforts to improve the situation of Romas, the document nevertheless points out:

> ...Nevertheless, the Roma in Hungary continue to suffer greatly from low social status and from discrimination. Some Roma charge that the government

is not serious about carrying out its own medium-term strategy and cite what they consider to be insufficient financial resources devoted to it.

(application record, at page 58)

...

... Although Hungary has been ranked as one of the candidate nations most likely to become a member in a relatively short period of time, the situation of its Romani population has been a major element in the EU's critique of Hungary's performance. The EU has repeatedly indicated that the Hungarian government must make additional political and financial efforts to improve the situation of the Roma if it is to meet the criteria for accession.

(application record, at page 60)

[48] In another document prepared by the U.S. Department of State entitled *Country Reports on Human Rights Practices - 2000* (Released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001) it is mentioned as follows:

...Many human rights and Romani organizations claim that Roma receive less than equal treatment in the judicial process. Specifically they allege that Roma are kept in pretrial detention more often and for longer periods of time than non-Roma. This allegation is credible in light of general discrimination against Roma; however, there is no statistical evidence because identifying the ethnicity of offenders is not allowed under the data protection law. Since the majority of Roma fall into the lowest economic strata, they also suffer from poor counsel and unenthusiastic representation.

(application record, at page 72)

[49] With respect to the issue of discrimination in housing, the report states that the "local authorities have in some cases tried to expel Roma from towns or have taken advantage of situations (eviction for non-payment of bills or condemnation of Romani homes) to relocate and concentrate Romani populations, in effect creating ghettos" (application record, at page 73).

[50] Furthermore, according to the 2001 Amnesty International report, the Council of Europe's European Commission against Racism and Intolerance noted that "severe problems of racism and intolerance continue in Hungary". It noted that the incidence of discrimination towards the Romani population continued in all fields of life and expressed concern particularly about police ill-treatment. Yet the government still refused to pass an anti-discrimination law.

[51] In a report of a recent forum of Romany Organizations of Hungary, the "Romanies' situation in the past 10 years have been continuously deteriorating over the past 10 years..." (application record, at page 79).

[52] With respect to the issue of "special schools" of which the applicants complained, the Ombudsman himself issued a report which "found that the high

proportion of Romani children in "special schools" for the mentally disabled was a sign of prejudice and a failure of the public education system. Schools for Roma are more crowded, more poorly equipped, and in markedly poorer condition than those attended by non-Roma" (application record, at page 74).

[53] Furthermore, even contradictions in exhibit A-7 at pages 174-196 of the certified record can be found showing that the efforts of the state to protect its citizens might not be as effective as the Board suggests where it states that "the exhibit A-7 speaks of actions by the government and police to prosecute anyone who perpetuated a crime against Romas" (my emphasis). For example at page 179:

> On 9 July 2001, the RPC reported that the Jasz-Nagykun-Szolnok county prosecutor's criminal department had reopened a case, in which two policemen and two riverbank patrol officers had been accused of forcing a 14-year-old male Roma into the icy waters of the Tisza river in Tiszabura (16 July 2001a). The young Roma was allegedly caught fishing without a valid license by the officers (ibid. 3 September 2001c). The resumed investigation revealed that four other young male Roma had been "ill-treated" by the four officers (ibid). As of 29 August 2001, charges of torture and unlawful detention were brought against the riverbank patrol officers (ibid). No mention of charges against the two policemen could be found among the sources consulted by the Research Directorate." (my emphasis)

[54] This Court has held that all of the documentary evidence must be assessed, and it must be assessed together, and not in parts in isolation from each other (*Owusu* v. *Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 33 (F.C.A.); *Lai* v. *Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.); and *Hilo* v. *Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.)). I agree with the following reasoning expressed by Hansen J. in *Polgari* v. *Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 957, at paragraph 32:

> Second, the documents tendered by the applicants and those contained in the RCO disclosure materials cast doubt and indeed contradict the availability and effectiveness of state protection for Hungarian Roma. While it may have been reasonably open to the panel to make the findings it did, the absence of any analysis of the extensive documentation contained in the Hungarian Lead Case Information Package and the materials in the RCO disclosure package or the documents submitted by the applicants coupled with the failure to adequately address the contradictory documents and explain its preference for the evidence on which it relied warrants the Court's intervention.

[55] Second, the Board also implies in its decision that since Romas can seek help from international Roma and human rights organisations for wrongs done to them, the applicants cannot claim that they are being persecuted or that they do not benefit from effective state protection. Such premises, and the conclusions which the Board draws from them, fail to consider the requirement that a refugee claim should be considered based on the circumstances of each particular case. If the reasoning of the Board were to be accepted, every claim by a Hungarian Rom for refugee protection in Canada could conceivably be rejected.

[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: "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" (*Elcock* v. *Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 116 at 121). Hungary is now considered a democratic nation which normally would be considered as being able to provide state protection to all its citizens (*Ward, supra*). Unfortunately, there are still doubts concerning the effectiveness of the means taken by the government to reach this goal. Therefore, a "reality check" with the claimants' own experiences appears necessary in all cases.

[57] The Court in *Molnar* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1425 ("Molnar"), a recent decision of this Court, illustrates, in my view, the approach that ought to be taken here. Tremblay-Lamer J. determined that "the Board erred in imposing on the applicants the burden of seeking redress from agencies other than the police". The function of the police forces is specifically to protect the citizens of the country and in the event they refuse or are unwilling to fulfill their inherent functions then it has been recognized by this Court that there is no obligation on the person to resort to human rights organisations. The purpose of these organisations is not to provide protection from crime. That is the role of the police (*Balogh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1080, at para. 44; and *N.K.* v. *Canada (Solicitor General)* (1995), 107 F.T.R. 25, at para. 44-45). Tremblay-Lamer J. concluded, at paragraph 34, that the documentary evidence provided to the Board clearly indicated that despite apparent efforts by the state, "police protection of the Roma is inadequate" and also that: "[t]his evidence demonstrates that Roma live in fear of both the police and the judicial process in Hungary, as they are the victims of police violence and a judicial process that supports and even encourages violence against them".

[58] In the case at bar, although the applicants complain of discriminatory acts, they also suffered from aggression from skinheads and police authorities. Those acts are criminal in nature. Furthermore, according to the documentary evidence, the principal applicant's nephew was murdered by skinheads. He, along with other gypsies, sought redress from the police but it was to no avail. The Board, by suggesting that the applicants could have requested help from "international Roma and human rights organisations", failed to address the real issue of protection from criminal acts and thus committing an error of law.

[59] Therefore, I find that the Board erred in holding that the applicants had not discharged their burden to seek protection from their country of origin.

CONCLUSION

[60] The application for judicial review is allowed. Consequently, considering the above reasons and all the documentary evidence before me, the Board's decision is set aside and the matter is sent back for redetermination to a newly constituted panel.

[61] In the event that the Court decides to grant the present application, which is the case here, the respondent has asked the Court to certify the following question:

With respect to the requirement that a claimant provide clear and convincing evidence that the state will not protect him or her, is a refugee claimant required to approach agencies beyond the police?

[62] This question has been previously certified in *Cuffy* v. *Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1316, at paragraph 14, but was never brought to the Federal Court of Appeal to be answered.

[63] It was decided in *Liyanagamage* v. *Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4 that "... a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application [...] but it must also be one that is determinative of the appeal" (*Liyanagamage*, at paragraph 4). In the case at bar, the applicants seem to have been mistreated by police authorities and therefore could not be expected to seek their protection. Furthermore, since I have decided that the Board ignored relevant and important parts of the documentary evidence, I conclude that the question submitted by the respondent cannot be answered in the absence of proper factual background. This question would not be determinative of the appeal in the present case, especially if I consider that other relevant factual aspects of these refugee claims have not been properly addressed by the Board and need to be examined again before a final determination is made with respect to the issue of state protection.

[64] In conclusion, I will add that in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 R.C.S. 817, the Supreme Court of Canada established as part of the duty of procedural fairness, the principle that an administrative tribunal is required to provide written reasons for its decision. The decisions affecting claimants for refugee status are of such importance and can be considered critical to their future that the omission to tell them why the result was reached would be unfair. Boilerplate types decisions with an architecture that permits the substitution of claimants are imminently suspect and will undoubtedly generate allegations that the Board has not really turned its attention to the actual facts of a refugee claim. The case at bar is a good example of a case where the requirement of providing reasons may be satisfied from a formal point of view, but where the Board has nevertheless failed to justify its findings in an acceptable fashion.

ORDER

THIS COURT ORDERS that the application for judicial review of the decision of the Immigration and Refugee Board, Convention Refugee Determination Division, dated February 26, 2002, wherein it concluded that the applicants were not Convention refugees pursuant to subsection 2(1) of the *Immigration Act*, be granted

and the file be remitted back to a newly constituted panel for redetermination. No question of general importance will be certified.

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1298-02

STYLE OF CAUSE: Janos Mohacsi and others

- and -

The Minister of Citizenship and Immigration

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: February 20, 2003

REASONS FOR ORDER

AND ORDER : The Honourable Mr. Justice Martineau

DATED: April 11, 2003

APPEARANCES:

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