

Federal Court



Cour fédérale

**Date: 20150302**

**Docket: IMM-5660-13**

**Citation: 2015 FC 260**

**Toronto, Ontario, March 2, 2015**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**NORBERT NEUBAUER  
SZILVIA NEUBAUERNE LAKATOS  
(A.K.A. NORBERTNE NEUBAUER)  
MILAN NORBERT NEUBAUER  
ANTAL LAKATOS**

**Respondents**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review brought by the Minister of Citizenship and Immigration pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of the Refugee Protection Division [RPD] of the Immigration

and Refugee Board [IRB], dated August 28, 2013 (and rendered orally July 29, 2013), in which the Board determined that the Respondents were Convention refugees.

[2] This application for judicial review should be allowed for the reasons set out below.

I. Facts

[3] The Respondents (the principal Respondent along with his wife, son, and father-in-law) are a family from Hungary who fear that they will be discriminated against, harassed and harmed on account of their Roma ethnicity.

[4] The Respondents submit that they were subject to discrimination in the workplace, in schools, in seeking employment, in housing, in healthcare, on public transportation, in stores, and in obtaining loans. As the residents of a predominantly Roma apartment complex, the Hungarian Guards would consistently harass and intimidate them, yelling epithets like “dirty gypsy you will die” and assaulting them on occasion.

[5] In particular, Mr. Neubauer alleges three recent incidents of physical violence. In November 2008, he was hit by a car on a crosswalk by a big bald man with a swastika tattoo, who jumped out of his car and started yelling at him. He claims that he called the police but no report was made. In November 2009, the Respondents’ door was broken down in the middle of the night while they were asleep, and they “got into a brawl”. Again, they called the police but were told, “just shut up stinky gypsy.” The police did not press charges. Further, in November

2010, Mr. Neubauer was surrounded by a group of Hungarian Guards one night as he approached his apartment complex on his way home from work. They grabbed his clothes and shoved him. Police officers were walking by and did nothing about it, telling him that he should be lucky to be alive (CTR, p 22).

## II. Decision

[6] The RPD found the Respondents to be Convention refugees.

[7] The Board began by finding that the allegations of the Respondents in the narrative were true, citing the presumption from *Maldonado v Canada (Minister of Employment and Immigration)*, [1994] FCJ No. 72 (FCTD), that a claimant's account is to be believed unless there is a reason to doubt their truthfulness. It then noted that it appears that the Respondents had received at least some level of education, healthcare, and employment, but inconsistencies regarding their claims of discrimination in these areas were insufficient to impugn their overall credibility or the documentary evidence.

[8] The Board went on to assess the issue of state protection. It acknowledged that Hungary is a democracy, and therefore the presumption of state protection was a strong one, but ultimately concluded:

[23] [...] In this particular case the claimants showed that they were assaulted and discriminated on numerous occasions because of their ethnicity.

[24] I find that the claimants were discriminated to a certain degree in Hungary on the basis of the cumulative acts of discrimination directed at them. They have also somewhat rebutted the presumption of state protection in their personal circumstances.

### III. Issues

[9] This judicial review raises the following issues:

- a) Did the Board apply the proper test for state protection?
- b) Was the decision was reasonable?

### IV. Standard of Review

[10] Whether the Board applied the proper test for state protection is reviewable on a standard of correctness (*Buri v (Citizenship and Immigration)*, 2014 FC 45 at paras 17-18; *Yu v Canada (Citizenship and Immigration)*, 2015 FC 167 at para 8).

[11] The application of the law to the facts is reviewed on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*]). Whether the hardship encountered by the Respondents amounts to persecution and whether there is adequate state protection for the Respondents in Hungary are both questions of mixed fact and law and are reviewable on a standard of reasonableness (*Horvath v (Citizenship and Immigration)*, 2014 FC 313 at paras 14-16).

[12] When reviewing a decision on the standard of reasonableness, the Court is concerned with “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47).

V. Positions of the Parties

[13] The Applicant argues that the Board: (i) misstated the test for state protection; (ii) misapplied the standard of proof on state protection; (iii) failed to assess all the evidence; (iv) failed to analyze or explain why it concluded that the discrimination amounted to persecution; and (v) failed to provide adequate reasons.

[14] In response, the Respondents submit that the decision of the Board is transparent, thorough, intelligible and reasonable.

[15] First, the Respondents submit that the Board stated the correct test for state protection and applied the correct standard of proof.

[16] Second, the Respondents submit that the Board did not ignore the personal experiences of the Respondents or contrary evidence. Given the presumption that the Board has considered all the evidence, it is assumed that the Board had full regard to all the personal and documentary evidence before it, and weighed it before making its findings on state protection. In addition, the Board explicitly acknowledged the US Department of State Report and aspects of Hungary’s

make up that favour a finding of adequate state protection. The Board followed the rule that each case is decided on its own merits, and reached a reasonable conclusion based on the evidence before it.

[17] Third, the Respondents submit that the Board analyzed the issue of persecution. The Board accepted that the Respondents were credible, referred to the Respondents' narrative, and reasonably held that the cumulative events referred to therein amounted to persecution.

[18] Finally, the Respondents submit that the Board provided adequate reasons. The Board is required to render oral decisions where possible (*Refugee Protection Division Rules*, SOR/2012-256, subrule 10(8)), and as such, the Court should not take a microscopic approach to the assessment so long as it is clear how the Board came to its conclusion. The reasons meet the *Dunsmuir* and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 criterion as they provide a clear basis for the reasoning behind the decision. Further, the Board referred to key pieces of evidence on which it relied, as well as case law and IRB documents.

## VI. Analysis

### A. *Did the RPD apply the correct legal test for state protection?*

[19] I agree with Applicant's position that it is unclear whether the Board applied the correct legal test for state protection. As noted by Justice LaForest in *Canada (Attorney General) v*

*Ward*, [1993] 2 SCR 689 at 724 [Ward], a claimant seeking refugee protection must provide “clear and convincing confirmation of a state's inability to protect” (see also: *Canada (Citizenship and Immigration) v Balogh*, 2014 FC 932 [Balogh] at para 27; *Glasgow v Canada (Citizenship and Immigration)*, 2014 FC 1229 at para 35). When the proper test for state protection has been misunderstood by the Board, it is not this Court’s role to reweigh the evidence, as it cannot anticipate how the Board would have concluded had it properly assessed the evidence (*Kumati v Canada (Citizenship and Immigration)*, 2012 FC 1519 at para 42).

[20] The Board properly stated the standard of proof for rebutting the presumption of state protection at some points in the decision. For example, at paragraphs 12-13:

[12] In assessing the issue I am guided by a number of cases in which the principles were applied to this case. There is a presumption, except in situations where the state is in a complete breakdown, that it is capable of protecting its citizens. The claimant who alleges that state protection is inadequate must persuade the Board that on a balance of probabilities the evidence establishes that state protection is inadequate.

[13] The Refugee Protection Division is not obliged to prove that the state can offer the claimant effective protection. Rather, the claimant bears the legal burden of rebutting the presumption that state protection exists, by adducing clear and convincing evidence which satisfies the RPD on a balance of probabilities.

(CTR, p 6)

[21] However, despite the accurate articulation of the test noted above, the Board also communicated a version of the test which lowered the burden of proof :

[11] I considered the issue of state protection in Hungary and I find in this particular case that the claimants have to some extent rebutted the presumption of state protection to a certain level based on their personal experience.

[16] ...The onus seems to have shifted to the Board to demonstrate that adequate state protection is not available in Hungary, rather than the onus being on the claimant to rebut the presumption that adequate state protection exists.

[Emphasis added]

[22] This is the version of the test the Board appears to have applied, as the error was further repeated in its conclusion:

[24] I find that the claimants were discriminated to a certain degree in Hungary on the basis of the cumulative acts of discrimination directed towards them. They have also somewhat rebutted the presumption of state protection in their personal circumstances.

[23] The correct application of the test for state protection is of considerable importance, since the availability of state protection is determinative of a refugee claim in circumstances when the presumption has not been rebutted (*Rosas Maldonado v Canada (Citizenship and Immigration)*); 2011 FC 1183 at para 19; *Goloubov v Canada (Citizenship and Immigration)*, 2013 FC 1114 at para 5).

[24] In my view, allowing a claimant to “somewhat rebut” a presumption of state protection (or shifting the onus entirely) is to apply a decidedly lower legal threshold than requiring them to provide “clear and convincing evidence” that proves, on a balance of probabilities, that state

protection is inadequate (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30). Even though this Court has held that a test need not be precisely phrased by the Board if the gist of the test is apparent, it has chosen to remit the matter in circumstances in which the wrong test has been applied, or it is unclear as to which test has been applied (*Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 9; *Arrinaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 773 at para 44 [Arrinaj]; *Balogh* at paras. 28-29).

[25] While the Board in this case stated that given Hungary's status as a democracy, it created a strong presumption that state protection would be forthcoming (CTR, p 8) and acknowledged that adequacy of protection, rather than effectiveness or perfection, is what is required of the state (CTR, p 6), it conducted no analysis of the evidence that it found rebutted the presumption of state protection. As a consequence, it is unclear which legal standard the Board actually applied, and the manner in which they applied it. In finding this error, I find the words of the Justice O'Keefe in *Arrinaj* instructive:

[44] In the present case, the Board has stated two different tests in two different portions of the decision. The first test stated at page 2 is the correct test, while the second test is not. In carrying out its analysis, the Board used the incorrect test. I cannot tell from the decision which test the Board actually applied in reaching its decision. If the Board used the incorrect test to reach its decision, then the Board committed an error of law. As I cannot tell which test was applied, I am of the view that the decision must be set aside.

[26] In acknowledging the reviewable error above, I make no comment on the substantive merits of the Respondents' case. Indeed, I recently found in *Canada (Minister of Citizenship and Immigration) v Horvath*, Federal Court Docket IMM-6775-13, that the Board's conclusion that the presumption of state protection in Hungary was rebutted was a reasonable one. However, unlike the case at bar, the reasons in that case cited the objective documentary evidence the Board relied on and set out the correct test, enabling the Court to discern that the test had been correctly applied.

[27] I allow the Application and remit the matter to be decided by another member in accordance with these reasons.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed.

No question of general importance warranting certification was raised.

"Alan S. Diner"

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Judge

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

**DOCKET:** IMM-5660-13

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION v NORBERT NEUBAUER SZILVIA  
NEUBAUERNE LAKATOS (a.k.a. NORBERTNE  
NEUBAUER) MILAN NORBERT NEUBAUER  
ANTAL LAKATOS

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 10, 2014

**JUDGMENT AND REASONS  
BY:** DINER J.

**DATED:** MARCH 2, 2015

**APPEARANCES:**

Jocelyn Espejo-Clarke

FOR THE APPLICANT

Daisy McCabe-Lokos

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

William F. Pentney  
Deputy Attorney General of  
Canada

FOR THE APPLICANT

Rochon Genova LLP  
Barristers and Solicitors  
Toronto, Ontario

FOR THE RESPONDENTS

## ANNEX

### Section 96 of *IRPA*

#### Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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

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

#### Définition de « réfugié

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

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