



IMMIGRATION AND REFUGEE BOARD  
(REFUGEE PROTECTION DIVISION)

LA COMMISSION DE L'IMMIGRATION  
ET DU STATUT DE RÉFUGIÉ  
(SECTION DE LA PROTECTION DES RÉFUGIÉ)

IN PRIVATE  
HUIS CLOS  
TA1-25948

CLAIMANT(S)

DEMANDEUR(S)

DATE(S) OF HEARING

**February 24, 2003**

DATE(S) DE L'AUDIENCE

DATE OF DECISION

**March 20, 2003**

DATE DE LA DÉCISION

CORAM

**L. Fournier**

CORAM

FOR THE CLAIMANT(S)

**Andrew Kadar**

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

**Not Present**

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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These are the reasons for the decision of the Refugee Protection Division (RPD) in the claim for protection made by (the claimant) who claims refugee protection due to fear of returning to Hungary based on his sexual identity as a homosexual.

**SUMMARY OF THE CLAIMANT'S ALLEGATIONS:**

The purpose of this summary of allegations is not to restate the entire narrative of the principal claimant's Personal Information Form (PIF).<sup>1</sup> However, all documentary evidence and information contained in the PIF, the claimant's oral testimony and submissions of counsel, received March 7, 2003, were considered in this decision.<sup>2</sup>

The claimant alleges that he fell in love with his girlfriend's 21 year-old nephew, He claims that this relationship became public knowledge and that he suffered torment in the form of name-calling. The claimant alleges that gypsies wrote derogatory remarks on his walls and that he and his dog were sprayed with paint. He also claims that people have spit at him.

The claimant states that he left Hungary on August 7, 2001 arrived in Canada on the same date, and made his claim for protection immediately upon arrival.

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<sup>1</sup> Exhibit C-1, Personal Information Form of dated December 27, 2001.

<sup>2</sup> Kanagasabapathy, Pushparajah v. M.C.I. (F.C.T.D., no. IMM-1-02), Rouleau, January 27, 2003.

**IDENTIFY:**

The claimant is a 35 year-old citizen<sup>3</sup> of Hungary. He was born on 1967 in Gyula, Hungary. I am not persuaded that he is a bisexual.

**DETERMINATION:**

I find that the claimant is not a Convention refugee, as he does not have a well-founded fear of persecution for a Convention ground in Hungary. I also find that the claimant is not a person in need of protection in that his removal to Hungary would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or punishment. There are no substantial grounds to believe that his removal to Hungary will subject him personally to a danger of torture.

**ANALYSIS:**

To the Board, there are three central issues to this claim. The first issue focuses on the claimant's alleged sexual identity as a bisexual. It is important here to understand how his alleged tormentors would conclude that he is a bisexual. More specifically, it is his allegation that this identity is well known. Secondly, the Board needs to determine, on a balance of probabilities, whether the claimant fears either persecution, a risk to his life or a danger of torture because of his sexuality. Finally, the Board has to ascertain why it is that state protection in Hungary is not available to the claimant.

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<sup>3</sup> Exhibit M-1, Hungarian Passport #

**CREDIBILITY/SEXUAL IDENTITY:**

I have found the claimant's testimony to be not credible. When a claimant swears that certain allegations are true, this creates a presumption that they are true "unless there be reason to doubt their truthfulness".<sup>4</sup> Despite statements in his PIF in which he claims to have developed an interest in his girlfriend's nephew and being identified as an apparent bisexual, I am not persuaded as to his claim of homosexuality. The claimant's statement that he fathered a son in 1987 and was divorced in 1994 are troubling and confusing. The claimant's four-year relationship with another woman, following his divorce, creates in my mind even more doubt about his alleged sexual identity. According to the port of entry notes, the claimant is quoted as saying that his living companion was \_\_\_\_\_ with whom he travelled to Canada. He is further quoted as saying that she, along with him, suffered verbal and physical harassment. The claimant makes no mention of \_\_\_\_\_ in his own PIF. One would think that such a relationship would be noted in question 15 of his PIF. That section specifically requires claimants to identify relationships, including common-law relationships.

The claimant testified that he lived with \_\_\_\_\_, the sister of \_\_\_\_\_ for four years in Hungary. In his PIF,<sup>5</sup> the claimant specifically states that he began a homosexual relationship: "My former common-law partner had a 21 year-old nephew

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<sup>4</sup> Maldonado v. Canada (Minister of Employment and Immigration) (1994), 23 Imm. L.R. (2d) 220 (F.C.T.D.).

<sup>5</sup> Exhibit C-1, PIF, question 37, paragraph 3 and 4.

..." The PIF goes on to state that [redacted] came to visit the claimant on 2000 and "we started drinking and by the time we came to our senses it was too late. We had already slept together." The claimant testified that once [redacted]'s parents found out about the sexual activity of the claimant with [redacted]'s parents disowned him and ended up living with the claimant, which led to a more visible relationship and, allegedly, more harassment. The claimant went on to testify that he came to Canada with [redacted] the mother of [redacted]. The improbability of this entire scenario is immense. The claimant asks the Board to believe, on the one hand, [redacted]'s parents, who had disowned their son due to his relationship with the claimant and on the other hand, that he came to Canada and lived for almost ten months with [redacted]'s mother. He alleges that small town people in Hungary who could only have learned about he and [redacted] from either him or [redacted]'s family openly harassed him. I do not believe such a relationship is consistent with the claimant's earlier allegations.

**FEAR OF PERSECUTION:**

Much of the claimant's complaints amount to discrimination and not persecution. He claims that he has been mocked, called names on the street and spit at because of his alleged sexual identity. Discrimination can be found to be persecutory based on certain very specific conditions. What the Board must decide is if the degree of discrimination the claimant faced amounted to persecution. Was the discrimination serious and

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persistent? The UNHCR Handbook<sup>6</sup> is helpful in making a determination, as it provides useful guidance regarding these issues.

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.<sup>7</sup> It is only in certain circumstances that discrimination will amount to persecution.<sup>8</sup> This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions of his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.<sup>9</sup>

In Sagharichi,<sup>10</sup> the Court ruled that to be considered persecution, the anticipated mistreatment or harm must be serious. This view is supported in Ward,<sup>11</sup> which states, *inter alia*, that inflicting of harm must occur with repetition or persistence or in a systematic way. What distinguishes discrimination from persecution is degree of seriousness of harm.<sup>12</sup>

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<sup>6</sup> Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, re-edited Geneva, January 1992.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Sagharichi v. Canada (Minister of Employment and Immigration) (1993), 182 N.R. 398 (F.C.A.).

<sup>11</sup> Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, at 724-725.

<sup>12</sup> Ibid.

**STATE PROTECTION:**

Finally, it is necessary to consider what state protection is available in Hungary. I am guided in this area by the decision in Ward,<sup>13</sup> where the court stated:

... the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already.

In Villafranca,<sup>14</sup> the Federal Court of Appeal stated that:

No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation.

In addition, Mr. Justice Gibson in Smirnov,<sup>15</sup> indicates that there can be instances in which:

Even the most effective, well-resourced and highly motivated police forces will have difficulty providing effective protection. This Court should not impose on other states a standard of "effective" protection that police forces in our own country, regrettably, sometimes only aspire to.

Case law makes it clear that unless state apparatus has completely broken down, there is a presumption that the state is capable of protecting the claimant.<sup>16</sup> The claimant

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<sup>13</sup> Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.

<sup>14</sup> Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.) at 132-133.

<sup>15</sup> Smirnov v. Canada (Secretary of State), [1995] 1 F.C. 780 (T.D.), at pages 5-6.

<sup>16</sup> Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 at 725.

must either approach the state for protection where such protection might reasonably be forthcoming or rebut this presumption by providing "clear and convincing proof" of the state's inability to protect.<sup>17</sup> The claimant has failed to establish that state protection is unavailable to him.

In evaluating the forward-looking aspect of this claim, the panel must consider the matter of availability of state protection, which is "... a crucial element in determining whether the claimant's fear is well-founded".<sup>18</sup> In Ward,<sup>19</sup> the claimant is required to approach his "home" state for protection before the responsibility of other states become engaged. In Villafranca,<sup>20</sup> the Court held that the claimant has the burden of showing that he is not able to avail himself of protection. The test is an objective one. Evidence is required to establish that the claimant was physically prevented from seeking the government's aid or that the government was prevented from giving it. Even though Hungary is a nation that makes claim to the democratic value of protection of human

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<sup>17</sup> Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, page 724.

<sup>18</sup> Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.

<sup>19</sup> Ibid.

<sup>20</sup> Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

rights,<sup>21</sup> it cannot be expected to guarantee the perfect protection of all its citizens at all time.<sup>22</sup>

In this case, no evidence was presented that the claimant was physically prevented from seeking the government's aid or that the government was prevented from giving it. In the absence of such evidence, it is reasonable to infer that the claimant was able to seek state protection, however, he willingly chose not to do so.

I note that the government of Hungary is a democratic one and is committed to upholding human rights and protecting its nationals; it is in effective control of its territory and has its own military and civil authorities.<sup>23</sup> I have relied on documentary evidence that I view "as the most authoritative".<sup>24</sup>

Homosexuality was decriminalized in Hungary in 1961. Before that, both male and female homosexual acts were banned and punished. Since then, partners who are both of age can have same sex relationships. In 1961, legal majority was obtained at the age of 20 years;<sup>25</sup> this was reduced to 18 in 1963. In addition to the changes to the

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<sup>21</sup> Exhibit R-1, US Department of States Report, February, 2001.

<sup>22</sup> Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

<sup>23</sup> Exhibit R-1, US DOS, February 2001.

<sup>24</sup> Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 589 (C.A.); (1993), 22 Imm. L.R. (2d) 241 (F.C.A.).

<sup>25</sup> Exhibit R-1, "World Legal Survey, The International Lesbian and Gay Association", November 7, 1999.

legislation, Hungary also provides a climate for gay organizations. Homeros Lambda was officially registered in 1988, after two years of effort. It was this organization that established links with Western gay and lesbian groups, especially the International Lesbian and Gay Association (ILGA). Members of this organization set up other more open and active organizations in the early nineties when the political climate had been through many changes and a number of non-government organizations (NGOs) were formed. The Rainbow (Szivarvany) Association for the rights of gays and lesbians was the first organization that set its task in political terms.

According to Geza Juhasz, head of the Habeas Corpus organization that provides legal aid to homosexuals, such violence or threat of such violence has been quite rare in the past few years. The organization is aware of only one case where a man in Budapest was ill-treated by police officers in February 1997 because of his homosexuality. In this case, the investigation carried out by the public prosecutor's investigative bureau was terminated without result. Presently, the Budapest Chief Prosecutor's Office, as the authority of the second instance is investigating the case. Juhasz stated that the Habeas Corpus, as well as, the majority of homosexual organizations, believes that there is not a danger situation in Hungary which would constitute well-founded grounds for granting refugee status and that they had presented this opinion before the US Embassy in Budapest some years ago.

**CONCLUSION:**

Based on all of the foregoing analysis, I conclude that the claimant, is not a Convention refugee and has not shown that there is a serious possibility that he would be subjected personally to persecution, a risk to life or risk of cruel or unusual treatment or punishment or a danger of torture, should he return to Hungary. I therefore reject this claim.

\_\_\_\_\_  
"L. Fournier"  
L. Fournier

DATED at Toronto this 20th day of March, 2003.

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