

# **Keninger v. Canada (Minister of Citizenship and Immigration)**

Between  
Erzsebet Keninger, Barbara Olah, Attila Feher and Attila  
Feher, applicants, and  
The Minister of Citizenship and Immigration, respondent

[2001] F.C.J. No. 1114  
2001 FCT 768  
Court File No. IMM-3096-00

**Federal Court of Canada - Trial Division**  
**Toronto, Ontario**  
**Gibson J.**

Heard: June 21, 2001.  
Judgment: July 6, 2001.  
(26 paras.)

*Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Credible basis for claim — Persecution, protection of country of nationality.*

Applicaiton by Keninger and Feher for judicial review of a decision of the Immigration and Refugee Board that they were not Convention refugees. Keninger and Feher were husband and wife. They had two children. They were all citizens of Hungary. Keninger argued that she had a well-founded fear of persecution because of her Roma ethnicity. She stated that she had been threatened by certain individuals on one occasion. The police laid charges in connection with the incident. The Board held that there was not any evidence that they would be persecuted in the future. It also held that their experiences amounted to discrimination, but not persecution.

**HELD:** Application dismissed. The Board's decision was reasonable based on the totality of the evidence. Keninger and Feher had the ability to seek protection from the state.

## **Statutes, Regulations and Rules Cited:**

Immigration Act, R.S.C. 1985, c. I-2, s. 2(1).

## **Counsel:**

Rocco Galati, for the applicants.  
Kevin Lunney, for the respondent.

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1 **GIBSON J.** (Reasons for Order):— These reasons arise out of an application for judicial review of a decision of Convention Refugee Determination Division (the "CRDD") of the Immigration and Refugee Board wherein the CRDD determined the applicants not to be Convention refugees within the meaning given to that expression in subsection 2(1) of the Immigration Act<sup>1</sup>. The decision of the CRDD is dated the 16th of May, 2000.

2 Erzsebet Keninger (the "female applicant") and Attila Feher (the "male applicant") are husband and wife. Barbara Olah and Attila Feher, the younger, are their children. All are citizen of Hungary. The female applicant is of Roma ethnicity. She bases her claim to Convention refugee status on her ethnicity. The male applicant is of Hungarian ethnicity. He bases his claim to Convention refugee status on his membership in a particular social group, members of families that are perceived to be of Roma ethnicity or that include a member who is in fact of Roma ethnicity. The children base their claim on their perceived ethnicity derived from that of their mother.

3 The credibility of the applicants as to the evidence before the CRDD through their narrative statements to their Personal Information Forms and through their oral testimony was not questioned by the CRDD.

4 The allegations of the applicants were summarized by the CRDD in the following terms in their reasons for decision:

The female claimant described difficulties dating back to her childhood; she said that she suffered discrimination in school because she was a Roma, as did her brother and sister. The female claimant said that she and her brother were both mistreated by the teachers; she and her sister both received bad grades because of their Roma origins in spite of their interest in being good students. The female claimant said she was able to and had to hide her Roma origins in order to get work; her brother had a harder time because he is more easily identified by sight as a Roma so when he got work it was at minimum wage.

The female claimant described one incident in 1997 where she was chased by a neighbouring bar owner after she complained to him about glass being broken near where the children were playing. The female claimant said that after she complained to the police, her husband was threatened near a telephone booth by four bald men and their pitbull dog; she thought the four men were skinheads. The female claimant said the children were

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<sup>1</sup> R.S.C. 1985, c. I-2.

traumatized by this; a psychologist advised the female claimant to move; she had already received this advice from the police when she complained. Finally, due to the fact that there were constant fights between skinheads and gypsies in front of her building, the family left Hungary for Canada in October 1998.

In oral testimony the female claimant testified that the daughter of one of her cousins was attacked at the end of 1996 by a gang of men; the victim became depressed as a result and in spite of medical treatment and a move to Canada, she eventually committed suicide. The female claimant indicated that although she thought the attackers were skinheads, she could not say that for sure; she thought police assistance would have been sought but she was not sure of this. The female claimant also testified that other cousins were harassed in their residences and assaulted. Many of these cousins have now come to Canada.

The male claimant adopted the female claimant's PIF narrative. He also testified that in the 1997 incident involving the pitbull, he went to a telephone booth to make a call related to his job; the window to the telephone booth was broken and the telephone receiver was grabbed out of his hand. When the male claimant turned around to see what was happening, a man known to him as the restaurant owner where the glass had been broken was there with four of his friends and their dogs. The male claimant testified that the incident occurred before the court date set in this matter for July 1997.

The male claimant testified that he took many trips out of the country in 1997 and 1998 as part of his job; he could not tell the panel the name of his employer during that period. The male claimant testified that he was out of the country on these trips for several days but that he did not ever make a claim for refugee status, although he did visit signatories to the Convention. When asked why he did not pursue a claim, the male claimant said that in order to demonstrate a real problem, he would have to go back to his early childhood and that he had not even thought of leaving Hungary. When asked what he feared should he have to return to Hungary, the male claimant initially spoke of the events surrounding the 1956 revolution; he eventually said that he was afraid for his children now and that he has fear of the restaurant owner, who, with friends, surrounded him at the telephone booth in 1997.

5 The foregoing summary does not reflect the fact that the applicants were, for a period of some eighteen (18) months following the female applicant's confrontation with the neighbouring bar owner, harassed and threatened. Nor does it reflect the fact that, following the female applicant's complaint to the police with respect to the conduct of the bar owner, an investigation was conducted, a charge or charges were laid against the bar owner, when he failed to appear to respond to those charges, a bench warrant was issued for his arrest, he was arrested and briefly held in custody, a new hearing date was set, and

only when he appeared at the second scheduled hearing was he acquitted. Apparently his acquittal may have flowed, not from failure of diligent pursuit of the prosecution on behalf of the Hungarian government, but rather from failure of the applicants to themselves pursue the matter.

6 Before me, counsel for the applicants urged that the CRDD had erred in a reviewable manner in four (4) respects: first, by referring directly to an earlier decision of the CRDD on a "lead case" in respect of Hungarian Roma and adopting the reasoning of the CRDD in respect of that matter where, of course, the facts were different than those in this matter; secondly, by imposing too high a test for Convention refugee status on the applicants; thirdly, by erring in its interpretation of the distinction between persecution and discrimination; and finally, by failing to effectively weigh the totality of the documentary evidence before it on the issue of country conditions in Hungary.

7 With respect to the first issue, the CRDD wrote:

However, there is also documentary evidence indicating that this problem [the issue of state protection for Roma in Hungary] is being addressed through the recruitment of Roma into the police forces and through training on cultural diversity.

For this proposition, the CRDD simply cited the reasons of another panel of the CRDD on CRDD file T-98-04435, which reasons were dated the 20th of January, 1999. The specific reference was to pages 36 and 37 of those reasons.

8 The reasons of the CRDD on file T-98-04435 were not in evidence before me. What the members of the CRDD there stated at pages 36 and 37 of their reasons was left unknown to me. Given the foregoing, I am simply not prepared to accept counsel's submission on behalf of the applicants that the CRDD, in this matter, adopted the analysis in the earlier matter on different facts. I am prepared to assume nothing more than that the CRDD in the earlier matter made specific reference to documentary evidence before it and that, in this matter, the CRDD simply adopted those references to documentary evidence that I am also prepared to assume was before the CRDD in this matter. In the absence of evidence to the contrary, I am not prepared to go further. In the result, I conclude that on this issue, the CRDD made no reviewable error.

9 On the second issue, whether or not the CRDD imposed too high a threshold against the applicants for determination of Convention refugee status, the CRDD wrote at page 7 of its reasons:

Assuming that on a balance of probabilities the incidents described by the claimants occurred approximately as they say they did, the behaviour complained of does not, in the panel's view amount to past persecution; it would qualify as discrimination.

Later, on the same page of its reasons, the CRDD continued:

This, [an attack on a cousin's daughter] in the panel's view, does not amount to harm inflicted in a repetitious, persistent or systematic way or harm of a serious enough nature to cross the line from discrimination to persecution.

For the first quoted conclusion, the CRDD cited *Canada (Attorney General) v. Ward*<sup>2</sup>, among other cases. For the second conclusion, the CRDD also cited the *Ward* decision of the Supreme Court of Canada as well as *Rajudeen v. Canada (Minister of Employment and Immigration)*<sup>3</sup> and one other case from this Division of this Court.

10 At page 9 of its reasons, the CRDD wrote:

The claimants have not established clear and convincing proof that the state is unable or unwilling to protect the claimants and their family.

...

The claimants have not satisfied the burden of proof that there is a serious possibility or reasonable chance that they will suffer persecution should they return to Hungary.

[emphasis added]

For the first of the foregoing propositions, the CRDD again cites *Rajudeen* and the same additional decision from this Division. For the latter proposition, no authority is cited and it is this statement of the test that counsel for the applicants urged reflects reviewable error.

11 In *Salibian v. Canada (Minister of Employment and Immigration)* [See Note 4 below], Mr. Justice Décary, for the Court, wrote at page 173:

It can be said in light of earlier decisions by this Court on claims to Convention refugee status that

- (1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;
- (2) the applicant can show that the fear he had resulted not from

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<sup>2</sup> [1993] 2 S.C.R. 689.

<sup>3</sup> (1984), 55 N.R. 129 (F.C.A.).

reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;

...

12 On the same issue in *Piel et al v. Canada (Minister of Citizenship and Immigration)*<sup>4</sup>, Mr. Justice O'Keefe wrote in paragraph 25 of his reasons:

The tribunal's discussion with respect to persecution is very limited as the decision deals mainly with the issue of the state's ability to protect the applicants. With respect to "a well-founded fear of persecution" there is simply a finding ... that the "claimants have not discharged their onus of establishing that there is a reasonable chance or a serious possibility that they will be persecuted by reason of ...". I am of the opinion that this issue should be more fully addressed and determined by the panel which will rehear this application. [emphasis added]

After citing from *Salibian*, Mr. Justice O'Keefe continued:

Because of the reference to "they will be persecuted" and the lack of any detailed explanation, it would appear to me the tribunal may have believed that the applicants had to show that they themselves were persecuted. This is an error.

13 I reach a different conclusion here given the entire context in the CRDD's reasons of the above-quoted passages and in particular, on the basis of the reasons of the Federal Court of Appeal in *Adjei v. Canada (Minister of Employment and Immigration)*<sup>5</sup> where Mr. Justice MacGuigan, for the Court, wrote at page 683:

The parties were agreed that one accurate way of describing the requisite test is in terms of "reasonable chance": is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?

We would adopt that phrasing ...

In *Salibian*, *supra*, the foregoing statement of the appropriate test was adopted with the verb form "would" converted to the more positive form "will" here adopted by the CRDD.

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<sup>4</sup> [2001] F.C.J. No. 859 (Q.L.) (F.C.T.D.); 2001 FCT 562.

<sup>5</sup> [1989] 2 F.C. 680.

14 On the third issue, whether or not the CRDD erred in its determination that the experiences of the applicants amounted to discrimination and not persecution, the CRDD wrote:

Assuming that on a balance of probabilities the incidents described by the claimants occurred approximately as they say they did, the behaviour complained of does not, in the panel's view amount to past persecution; it would qualify as discrimination. At worst, the claimants described difficulty in obtaining work and an education, one rather prolonged incident involving a threat to physical safety in 1997 and harassment such as hydro being deliberately cut off between 1997 and 1998 when the family left Hungary. The female claimant described psychological sequelae from the 1997 incident but no psychological report was tendered. The female claimant described an attack on a cousin's daughter but based on her testimony, quite candidly given, the panel cannot conclude that it was anything other than an isolated incident; the female claimant was not able to provide enough detail on the incident to allow for that conclusion.

15 In *Horvath et al v. Canada (Minister of Citizenship and Immigration)*<sup>6</sup>, Mr. Justice MacKay wrote at paragraphs 16 to 18 of his reasons:

In this case the panel, while not fully accepting the evidence of the applicants' PIFs and the mother's testimony, does accept that the applicants, as Roma, would, if returned to Hungary, face discrimination in education, in employment, in access to health care, and in harassment generally in relation to public services. It accepts that there is discrimination against Roma in virtually all of the areas of concern to the lives of the applicants. It did not consider whether cumulatively the treatment experienced by the applicants could give rise to a well-founded fear of persecution.

It may be that had the panel considered the cumulative effects of discriminatory treatment of the applicants, it might have concluded that these did not provide the basis for a well-founded fear of persecution. But in the circumstances of these claimants, on the evidence before the panel, it was an error on its part to fail to consider the cumulative effects of the treatment that the panel consistently accepted as discriminatory, and indicative of serious problems facing Roma in Hungary.

Assessment of the cumulative effects of harassment as a possible basis for a finding of persecution is recognized by the Court of Appeal in *Retnem v. M. E. I.*, [1991] F.C.J. No. 428... . It is also set out in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status in

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<sup>6</sup> [2001] F.C.J. No. 643 (Q.L.) (F.C.T.D.); 2001 FCT 398.

the following terms:

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 a well-founded fear of persecution on "cumulative grounds".

[emphasis added; citation omitted]

Mr. Justice MacKay went on to conclude that, in the circumstances of the matter before him, the CRDD erred by not assessing whether the cumulative effect of discriminatory treatment, based on ethnic origin, constituted persecution.

16 I am satisfied that, on the facts of this matter, a different conclusion is warranted. Albeit that the earlier quoted summary of the experiences of the applicants might be seen by some as minimizing those experiences rather than maximizing them or even fairly describing them, the summary is provided and amounts to an examination of the totality of the applicants' experiences. It is followed by the following conclusion:

This, in the panel's view, does not amount to harm inflicted in a repetitious, persistent or systematic way or harm of a serious enough nature to cross the line from discrimination to persecution. The panel acknowledges that the test is forward-looking; however, one indicator of future behaviour is past behaviour.

17 While I might have reached a different conclusion on the facts of this matter as to whether the line between discrimination and persecution was crossed in respect of the applicants, based on their cumulative experiences and those of others similarly situated, that is not the test. I am satisfied that the CRDD's conclusion was reasonably open to it and was not based on a failure to assess the totality of the applicants' experiences and those of others with which they were familiar, or on an inadequate assessment of those experiences.

18 Finally, I turn to the fourth issue, the CRDD's weighing of the totality of the evidence, in particular the documentary evidence, that was before it. In this regard, the CRDD wrote:

In light of the existence of documentary evidence indicating that there is widespread discrimination against Roma, the panel examined the issue of



state protection with respect to the claimant. The panel is aware of the evidence documenting police brutality and discrimination against Roma. However, there is also documentary evidence indicating that this problem is being addressed through the recruitment of Roma into the police forces and through training on cultural diversity. The claimants both said that all the police did when they were approached was give them the "good advice" to move; when asked what this expression means, the male claimant said it meant they gave malicious advice. The female claimant said the family was unable to move due to lack of funds. When asked how she was able to travel outside the country if she did not have money, the female claimant said that it costs more to move than to travel. The panel notes that a court date on the complaint against the restaurant/bar owner had been assigned; this suggests that the police made some attempt to prosecute the restaurant/bar owner. The claimants attended court on the date set out in the notice. The restaurant/bar owner did not appear; a warrant for his arrest was issued. The female claimant said he was arrested and released before a new court date was set. Although the matter may not have been resolved to the satisfaction of the claimants, the panel finds that state protection was not only available to the claimants but was demonstrated to them.

The female claimant said she approached the self-government and the child protection department to search for family and child protection. The female claimant said she asked these organizations to close the restaurant/bar where the 1997 incident occurred; she testified that she was told by these organizations that this was not their responsibility. However, the panel believes that should the claimant require it, there is adequate state protection available to her in Hungary; the protection need not be, nor will it be, perfect. The documentary evidence indicates that the state has put protective programmes in place. Although in the claimants' case, it appears that the court process may not have been able to solve their problem in 1997, there is evidence that as Roma become aware of and seek to enforce their rights, the courts will assist them. The claimants have not established clear and convincing proof that the state is unable or unwilling to protect the claimants and their family.

19 On this issue, Mr. Justice MacKay wrote in Horvath, supra, at paragraphs 14 and  
15:

In large part the panel's ultimate finding of lack of well-founded fear of persecution is based on subordinate findings that are based on reliance upon selective portions of the documentary evidence. It is not the Court's function to question the weighing of evidence by the panel unless its findings are found to be perverse or patently unreasonable. It is accepted that failure to refer to specific documents does not imply the documents

were ignored. Yet where the panel makes no reference to documentary evidence of generally acceptable sources which contradicts the portions on which the panel relies, it is difficult to conclude that the panel did consider all relevant evidence.

Here, the Board concludes, while acknowledging the applicants' concerns about difficulties they faced in education, in accessing health care, in employment, in dealing with harassment and attacks by skinheads, that government and other measures to deal with the problems of the Roma minority in Hungary now provide effective means to protect their interests. That appraisal is less clearly supportable from certain regularly accepted documentary evidence. In my view, the failure to refer to that evidence in the circumstances here is indicative of the panel's failure to consider all the relevant evidence.

[emphasis added]

20 Among the footnoted references to the last foregoing quotation from the reasons of the CRDD, are references to the Hungarian Lead Case Information Package. At least one of those footnoted references to the Package is to the package as a whole, without reference to specific pages within that package. In *Polgari et al v. Canada (Minister of Citizenship and Immigration)*<sup>7</sup>, Madame Justice Hansen, faced with similar references, wrote at paragraphs 31 and 32 of her reasons:

In the circumstances of the present case a number of issues arise. First is the panel's reference to the Hungarian Lead Case Information Package. The index to this package refers to in excess of seventy-five documents, from a variety of sources, covering a time frame from 1987 to 1998 together with the transcripts of the evidence of six specialists. Where there is no reference to the specific documentary evidence within the package being relied upon, there is no basis on which the applicants can challenge the currency of the documentation, the objectivity of the source, or the expertise. Nor is the Court in a position to assess the reasonableness of any findings based on the documentation.

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

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<sup>7</sup> [2001] F.C.J. No. 957, 2001 FCT 626, June 8, 2001, IMM-502-00.

contradictory documents and explain its preference for the evidence on which it relied warrants the Court's intervention.

21 Much the same might be said here, but I reach a different conclusion. In its reasons, the CRDD acknowledges that the material before it included documents on country conditions submitted by counsel for the applicants. Notes from Citizenship and Immigration Canada including copies of the claimants' passports, and documents from the Refugee Claim Officer were also entered. The footnoted references to the CRDD's reasons include only one reference to the documentary package submitted by counsel for the applicants which is in the most general terms and is cited to the statement "The panel notes that the documentary evidence chronicles widespread discrimination against Roma in Hungary." References to the documents from the RCO are more prevalent, the RCO's package apparently including the Hungarian Lead Case Information Package.

22 While I have previously had occasion to consider the documentary package submitted by counsel for the applicants before the CRDD, and to note its unwieldy and ill-indexed nature, that package was not before me in this matter, and was not commented on critically as to its utility by the CRDD itself in its reasons. Counsel before me did not take me to any documentary evidence that was before the CRDD that could be said, in the words utilized by Madame Justice Hansen, to have "... cast doubt and indeed contradict[ed] the availability and effectiveness of state protection for Hungarian Roma". While presumably there was before the CRDD in this matter, evidence that would have cast doubt on and indeed contradicted the evidence relied upon here by the CRDD to conclude that effective state protection was available for these applicants in Hungary, in the absence of being specifically taken to such materials, I am not prepared to reach the same conclusion as did Madame Justice Hansen.

23 In the result then, on the basis of the material before it and arguments of counsel before me and, further, on the basis of the foregoing analysis, I find no reviewable error made by the CRDD in concluding as it did with respect to these applicants. This application for judicial review will be dismissed.

24 Counsel for the applicant recommended four (4) questions for certification in the following terms:

1. Can physical attacks, threats, and/or injury to the physical and psychological integrity and well-being of a person, or serious threats thereof, based and triggered by the identifiable racial features of the victim, ever amount to "discrimination" or is it invariably "persecution" under the refugee definition?
2. Where is the line to be drawn between "adopting the reasoning" of another panel and "adopting findings of fact" of another panel, with respect to general country conditions and effective state protection?
3. Does the concept of a "lead case", to establish findings of fact with

respect to country conditions and state protection, to be used and relied upon by other CRDD panels, without full particulars of the genesis and parameters of the "lead case", in the tribunal record, give rise to a reasonable apprehension of bias, constitute denial of a fair hearing, or is otherwise contrary to the scheme and CRDD jurisdiction under the Immigration Act?

4. Does the CRDD lack or exceed jurisdiction by importing evidence, such as viva voce and documentary evidence, as well as particular findings of fact from (an)other CRDD case(s) when the actual evidence from that other case is neither put before the claimant nor included in the tribunal record before the Federal Court, but rather and only a descriptive "index" of that evidence is provided and produced?

25 Counsel for the respondent urged against certification of any of the proposed questions or, indeed, any question at all.

26 I find the questions proposed by counsel for the applicants, generally speaking, to be more in the nature of reference questions than questions directed to the specific facts of this matter and in terms such that a response to any of the questions would be clearly dispositive of an appeal of my decision herein. In the result, while the questions proposed may be "serious question of general importance", I am not satisfied that they are appropriate for certification on the specific facts of this matter. Accordingly, no question will be certified.

GIBSON J.