Osgoode Hall Law School of York University
Osgoode Digital Commons

Osgoode Legal Studies Research Paper Series

Research Papers, Working Papers, Conference Papers

2015

# No Refuge: Hungarian Romani Refugee Claimants in Canada

Julianna Beaudoin

Jennifer Danch

Sean Rehaag
*Osgoode Hall Law School of York University*, srehaag@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/olsrps


Part of the Human Rights Law Commons

## Recommended Citation

Beaudoin, Julianna; Danch, Jennifer; and Rehaag, Sean, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015). *Osgoode Legal Studies Research Paper Series.* Paper 94.
http://digitalcommons.osgoode.yorku.ca/olsrps/94

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.

# OSGOODE HALL LAW SCHOOL

LEGAL STUDIES RESEARCH PAPER SERIES

**Research Paper No. 12**

**Vol. 11/ Issue. 03/ (2015)**


# No Refuge: Hungarian Romani Refugee Claimants in Canada


Beaudoin, J., Danch, J. & Rehaag, S. (2015). No Refuge: Hungarian Romani Refugee Claimants in Canada. *Osgoode Hall Law Journal*, forthcoming.



Sean Rehaag, Julianna Beaudoin, and Jennifer Danch



**Editors:**

Editor-in-Chief: Carys J. Craig (Associate Dean of Research & Institutional Relations and Associate Professor, Osgoode Hall Law School, York University, Toronto)

Production Editor: James Singh (Osgoode Hall Law School, York University, Toronto)

This paper can be downloaded free of charge from:
http://ssrn.com/abstract=2588058

Further information and a collection of publications from the Osgoode Hall Law School Legal Studies Research Paper Series can be found at:
http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=722488

Osgoode Legal Studies Research Paper No. 12
Vol. 11/ Issue. 03/ (2015)

# No Refuge: Hungarian Romani Refugee Claimants in Canada

Beaudoin, J., Danch, J. & Rehaag, S. (2015). No Refuge: Hungarian Romani Refugee Claimants in Canada. *Osgoode Hall Law Journal*, forthcoming.

Sean Rehaag, Julianna Beaudoin, and Jennifer Danch

**Abstract:**
From 2008 to 2012, large numbers of Hungarian Romani refugee claimants came to Canada. Their arrival was controversial. Some political actors suggested that their claims were unfounded and amounted to abuse of Canada's refugee processes -- abuse which could only be prevented through wide-scale reforms to the refugee determination system. Many advocates for refugees, by contrast, argued that persecution against Roma was rampant in Hungary and noted that hundreds of Hungarians had been recognized as refugees in Canada. Some went further and contended that Romani refugee claimants fled persecution in Hungary only to be confronted with similar mistreatment in Canada.

Unfortunately, much of the debate about Hungarian Romani refugee claims in Canada has occurred in an evidentiary vacuum. The purpose of this article is to fill this vacuum by setting out the results of a quantitative and qualitative empirical study of Hungarian Romani refugee claims. The article begins by discussing the context of the study, offering an overview of the historic and contemporary experience of Roma in Hungary and outlining the history of Hungarian Romani migration to Canada, including two recent streams of migration by Hungarian Romani refugee claimants and Canada's response to these claimants. The article then moves on to an empirical study about the experience of Hungarian Romani with Canada's refugee determination system between 2008 and 2012. Finally, the article offers concluding remarks, focusing on several particularly troubling findings from the study, including the impact of anti-refugee rhetoric, concerns about institutional bias and inconsistent decision making at the Immigration and Refugee Board, and problems related to quality of counsel.

**Keywords:**
Refugee Law, Canada, Hungary, Roma, Administrative Decision-Making, Institutional Bias, Quality of Counsel, Empirical Legal Research

**Author(s):**
Sean Rehaag
Associate Professor
Osgoode Hall Law School
York University, Toronto
E: srehaag@osgoode.yorku.ca

Jennifer Danch
JD Candidate
Osgoode Hall Law School
York University, Toronto
E: jenniferdanch@osgoode.yorku.ca

Julianna Beaudoin
University of Western Ontario
London, Ontario, Canada
E: julianna.beaudoin@gmail.com

# NO REFUGE: HUNGARIAN ROMANI REFUGEE CLAIMANTS IN CANADA⊕

**Sean Rehaag,[*] Julianna Beaudoin[**] & Jennifer Danch[***]**

1. Introduction ..... 2
2. Context ..... 3
2.1. The Roma in Hungary ..... 3
2.2. History of Hungarian Roma Migration to Canada ..... 8
2.3. Romani Refugee Claims and Canada's response: 1998 to 2002 ..... 12
2.4. Romani Refugee Claims and Canada's response: 2008 to 2012 ..... 14
3. The Study: Hungarian Romani Refugee Claims (2008-2012) ..... 21
3.1. Methodology ..... 21
3.2. Statistical Overview ..... 23
3.3. Claim Type ..... 26
3.4. Grounds for Denial ..... 28
3.4.1. State Protection ..... 29
3.4.2. Discrimination versus persecution ..... 32
3.4.3. General negative credibility ..... 33
3.4.4. Other grounds of refusal ..... 34
3.5. Institutional Bias ..... 37
3.6. Consistency at the Immigration and Refugee Board ..... 42
3.7. Quality of Counsel ..... 45
3.8. Abandoned and Withdrawn Claims ..... 53
4. Conclusion ..... 57

⊕ This research was made possible through generous funding provided by the Social Sciences and Humanities Research Council, the Law Commission of Ontario, and the Canadian Forum on Civil Justice. The authors would like to thank Caitlin Beresford, Ian Brittain, Amedeo Clivio, Nadia Halum and Joshua Patlik for their able research assistance. The authors are would also like to express their gratitude to the interviewees who agreed to participate in this research.

[*] Associate Professor, Osgoode Hall Law School
[**] Western University
[***] JD Candidate, Osgoode Hall Law School

*1. INTRODUCTION*

Canada revised its refugee-determination system in 2012, dramatically speeding up the process and limiting substantive and procedural rights for some refugee claimants. Proponents argued that these revisions were needed to crack down on alleged abuse of the existing refugee determination system by "bogus" refugee claimants. [1] Hungarian refugee claimants - most of whom were Roma - were held out to be an example of this alleged abuse.[2] Political actors, including Minister of Citizenship and Immigration Jason Kenney, noted that large numbers of Hungarian refugee claims were made in Canada between 2008 and 2012, few of which succeeded and many of which were withdrawn or abandoned.[3] Declines in the number of Hungarian refugee claims made in Canada after the revisions were held out to be an indication that the reforms have been successful.[4]

Many advocates for refugees, however, contest this story about Hungarian Romani refugee claimants and abuse of the refugee-determination system.[5] They point to evidence collected by human-rights organizations of persecution against Roma in Hungary, and they note that many Hungarian Roma have been granted refugee protection on this basis in Canada.[6] They also argue that the frequency with which Hungarian Romani refugee claims were denied or abandoned is not necessarily proof of abuse of

[1] See e.g., Citizenship and Immigration Canada, "Speaking notes for the Honourable Jason Kenney" (29 June 2012), online: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-06-29.asp>.
[2] For a discussion of Hungarian Roma as an oft-cited exemplar of allegedly abusive refugee claims in these debates, see C. Levine-Rasky, J. Beaudoin & P. St Clair, "The Exclusion of Roma claimants in Canadian Refugee Policy" (2014) 48:1 Patterns of Prejudice 67.
[3] See e.g., Citizenship and Immigration Canada, "Speaking notes for The Honourable Jason Kenney" (14 December 2014), online: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-12-14.asp>.
[4] See e.g., Citizenship and Immigration Canada, "Speaking notes for Chris Alexander" (22 January 2014), online: <http://news.gc.ca/web/article-en.do?nid=831769 >.
[5] See e.g., R. Westhead, "Why the Roma are Fleeing Hungary and Why Canada is Shunning them", *Toronto Star* (13 October 2012); G. Csanyi-Robah, "Protecting Roma Refugees: a Unique Perspective", *Canadian Jewish News* (14 January 2013); K. Shane, "Critics Urge Rethink of Hungary's Safe-Country Label", *Embassy Magazine* (23 April 2014).
[6] See e.g., Roma Community Centre, "Roma Refugees in Canada and Bill C-31: Brief Submitted to Canadian Government Standing Committee on Citizenship and Immigration" (29 April 2012), online: <http://www.romatoronto.org/pdf/Roma_Community_Centre_brief_to_CIMM_re_Bill_C-31.pdf>; K. Harris, "Refugee Board Approves Claimants Labelled 'Bogus' by Ottawa", *CBC News* (11 July 2014), online: <http://www.cbc.ca/news/politics/refugee-board-approves-claimants-labelled-bogus-by-ottawa-1.2701153>.

the system, and that this may instead be evidence of flaws in the refugee-determination system.[7] Some go further and contend that Romani refugee claimants fled persecution in Hungary only to be confronted with similar mistreatment in Canada.[8]

Unfortunately, much of the debate about Hungarian Romani refugee claims in Canada has occurred in an evidentiary vacuum. The purpose of this article is to fill this vacuum by setting out the results of a quantitative and qualitative empirical study of Hungarian Romani refugee claims. The article begins by discussing the context of the study, offering an overview of the historic and contemporary experience of Roma in Hungary and outlining the history of Hungarian Romani migration to Canada, including two recent streams of migration by Hungarian Romani refugee claimants and Canada's response to these claimants. The article then moves on to an empirical study about the experience of Hungarian Romani with Canada's refugee determination system between 2008 and 2012. Finally, the article offers concluding remarks, focusing on several particularly troubling findings from the study, including the impact of anti-refugee rhetoric, concerns about institutional bias and inconsistent decision making at the Immigration and Refugee Board, and problems related to quality of counsel.

## *2. CONTEXT*

### *2.1. The Roma in Hungary*

The term "Roma" encompasses a range of peoples around the world who share a common heritage originating in India.[9] Many also share a Romani language, with varied dialects.[10] Romani peoples moved from India across the Byzantine Empire before entering Europe, where they have been

[7] See e.g., C. Ruf, "A Taste of Tolerance", *UCObserver* (January 2012).
[8] See e.g., B. Farber, N. Leipciger and A. Rosenweig, "Hating the Jew, Hating the 'Gypsy'", *National Post* (25 September 2012); K. Nerenberg, "First they Demonized the Roma, but I did not Speak Out Because I was not Roma...", *Rabble.ca* (20 December 2012), online: <http://rabble.ca/blogs/bloggers/karl-nerenberg/2012/12/first-they-demonized-roma-i-did-not-speak-out-because-i-was-no>.
[9] For general historical accounts of Romani peoples, see A. Fraser, *The Gypsies* (Oxford: Blackwell 1992); I. Hancock, *We are the Romani People* (Hatfield: University of Hertfordshire Press, 2002); D. Crowe, *A History of the Gypsies of Eastern Europe and Russia* (New York: Palgrave Macmillan, 2007). For an analysis of recent evidence of a common heritage in India, see P. Bakker, "Romani Genetic Linguistics and Genetics: Results, Prospects and Problems" (2012) 22:2 Romani Studies 91.
[10] Y. Matras, *Romani: A Linguistic Introduction* (Cambridge: Cambridge University Press, 2005).

present since the 14th century or earlier.[11] Historical documents describe Romani presence in what is now Hungary by the mid-16th century.[12]

Today, there are large Romani communities in many European countries, including Hungary. Population estimates vary, but it is generally agreed that around 10-12 million Roma currently reside in Europe.[13] According to figures collected by the Council of Europe in 2010, Hungary was home to the sixth-largest Romani community in Europe, with a population between 400,000 and 1,000,000, which represented 4 to 10 percent of the Hungarian population.[14]

Unfortunately, anti-Roma persecution has deep roots in Hungary, as it does in much of Europe.[15] For centuries, this persecution has drawn on and perpetuated stereotypes about so-called 'Gypsies', a label often imposed on, but rejected by, many Romani communities.[16] According to these stereotypes, Roma are nomadic peoples, reluctant to settle permanently and take up productive jobs, preferring instead transient lifestyles. These stereotypes also take a variety of other forms, ranging from romanticized and sexualized images of travelling 'Gypsy' musicians and fortunetellers to explicitly racist characterizations of 'Gypsies' as criminals, beggars, and thieves.[17]

Such stereotypes not only gloss over the wide diversity of Romani communities but also downplay the degree to which migration, precariousness, and transience are related to centuries of persecution.[18] As early as the 15th century, many European countries passed laws expelling Roma from their territories, and continued to do so well into the 18th century.[19] Other countries went further, passing

[11] I. Kemény, "History of Roma in Hungary" in I. Kemény & B. Janky, eds, *Roma of Hungary* (Boulder: Social Science Monographs, 2005) 1 at 1.
[12] *Ibid*.
[13] European Commission, "EU and Roma", online: <http://ec.europa.eu/justice/discrimination/roma/index_en.htm>.
[14] Council of Europe, "Roma and Travellers", online: <http://www.coe.int/t/dg3/romatravellers>.
[15] M. Brearley, "The Persecution of Gypsies in Europe" (2001) 45:4 American Behavioral Scientist 588; T. Hammarberg, *Human Rights of Roma and Travellers in Europe* (Strasbourg: Council of Europe: 2012)
[16] *Ibid* (Hammarberg) at 31.
[17] Council of Europe, "Is this a Stereotype: A Tool for Fighting Stereotypes Towards Roma", online: <http://www.coe.int/t/dg3/romatravellers/source/documents/toolstereotypesEN.pdf>.
[18] D. Petrova, "The Roma: Between and Myth and the Future" (2003) 70:1 Social Research 111 at 119-125
[19] *Ibid* (Petrova) at 119-125; Z. Barany, "The East European Gypsies in the Imperial Age" (2001) 24:1 Ethnic and Racial Studies 50 at 58; V. Ljujic, et al, "Romaphobia: A unique phenomenon?" (2012) 22:2 Rom Stud 141.

laws enslaving all Roma.[20] Hungary largely focused on strategies involving assimilation - making Roma disappear as a community - rather than on expulsion or enslavement. For example, in 1753, a decree prohibited Roma from moving around the country, from owning horses, playing music, wearing traditional clothing, or marrying amongst themselves.[21] Further laws banned the Hungarian word for Roma (*Cigány*), outlawed use of the Romani language, and ordered that Romani children be taken away from their families.[22] Migration was a key strategy through which Roma sought to avoid such persecutory laws.[23]

European attacks on Romani communities continued in Hungary and across Europe throughout the 18th and 19th centuries. They reached an apex in the 20th century during the Holocaust, known in Romani as *Porrajmos* ("the Devouring").[24] Estimates of the number of Roma killed by the Nazis vary greatly, ranging from 250,000 to 1,500,000 or more.[25] Irrespective of the uncertainty around the numbers, however, it is clear that the Nazis intended to eliminate the entire Romani population across Europe.[26] In Hungary, the fascist Arrow Cross Party, which seized power shortly after the German invasion in 1944, orchestrated the genocide against the Hungarian Romani community.[27] Thousands of Hungarian Roma were murdered,[28] and far more would have been killed had the Nazis won WWII.[29]

After WWII, the mistreatment of Hungarian Roma continued, albeit to a lesser extent, during the imposition of Communism under Soviet rule.[30] Hungarian Roma were not included in land redistribution,

---

[20] Hancock, *supra* note 9 at 21.
[21] Kemény, *supra* note 11 at 15-16.
[22] *Ibid*.
[23] Crowe, *supra* note 9 at xvii.
[24] See generally, G. Lewy, *The Nazi Persecution of the Gypsies* (Oxford: Oxford University Press, 2000).
[25] Petrova, *supra* note 18 at 130; D. Crowe, "The Roma Holocaust" in B. Schwartz & FC. DeCoste, eds, *The Holocaust's ghost: writings on art, politics, law and education* (Edmonton: University of Alberta Press, 2000) 178 at 197.
[26] B. Fisher, "No Roads Lead to Rom: The Fate of the Romani People Under the Nazis and in Post-War Restitution" (1999) 20 Whittier L. Rev. 513 at 526.
[27] Kemény, *supra* note 11 at 47-48.
[28] *Ibid* at 48; Crowe, *supra* note 25 at 193.
[29] *Ibid* (Kemény), at 48.
[30] M. Stewart, "Communist Roma policy 1945-1989 as seen through the Hungarian case" in W. Guy, ed, *Between past and future: the Roma of Central and Eastern Europe* (Great Britain: University of Hertfordshire, 2001) 71 at 71.

meaning they could neither own nor farm on land of their own.[31] Communism did provide employment opportunities for many Roma, but Romani families were still much poorer than the Hungarian average under Soviet rule.[32]

Since the collapse of Communism in 1989, anti-Roma sentiment in Hungary has increased dramatically.[33] Faced with both workplace discrimination and the elimination of many Communist-era industries in which Roma predominated, unemployment rates for Roma have skyrocketed.[34] Other economic and social indicators for Roma in Hungary, including massive poverty rates, substandard housing, excessive reliance on government transfers, poor health metrics, and low representation rates in political institutions are also troubling.[35] Hungarian Roma are also disproportionately subject to police enforcement activities.[36] Furthermore, abysmally low education rates are especially worrisome[37] - though these rates are perhaps not surprising, given that Hungarian Roma children are disproportionately placed in special schools and classes designated for children with 'mental disabilities', leading to de facto racially segregated schools.[38]

Roma in Hungary have also been confronted with mounting racist rhetoric and violence, all too often with the support of the Hungarian political leadership.[39] The European Roma Rights Centre has documented dozens of incidents between 2008 and 2012 where Hungarian Roma were subject to racist attacks, some of which resulted in deaths.[40] Far-right extremist groups, including the Hungarian Guard, have conducted paramilitary marches in Romani neighbourhoods protesting "Gypsy crime" while openly

[31] Kemény, *supra* note 11 at 49.
[32] *Ibid* at 52-60.
[33] Hammarberg, *supra* note 15.
[34] A. Ivanov & A Zheliazkova, *The Roma in Central and Eastern Europe: Avoiding the Dependency Trap* (UNDP, 2002) at 13-21 & 31-37.
[35] *Ibid* at 39-51.
[36] Hammarberg, *supra* note 15 at 80-84.
[37] UNICEF, "Towards Roma Inclusion: A Review of Roma Education Initiatives in Central and South-Eastern Europe" (2010), online: <http://www.unicef.org/ceecis/ROMA_PAPER_FINAL_LAST.pdf> at 12; C. Brüggemann, "Roma Education in Comparative Perspective" (Bratislava: United Nations Development Programme, 2012).
[38] *Ibid* (Brüggemann) at 63-71; *Horváth and Kiss v Hungary*, No 11146/11, [2013] ECHR.
[39] "Violent Attacks against Roma in Hungary: Time to Investigate Racial Motivation", Amnesty International (10 November 2010), online: <http://www.amnesty.org/en/library/asset/EUR27/001/2010/en/7ee79730-e23f-4f20-834a-deb8deb23464/eur270012010en.pdf> at 13.
[40] European Roma Centre, "Attacks against Roma in Hungary: January 2008-September 2012" (1 October 2012), online: < http://www.errc.org/cms/upload/file/attacks-list-in-hungary.pdf>.

deploying Nazi imagery.[41] Although the Hungarian Guard has officially been disbanded, its former members continue to undertake anti-Roma activities and other organizations have quickly taken up similar measures.[42] Moreover, many leading Hungarian political figures support both the Hungarian Guard and its replacements. For example, in 2010 the Chair of Jobbik - an extreme far right-wing political party with representation in Hungary's National Assembly and in the European Parliament - wore a Hungarian Guard uniform to the swearing in of the Hungarian Parliament.[43] The same year, the Vice Chair of Jobbik suggested that Roma constitute a threat to public safety and should be restricted to living in what amount to concentration camps.[44] More recently, Zsolt Bayer, a founding member of Hungary's ruling Fidesz party said, "[m]ost Gypsies are not suitable for cohabitation. They are not suitable for being among people. Most are animals and behave like animals. They shouldn't be tolerated or understood, but stamped out."[45]

Although some institutions - at the national, European, and international levels - have taken steps to try to protect the human rights of Hungarian Roma,[46] international human-rights bodies and non-governmental organizations report that the mistreatment of Hungarian Roma continues.[47] For example, a recent report by the François-Xavier Bagnoud Center for Health and Human Rights found that, between 2008 and 2012, prejudice and discrimination against Roma escalated and that hate speech and violent attacks by extremist groups proliferated.[48] The report went on to conclude:

---

[41] *Vona v Hungary*, No 35943/10, [2003] ECHR at para 69.
[42] Hammarberg, *supra* note 15 at 48; US Department of State, "Hungary 2014 Crime and Safety Report" (14 March 2014), online: <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=15321>.
[43] *Ibid* (Hammarberg).
[44] *Ibid* (Hammarberg) at 42.
[45] C. Rowlands, "Hungary's rabid right is taking the country to a political abyss", *The Guardian* (5 February 2013).
[46] For an outline of these measures, see G Muigai, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai: Mission to Hungary*, UNGAOR, 20th Sess, UN Doc A/HRC/20/33/Add.1 (2012) at para 29-33.
[47] *Ibid* at para 34-41; *European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary* (2012/2130); Amnesty International, "Hungary: Murder convictions are 'wake-up call' over hate crimes against Roma" (6 August 2013), online: < http://www.amnesty.org/en/news/hungary-roma-trial-verdict-2013-08-06>.
[48] François-Xavier Bagnoud Center for Health and Human Rights, "Accelerating Patterns of Anti-Roma Violence in Hungary" (February 2014), online: <http://fxb.harvard.edu/wp-content/uploads/sites/5/2014/02/FXB-Hungary-Report_Released-February-4-2014.pdf> at 42-43.

> Although the incidents provided very clear signals for taking action, the Government response was inadequate to stem the rise in racial crimes and extremist action.
>
> The fact that these acts have not provoked a strong governmental response has emboldened the perpetrators and their followers, and has led to the perception that such action is the preferred solution to a problem defined in racist terms.
>
> In the last five years, the increasing tolerance of far right speech and activity against the Roma in Hungary has led to institutionalization of racist political parties, acceptance of paramilitary organizations, anti-democratic legislation, and police indifference and impunity. These developments point to the heightened possibility that Hungary is moving into a more violent phase.[49]

We agree with this assessment. While we acknowledge that the Hungarian state has made efforts to improve the circumstances of Hungarian Roma, it is our view that these measures have failed to stop the alarming escalation of anti-Roma activities in recent years. As will now be seen, the ongoing mistreatment of Roma in Hungary has prompted significant numbers to flee and seek refuge in other countries, including Canada.

*2.2. History of Hungarian Roma Migration to Canada*

Canada has been home to Romani communities since at least the end of the 19th century,[50] though the size of those communities today is not entirely clear. In the 2011 Canadian National Household Survey, 5,255 respondents identified as Romani.[51] Census data, however, is notorious for undercounting Romani populations.[52] The Roma Community Centre in Toronto offers a much higher estimate of the Canadian Roma population, at around 80,000.[53] Data on the Canadian population of Roma with Hungarian heritage is even less clear. One way to estimate that population would be to look to the 2011 National Household survey, in which around 317,000 respondents identified themselves as at least

[49] *Ibid.*
[50] R. Lee, "Post-Communism Romani Migration to Canada" (2000) 13:2 Cambridge Rev Int Aff 51 at 51-52 [Lee, "Romani Migration"]; C. Smith, *Gypsies, Preachers and Big White Bears: One Hundred Years on Country Roads* (Burnstown, Ontario: General Store Publishing House, 1998).
[51] Statistics Canada, 2011 National Household Survey (Ethnic Origin), Catalogue no. 99-010-X2011028.
[52] P. Simon, "Collecting Ethnic Statistics in Europe: a Review" (2012) 35:8 Ethnic and Racial Studies 1366 at 1385-6; A. Krisán, "Group Self-determination, Individual Rights, or Social Inclusion? Competing Frames for Ethnic Counting in Hungary" (2012) 35:8 Ethnic and Racial Studies 1392 at 1401.
[53] R. Lee, "Roma in Canada" (October 1998), online: <http://www.romatoronto.org/facts_canada.html>.

partly of Hungarian heritage.[54] As we have seen, Roma constitute somewhere around four to ten per cent of the population in Hungary, but it is not obvious that the same proportion would hold in the Canadian context. What is clear, however, is that Roma have long come to Canada as part of immigration from Hungary.

The history of Hungarian immigration to Canada involves intermittent patterns of what would today be considered mixed migration: migration aimed to varying degrees at escaping persecution (*i.e.*, refugees), and at searching for improved economic circumstances (*i.e.*, economic migrants).[55] Scholars have identified several 'streams' or 'waves' of Hungarian immigration to Canada, starting in the latter half of the 19th century, and there are controversies over the degree to which each stream involved refugees or economic migrants.[56] This is not surprising, considering both the complexity of motives that drive most migration and the narrowness of the refugee definition. Under international law, the refugee definition is restricted to those who have well-founded fears of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion.[57] Many people seeking to migrate in order to avoid various types of serious harms - including wars, collapsed states, humanitarian disasters, discrimination, and persecution on grounds other than those specified - may not meet the refugee definition even though they also cannot reasonably be characterized as economic migrants.[58] Nonetheless, debates about Hungarian immigration to Canada often come down to the refugee-versus-economic migrant dichotomy.

[54] Statistics Canada, *supra* note 51.
[55] For a critique of these labels (i.e. refugee versus economic migrant) in contemporary mixed migration contexts, see R. Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization" (2007) 20:2 Journal of Refugee Studies 172.
[56] See generally, N. Dreisziger, "The 1956-57 Refugee Movement in the Context of Hungarian Immigration to Canada since the Late 19th Century" in C. Adam, et al, eds, *The 1956 Hungarian Revolution: Hungarian and Canadian Perspectives* (Ottawa: University of Ottawa Press, 2010) 197.
[57] *Convention Relating to the Status of Refugees*, 28 July 1951, Art 1(A)(2).
[58] For a discussion of the restricted refugee definition and the complexity of motivations for migration, see T.A. Aleinikoff, "From 'Refugee Law' to the 'Law of Coerced Migration'" (1994) 9:4 American University International Law Review 25.

Perhaps the most well-known stream of Hungarian migration to Canada occurred in 1956, when an uprising against the Soviet-installed regime in Hungary was met with a Soviet military invasion.[59] During the three-week uprising, Hungary's borders were opened, and more than 200,000 Hungarians fled.[60] Most would today be considered refugees fleeing persecution on account of their political opinions. However, some were also likely motivated by better living conditions in the West and so could arguably be considered economic migrants.[61]

At any rate, when the Hungarian refugee crisis erupted in 1956, Canada had not yet signed on to the 1951 United Nations Refugee Convention and had no official refugee determination system in place. Nonetheless, within days, Canadian immigration officials were dispatched to Europe, regular immigration screening procedures were truncated, transportation was organized, and, ultimately, over 37,000 Hungarians arrived in Canada in less than a year.[62]

Canada's rapid resettlement of Hungarian refugees in 1956 was an important humanitarian achievement, and it helped to shape Canadian responses to subsequent refugee crises.[63] It is, however, worth noting that the government was reluctant to offer resettlement until community organizations agreed to shoulder most of the financial burden.[64] Moreover, the resettlement efforts largely reflected traditional national interests, including advancing the Cold War anti-Communist agenda and fuelling the

[59] See generally, J. Rainer, "The Hungarian Revolution of 1956: Causes, Aims and Course of Events" in C. Adam, et al, eds, *The 1956 Hungarian Revolution: Hungarian and Canadian Perspectives* (Ottawa: University of Ottawa Press, 2010) 12; R.H. Keyserlingk, ed, *Breaking Ground: The 1956 Hungarian Movement to Canada* (Toronto: York Lanes Press, Inc., 1993).
[60] *Ibid* (Rainer) at 12.
[61] Dreisziger, *supra* note 56 at 202.
[62] N. Kelley & M. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 2010) 346; S. Bangarth, "Migrating Magyars and Canadian Inclusiveness: Responses of the State and Voluntary Organizations to the Hungarian Refugees, 1956-1958" (2010) 10 Eger J Am Stud 11 at 13.
[63] G. Donaghy, "'An Unselfish Interest?': Canada and the Hungarian Revolution, 1954-1957" in C. Adam, et al, eds, *The 1956 Hungarian Revolution: Hungarian and Canadian Perspectives* (Ottawa: University of Ottawa Press, 2010) 256 at 269.
[64] S. Bangarth, "Citizen Activism, Refugees, and the State: Two Case-Studies in Canadian Immigration History" in C. Briggs, ed, *Modern Canada: 1945 to Present* (Toronto: OUP, 2013).

expanding Canadian economy.[65] It is also important to emphasize that, in a period of openly racist Canadian immigration policies, the majority of those resettled were both Christian and white.[66] Indeed, Canadian immigration officials fretted about Hungarian refugees who did not fall into these groups, including Jews who, in one immigration official's words, were not "bona fide" refugees but had instead "taken advantage of the situation."[67]

Notwithstanding the racist attitudes of Canadian immigration officials at the time, some Hungarian refugees selected for resettlement to Canada in 1956 were Romani.[68] Unfortunately, while Canada's response to Hungarian refugees in 1956 has attracted substantial academic attention, little is known about Roma included among this group, partly because many would have been reluctant to disclose their ethnicity out of fear of discrimination, and partly because Canada chose not to gather this information.[69] To this day, however, many Canadian Roma cite 1956 as a pivotal point in their family histories.[70]

After the 1956 uprising, the level of Hungarian migration to Canada throughout the remainder of the Soviet period was modest. From 1959 to 1967, approximately 275 Hungarian refugees came to Canada each year.[71] From 1967 to 1984, an average of 400 Hungarians immigrated to Canada yearly,[72] some through family-reunification programs and others as refugees.[73] Then, from 1985 to 1989, Hungarian migration to Canada underwent a small upsurge, with around 850 Hungarians, approximately 700 of whom were refugees, immigrating to Canada each year.[74] For much of this period, merely being

---

[65] Kelley & Trebilcock, *supra* note 62 at 346; H. Troper, "Canada and Hungarian Refugees: The Historical Context" in C. Adam, et al, eds, *The 1956 Hungarian Revolution: Hungarian and Canadian Perspectives* (Ottawa: University of Ottawa Press, 2010) 176.
[66] *Ibid*.
[67] R. Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orpen Dennys, 1987) at 67.
[68] Lee, "Romani Migration", *supra* note 50 at 53.
[69] Levine-Rasky, Beaudoin & St Clair, *supra* note 2.
[70] J. Beaudoin, *Challenging Essentialized Representations of Romani Identities in Canada* (PHD Thesis, University of Western Ontario, 2014) [unpublished] at 118-121.
[71] M. Lanphier, "Canada's Response to Refugees" (1981) 15:2 International Migration Review 113 at 120.
[72] Citizenship and Immigration Canada, "Citizenship and Immigration Statistics Archives (1966 to 1996)", online: <http://www.cic.gc.ca/ENGLISH/resources/statistics/index.asp> [CIC, "Statistics"].
[73] Dreisziger, *supra* note 56 at 218, n18.
[74] CIC, "Statistics", *supra* note 72.

Hungarian and outside the Eastern Bloc countries was sufficient to make a person qualify as a de facto refugee under a designated "self-exiled" class - though there were restrictions on the number of persons admitted under this class.[75] By 1990, with the end of the Soviet period, concerns about economic migrants exploiting this class[76] led to its elimination.[77]

The key points in all of this for our purposes are that, until the end of the Soviet period, Hungarian Roma came to Canada as part of the regular streams of Hungarian immigration, and that their ethnicity was seldom explicitly treated as relevant to how they qualified for immigration to Canada. Instead, they immigrated mostly under the family class or as refugees fearing political persecution at the hands of the Soviet regime. With the end of the Soviet period, however, that quickly changed.

*2.3. Romani Refugee Claims and Canada's response: 1998 to 2002*

In 1994, within a few years of the end of Soviet rule in Hungary, Canada dropped its visa requirement against Hungary, meaning that Hungarian citizens could travel to Canada without obtaining prior permission from the Canadian government.[78] Simultaneously, as we have seen, the mistreatment of Hungarian Roma increased substantially in the post-Soviet period. It is, therefore, not surprising that many Hungarian Roma came to Canada claiming refugee status. Unlike in the Soviet period, however, they based their refugee claims explicitly on persecution related to their Romani ethnicity.[79]

Hungarian Romani refugee claimants in the post-Soviet period arrived in Canada in two streams. The first stream involved approximately 9,500 refugee claims made between 1998 and 2002, representing about 6% of the total number of refugee claims made in Canada during this period.[80] At first, recognition rates in these cases were very high: around 70% of the approximately 200 Hungarian refugee claims

[75] Lanphier, *supra* note 71 at 117-118.
[76] See e.g. D. Matas, "The Self-Exiled Class" (1990) 9:4 Refuge 22.
[77] Kelley & Trebilcock, *supra* note 62 at 396.
[78] "Hungarian Visitors Won't Need Visas", *The Globe and Mail* (11 October 1994) A4.
[79] See generally, Levine-Rasky, Beaudoin & St Clair, *supra* note 2; Lee, "Romani Migration", *supra* note 50; G. Kernerman, "Refugee Interdiction Before Heaven's Gate" (2008) 43:2 Government and Opposition 230 at 245-247.
[80] Levine-Rasky, Beaudoin & St Clair, *supra* note 2 at 85.

decided on the merits in 1998 resulted in grants of refugee protection.[81] In the same year, all published Hungarian refugee determinations involved persecution on account of Romani ethnicity, and all were positive decisions.[82]

However, in 1999, in anticipation of increased numbers of Hungarian Romani refugee claims, the Immigration and Refugee Board (IRB) decided a lead case,[83] which is a tool for enhancing consistency in refugee determinations by providing non-binding guidance in cases involving similar facts.[84] The lead case, which found that Hungarian Roma do not face persecution and instead enjoy state protection in Hungary, was overturned by the Federal Court of Appeal in 2006 due to a reasonable apprehension of bias.[85] Relying in part on emails exchanged within the IRB and with other government agencies, the Federal Court of Appeal (FCA) found that:

> a reasonable person might well have concluded [...] that the panel [...] was not impartial. This is because one of its two panel members may have been predisposed towards denying the appellants' claims since he had played a leading role in an exercise that may seem to have been partly motivated by a desire by CIC [Citizenship and Immigration Canada] and the Board [the IRB] to produce an authoritative, if non-binding legal and factual "precedent", particularly on the adequacy of state protection, which would be used to reduce the percentage of positive decisions in claims for refugee status by Hungarian Roma. The panel may reasonably be seen to have been insufficiently independent from Board management and thus tainted by the Board's motivation for the leading case strategy. Support for a belief that the lead case strategy was motivated by a desire to deter potential claimants is the apparent leak to the Hungarian media of the negative decisions before they were released, and the ensuing publicity calculated to deter Roma from leaving for Canada in order to claim refugee status.[86]

In other words, the FCA found it reasonable to believe that, through the lead case, the IRB was attempting to manufacture a negative precedent that would reduce recognition rates and discourage Hungarian Romani refugee claimants from coming to Canada. Unfortunately, while the FCA overturned the lead case in 2006, the damage was already done. The year that lead case was decided, Hungarian refugee claim

[81] *Ibid*.
[82] M.N.O. (Re), [1998] CRDD No 36 (QL); U.P.E. (Re), [1998] CRDD No 82 (QL); Y.S.C. (Re), [1998] CRDD No 26 (QL); H.Q.W. (Re), [1998] CRDD No 30 (QL).
[83] *Kozak v Canada (MCI)*, 2006 FCA 124 [*Kozak*]. See also *ASS (Re)*, [1999] CRDD No 1 (QL); *FNS (Re)*, [1999] CRDD No 2 (QL).
[84] *Ibid* (*Kozak)* at para 7-9.
[85] *Ibid* at para 58-65.
[86] *Ibid* at para 65.

recognition rates dropped precipitously (from around 70% in 1998 to around 16% in 1999) and remained low for years (around 25% for 1999 to 2002).[87] The Canadian government also pointed to these low recognition rates when, in a bid to reduce the number of Hungarian refugee claimants coming to Canada, it re-imposed a visa requirement in 2001.[88]

Between the unfairly induced low recognition rates and the visa requirement, the number of Hungarian refugee claims made in Canada plummeted from an average of around 2,000 per year from 1998 to 2002 to an average of less than 100 claims per year from 2003 to 2007.[89] Nonetheless, it should be noted that, from 1998 to 2002, over 1,000 Hungarians were granted refugee protection in Canada.[90]

### *2.4. Romani Refugee Claims and Canada's response: 2008 to 2012*

The second stream of Hungarian Romani refugee migration to Canada - which is the subject of this article - occurred between 2008 and 2012. In 2008, due to international trade pressure,[91] Canada once again dropped the visa requirement for Hungarian citizens.[92] As a result, the number of Hungarian refugee claims rose considerably, with over 11,000 Hungarians (or around 8% of the total number of refugee claims made in Canada during this period) claiming refugee status between 2008 and 2012.[93] Statistics regarding the number of claims made and the outcomes of these claims are discussed in detail below. Suffice it to say, though, that, while hundreds of these claims succeeded, most did not, and many were withdrawn or abandoned.[94]

Canada's reaction to the most recent stream of Hungarian refugee claimants can, in our view, be best described as a racialized panic. Hungarian refugee claimants during this period, who were largely Romani,[95] were regularly decried as 'bogus' refugee claimants.[96] Minister of Citizenship and Immigration

[87] Levine-Rasky, Beaudoin & St Clair, *supra* note 2 at 85.
[88] SOR/2001-525 (29 November 2011).
[89] Levine-Rasky, Beaudoin & St Clair, *supra* note 2 at 85.
[90] *Ibid*.
[91] J. Sliva, "Visa Requirement Must Go, EU Warns Canada", *Toronto Star* (18 September 2007) A2.
[92] SOR/2008-54 (28 February 2008).
[93] See below, Table 1.
[94] *Ibid*.
[95] See section 3.3. below.

Jason Kenney frequently pointed to large numbers of unsuccessful Hungarian refugee claims as evidence that the refugee-determination system was vulnerable to abuse and in need of reform.[97] For example, at a news conference announcing measures aimed at "discouraging [the arrival of] those who are not refugees but [who] seek to abuse our generosity", Kenney stated that

> [I]t's cause for serious concern that the European Union, with its democratic tradition of freedom, respect for human rights and independent judiciaries, has been the number one source for asylum claims made in Canada over most of the past three years [...] [S]ince [...] 2008, we've seen some 6,000 Hungarian asylum claims finalized [...] [and] virtually none of them turn out to be well-founded.

Hungarian Romani refugee claimants were also accused of coming to Canada to take advantage of social programs. According to Minister Kenney, Hungarian claimants came to Canada not because they "need our protection" but rather "to benefit from the generosity of Canada's social welfare system."[98] He also told a Senate Committee that Hungarian refugee claimants come to Canada because of programs such as the GST rebate, the Child Tax Benefit, welfare, public housing and health care.[99] As he put it, "there is a wide series of benefits that people can obtain, which appears to be a significant factor in that migration."[100] An internal Canadian Border Services Agency (CBSA) report expressed a similar view about Hungarian Romani refugee claimants, accusing them of "entering refugee claims for economic betterment."[101] The report also states that "it is a widely accepted assumption that many of these

---

[96] For an overview (and a critique) of this way of framing Romani refugee claims, see P.M. Diop, "The 'Bogus' Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada's Bill C-31" (2014) 30:1 Refuge 67.
[97] See e.g., *House of Commons Debates*, 40th Parl, 3rd Sess, No 33 (26 April 2010) at 1205; *House of Commons Standing Committee on Citizenship and* Immigration, 40th Parl, 3rd Sess, No 12 (May 4 2010) at 1535 and 1620; *House of Commons Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No 31 (26 April 2012) at 1535 and 1620; *House of Commons Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No 46 (31 May 2012) at 1600.
[98] Citizenship and Immigration Canada, "Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism" (14 December 2012), online: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-12-14.asp>. Kenney was speaking about "EU claimants", but this is a euphemism, as most EU claimants during this period were Hungarian Roma.
[99] *Standing Senate Committee on Social Affairs, Science and Technology*, 41st Parl, 1st Sess (18 June 2012).
[100] *Ibid.*
[101] Canada Border Services Agency, "Project SARA: International and Domestic Activities: Final Report" (31 January 2012) at 7 (on file with authors). The report was ostensibly about all Hungarian refugee claimants, but the report notes that most such claimants are Romani. *Ibid* at 5.

individuals are taking advantage of Canada's refugee processing system, social assistance, and other benefits."[102]

Not only did government officials assert that Hungarian Romani refugee claimants were fraudsters who came to Canada to abuse welfare and other social programs, but they also issued warnings about risks of criminality. For example, the same internal CBSA report that said Hungarian Romani refugee claimants come to Canada for "economic betterment", also suggested that Hungarian Roma "are known to engage in petty theft, break and enter, fraud and forgery, and assault."[103] Who, exactly, this is "known" to is unclear, but it is clear that such assertions both invoke and perpetuate stereotypes about Romani cultures being tied to criminality. Other government actors, including Minister Kenney, spoke frequently about crimes alleged to have been committed by a few individuals in the Hungarian Romani community in Canada, and did so in a manner that implied widespread criminality within this community. For example, in comments made to a Parliamentary committee, Minister Kenney implied a connection between a criminal investigation into human trafficking and large numbers of unsuccessful Hungarian refugee claims made in Canada.[104] The criminal investigation that the Minister referred to ended up resulting in several convictions.[105] There was intense media coverage of the convictions, and the Romani heritage of the perpetrators was widely cited, yet the fact that most victims of the crime were vulnerable because they were seeking to escape anti-Roma mistreatment in their home country was not widely discussed.[106]

In May 2012, Gina Csanyi-Robah, Executive Director of the Roma Community Centre in Toronto, pleaded with a Parliamentary committee to reject the way that the most recent stream of Hungarian Roma were being presented by government officials and by the media, warning that anti-Roma rhetoric was making its way to Canada:

---

[102] *Ibid* at 12.
[103] *Ibid*.
[104] *House of Commons Debates*, 40th Parl, 3d Sess, No 36 (29 April 2010) at 1110.
[105] "Court Hands Out Toughest Canadian Sentence Yet for Human Trafficking", *National Post* (4 April 2012) A6. See also, "Canada Deports 20 Members of Hungarian Human Trafficking Ring", *Toronto Star* (22 July 2014).
[106] For an analysis of the media coverage of this incident, including a finding that 70% of all negative headlines from Roma-focused articles in 2012 focused on this single criminal case, see Beaudoin, *supra* note 70 at 195.

> Don't believe the stereotypes about us that we're criminals. [...] There was one case [with] 20 people involved. [...] There have been Roma living in Canada for over 100 years. There are over 80,000 of us. [...] One case cannot represent [...] an entire community of people. It's racism. [...]
>
> In Canada, we're [...] talking about bogus refugees, criminals, and people living off the welfare system. When people legitimately need help in Canada, they are being doubly victimized. They're being told to get out of Hungary. They're being told that Hungary is for Hungarians -- ethnic Magyars. After longer than Canada has been a country, they are told to get out.... They come here and people are, like, "You're criminals". *It's the same rhetoric, the same discourse, that's happening in these European societies, and we're allowing it to come here.*[107]

Unfortunately, these last remarks proved to be especially prescient. On 5 September 2012, in a television segment on the Sun News Network, conservative pundit Ezra Levant went on a viciously racist tirade against Hungarian Romani refugee claimants, deploying all the standard anti-Roma rhetoric:

> I told you about the wave of fraudulent refugee claims made by Gypsies trying to lie their way into Canada. [...] I mean, they're coming from Hungary, for crying out loud, a rich, generous, liberal democracy. No one's a refugee from Hungary [...]
>
> But these are Gypsies, a culture synonymous with swindlers. The phrase "Gypsy" and "cheater" have been [so] interchangeable historically that the word has entered the English language as a verb -- he "gypped" me.
>
> Well, the Gypsies have gypped us. Too many have come here as false refugees. And they come here to gyp us again, to rob us blind as they have done in Europe for centuries. [...]
>
> The Gypsies aren't a race, they aren't a religion, they aren't a linguistic group. They're [...] a shiftless group of hoboes [...]
>
> For centuries, these roving highway gangs have mocked the law and robbed their way across Europe. Now, because of our broken refugee system, they're here in Canada by the thousands and they've brought a Gypsy crime wave with them.[108]

Given all this rhetoric, it is not surprising that the government sought out measures to deter further Hungarian Roma from seeking refugee protection in Canada. Various options were considered.

[107] *House of Commons Debates*, 40th Parl, 3d Sess, No 39 (3 May 2010) at 1815.
[108] *Sun News Network re: The Source (Theft Ring)*, CBSC Decision 12/13-0069 (9 September 2013) [CBSC]. The Canadian Broadcast Standards Council condemned the segment for breaching a large number of broadcasting standards, including norms against "abusive or unduly discriminatory material or comment which is based on matters of race, national or ethnic origin." *Ibid*.

Re-imposing the visa requirement was put forward as a possibility,[109] but this proved not to be viable in light of negotiations regarding a Canada-EU free trade deal.[110] Another option reportedly considered was the mass detention of Hungarian Romani refugee claimants pending the determination of their claims.[111]

Ultimately, the measure selected by the government to, among other things, deter the arrival of Hungarian Romani refugee claimants, was to substantially reform Canada's refugee determination system.[112] The new system, which came into effect in December 2012,[113] purportedly aims to discourage unfounded refugee claims by speeding up the process and by limiting the procedural and substantive rights of various groups of refugee claimants, including claimants from Designated Countries of Origin (DCO).[114] Under the new system, claimants from DCOs are subject to expedited refugee claim processing timelines,[115] cannot appeal negative refugee determinations to the Refugee Appeal Division of the IRB,[116] do not benefit from an automatic stay on removal pending Federal Court review of their refugee determinations,[117] and are subject to restrictions on access to Pre-Removal Risk Assessments (a pre-deportation procedure through which new risks that have arisen since the time of a person's refugee claim

[109] See e.g., Canada Border Services Agency, *supra* note 101 at 54-55; H. Scoffield, "Visa Clampdown Near for Hungarian Visitors", *Toronto Star* (9 January 2010) A8; P. O'Neil, "Hungary Visa Restrictions Not Ruled Out, Minister Says", *National Post* (7 September 2010) A4.
[110] See e.g, A. Gurzu, "Visas to Once Again Top Canada-EU Agenda", *Embassy* (5 May 2010) 5; B. Campion-Smith, "Visa Spat Threatens Canada-EU Trade Deal", *Toronto Star* (27 April 2012) B1.
[111] "Federal Government Mulls Detaining Roma Refugee Claimants", *CBC News* (18 August 2012), online: <http://www.cbc.ca/news/canada/federal-government-mulls-detaining-roma-refugee-claimants-1.1271996>. In 2012, Canada's immigration legislation was revised to allow the government to designate groups of irregular arrivals to Canada as "designated foreign nationals". One consequence of designation is automatic detention with limited opportunities for any kind of review. *Immigration and Refugee Protection Act*, RSC 2001, c 27, s 20.1 & 55(3.1) [IRPA]. Tellingly, the only groups that have thus far been designated have been Roma. D.P. Ball, "Canada targets Romanians smuggling Gypsies." (5 December 2012), online: <http://news.yahoo.com/canada-targets-romanians-smuggling-gypsies-013031013.html>
[112] *Balanced Refugee Reform Act*, SC 2011, c 8; *Protecting Canada's Immigration System Act*, SC 2012, c 17. For an overview of the revised refugee determination system, see J. Swaisland & L. Waldman, *Canada's Refugee Determination Procedure: A Guide for the Post Bill C-31 Era* (Markham: LexisNexis, 2013).For explicit links between these reforms and Hungarian refugee claims, see Canada Border Services Agency, *supra* note 101 at 55. See also notes 233-234 (and accompanying text).
[113] SI/2012-94; SI/2012-95; SI/2012-96.
[114] Government of Canada, "Backgrounder- Designated Countries of Origin" (1 February 2013) online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp>
[115] IRPA, *supra* note 111, s 111.1(2); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.9 [IRPA, Regs].
[116] *Ibid* (IRPA), s 100(d.1).
[117] IRPA Regs, *supra* note 115, s 231.

are assessed).[118] They are also denied access to publicly funded health care, even while their refugee claims are pending.[119] Similarly, DCO claimants are ineligible for work permits,[120] and legislation currently before Parliament would allow provinces to deny social assistance to refugee claimants.[121] To no one's surprise, Hungary was among the first countries to be listed as a DCO. Thus, Hungarian Romani refugee claimants are now subject to all of these limitations.[122]

All of these features of the revised refugee-determination system have come under sustained critique from human-rights organizations,[123] lawyers' associations,[124] and legal academics.[125] The Federal Court has gone so far as to hold[126] that the restrictions on publicly funded health care for DCO claimants are unconstitutional due to violations of non-discrimination norms[127] and violations of the right to be free from cruel and unusual treatment.[128] In coming to these conclusions, Federal Court Justice Mactavish offered a devastating critique of the DCO provisions:

---

[118] IRPA, *supra* note 111 s 112(2)(d) and (c).
[119] *Order Respecting the Interim Federal Health Program, 2012*, SI/2012-26, s 4(3), as amended by *Order Amending the Order Respecting the Interim Federal Health Progra*m, 2012, SI/2012-49.
[120] IRPA Regs, *supra* note 115, s 206(2).
[121] Bill C-585, *An Act to amend the Federal-Provincial Fiscal Arrangements Act (period of residence)*, 2nd Sess, 41st Parl, 2014 (first reading 4 April 2014).
[122] *Order Designating Countries of Origin* (15 December 2012).
[123] Canadian Council for Refugees, *Protect Refugees from Bill C-31: Joint Statement* (March 2012), online: <http://ccrweb.ca/en/protect-refugees-c31-statement>; Canadian Civil Liberties Association, "Bill C-31: An Unjustified Assault on the Rights of People in Danger" (30 April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration, online: <http://ccla.org/wordpress/wp-content/uploads/2012/04/2012-04-30-Submissions-to-Committee-FINAL.pdf>; Amnesty International Canada, "Unbalanced Reforms: Recommendations With Respect to Bill-31" (17 April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration, online: <http://www.amnesty.ca/sites/default/files/ai_brief_bill_c_31_to_parliamentary_committee_0.pdf>.
[124] Canadian Bar Association, "Bill C-31: Protecting Canada's Immigration System Act" (April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration, online: <http://www.cba.org/CBA/submissions/pdf/12-27-eng.pdf>; Canadian Association of Refugee Lawyers, "Press Release: Designated Country of Origin Scheme is Arbitrary, Unfair, and Unconstitutional" (14 December 2012), online: <http://www.carlacaadr.ca/articles/32>.
[125] See e.g. J. Bond, "Shortchanging Justice: The Arbitrary Relationship between Refugee System Reform and Federal Legal Aid Funding" (2014) 91:3 Canadian Bar Review 583; A. Macklin, "A Safe Country to Emulate? Canada and the European Refugee" in H. Lambert, J. McAdam & M. Fullerton, eds, *The Global Reach of European Refugee Law* (Forthcoming: Cambridge 2013); C. Dauvergne, "It's Wrong to Shut the Door on European Refugees", *Vancouver Sun* (28 February 2012).
[126] *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 [*Doctors*].
[127] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the Canada Act 1982 (UK), c 11, s15 [*Charter*]. *Ibid* (*Doctors*) at para 871.
[128] Ibid (*Charter*), s 12; *Ibid* (*Doctors*) at para 689.

> The distinction drawn between [...] refugee claimants from DCO and non-DCO countries also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries. In particular, it perpetuates the stereotype that refugee claimants from DCO countries are queue-jumpers, "bogus" claimants and cheats who are only here to take advantage of Canada's social benefits and its generosity.[...]
>
> [T]he fact is that some refugee claimants from DCO countries are indeed genuine refugees. By way of example, in 2011, the Immigration and Refugee Board accepted 155 refugee claims from Hungary. [...]
>
> It is also true that a substantial percentage of refugee claims from DCO countries do not succeed. Does it necessarily follow that these claims were all "bogus", brought by queue jumpers and cheats seeking to abuse the generosity of Canadians? To suggest that this is the case is to have a grossly simplistic understanding of the refugee process.[...]
>
> Refugee claims are often brought on the basis of real hardship and genuine suffering. Amongst those whose claims do not succeed will be individuals who may well have come to Canada because of a real fear of persecution in their country of origin, but who were unable to meet the strict legal requirements of the refugee definition.
>
> By way of example, a Roma from Hungary may have experienced a lifetime of discrimination, abuse and marginalization in her country. She may truly dread returning home as a result of her past experiences. The Immigration and Refugee Board may well accept the claimant's story as true, but may conclude that the treatment experienced by the claimant, while discriminatory, did not rise to the level of "persecution". Alternatively, the Board may accept that the claimant had experienced "persecution", but may also find that adequate state protection is available to her in Hungary. Under either scenario, the fact that the refugee claim did not ultimately succeed does not mean that there was anything "bogus" about it.[129]

Thus far, the government has been unmoved by these critiques.[130] Instead, Canadian officials celebrate the reforms and insist that they were necessary to deter 'bogus' Hungarian refugee claims.[131] Indeed, the government was so keen to use the reforms to this end that, in January 2013, they launched an advertisement campaign in Hungary to publicize the changes.[132] The campaign focused on the town of Miskolc, which has a large Romani population. Six billboards in Miskolc were outfitted with Canadian government logos, a notice about revisions to the refugee determination system, as well as the message:

---

[129] *Ibid* (*Doctors*), at para 837-843.

[130] The government is, for example, appealing the Federal Court decision. D. Black, "Federal court rules refugee health-care cuts 'cruel and unusual': Tories vow to fight decision citing commitment to helping genuine claimants, citizens", *Toronto Star* (5 July 2014) A4.

[131] Citizenship and Immigration Canada, "Speaking notes for Chris Alexander, Canada's Citizenship and Immigration Minister at the News Conference Regarding Canada's Asylum System" (22 January 2014), online: <http://news.gc.ca/web/article-en.do?nid=831769>.

[132] N. Keung, "Roma Refugees: Canadian Billboards in Hungary Warn of Deportation", *Toronto Star* (25 January 2013).

"people who make a claim without sound reasons will be processed faster and removed faster."[133] Only a few months earlier, the same town was the site of a march by thousands of Jobbik party supporters, wielding torches and chanting "Gypsy crime! Gypsy criminals!"[134]

Ultimately, all of this combined - the anti-Roma rhetoric in Canada, low success rates in Hungarian Romani refugee claims, and the revised refugee determination process - significantly reduced the number of Hungarian refugee claims made in Canada (from an average of over 2,000 per year between 2008 and 2012 to under 200 in 2013), notwithstanding the alarming growth in anti-Roma activities in Hungary. In other words, we seem to be at the end of the most recent stream of Hungarian Romani migration to Canada.

With this context in mind, we will now turn to our study of refugee claims decided in the context of the most recent stream of Hungarian Romani migration to Canada.

## *3. THE STUDY: HUNGARIAN ROMANI REFUGEE CLAIMS (2008-2012)*

### *3.1. Methodology*

Empirical research about Canadian refugee-law decision-making must confront several methodological challenges. The most significant challenges are that refugee hearings are closed to the public[135] and that only a small and non-representative proportion of IRB refugee determinations are published.[136] As a result, standard legal-research methodologies - *i.e.*, obtaining relevant cases from legal databases and analyzing those cases - do not allow full explorations of decision-making in this area.

For this study, we used several empirical methodologies to overcome these limitations. We began by reading government statements, media accounts, and academic commentary relating to Hungarian Romani refugee claims in Canada. Next, we reviewed all published IRB and Federal Court refugee decisions involving Hungarian Romani claimants during the period of the study. These materials provided

[133] *Ibid.*
[134] M. Dunai, "Thousands Rally in Anti and Pro Roma Marches in Hungary", *National Post* (17 October 2012).
[135] IRPA, *supra* note 111, s 166(c).
[136] S. Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall Law Journal 71 at 82-83 [Rehaag, "Role of Counsel"].

us with a general understanding of the more visible challenges that Hungarian Roma faced in the refugee determination system. Our next step was to conduct ten semi-structured interviews with staff at non-governmental organizations and with refugee lawyers who had personal knowledge of the experience of Hungarian Romani refugee claimants. We transcribed the interviews and analyzed the transcripts for common themes. We also made access-to-information requests to the IRB, seeking statistics on refugee-claim outcomes as well as large datasets from the IRB's database regarding thousands of individual cases (the data requested included the file number, country, outcome, date of outcome, name of decision-maker, name of counsel, etc.). In addition to conducting analysis on this data, we drew on the data to request further information from the IRB for selected samples of cases, including unpublished written reasons for decisions and documents submitted by claimants. Because quality-of-counsel issues arose early in our research, we also asked for copies of all IRB records referring to quality-of-counsel concerns in the context of Hungarian Romani refugee claims.

For this study, then, we amassed a great deal of information on Canada's response to Hungarian Romani refugee claims between 2008 and 2012, and we conducted both qualitative and quantitative analyses on that information.

Before we set out the results of those analyses, one methodological limitation in our research bears emphasizing: we did not interview Hungarian Romani refugee claimants. Unfortunately, by the time we began this study, a large proportion of the claimants that we would have been most interested in interviewing either had been removed from Canada or are remaining despite being ordered to leave. Interviewing such claimants would have posed both practical and ethical challenges, and we decided not to pursue such interviews. That having been said, we are mindful of the dangers of academic research on marginalized communities that does not accord attention to the voices of members of those communities. We hope that other scholars will supplement our research with methodologies that do a better job of foregrounding the voices of Hungarian Romani refugee claimants.

*3.2. Statistical Overview*

**Table 1: Statistical overview -- All RPD refugee claimants, Hungary and all countries (2008-2012)***

**Hungary**

| Year | Referred | Abandoned | Withdrawn & Other | Negative | Positive | Finalized | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|---|---|
| 2008 | 288 | 8 | 39 | 13 | 22 | 82 | 62.9 | 57.3 | 26.8 |
| 2009 | 2,440 | 55 | 204 | 5 | 3 | 267 | 37.5 | 97.0 | 1.1 |
| 2010 | 2,300 | 117 | 967 | 72 | 22 | 1,178 | 23.4 | 92.0 | 1.9 |
| 2011 | 4,423 | 249 | 838 | 738 | 165 | 1,990 | 18.3 | 54.6 | 8.3 |
| 2012 | 1,882 | 147 | 1,406 | 2,151 | 448 | 4,152 | 17.2 | 37.4 | 10.8 |
| **Total** | **11,333** | **576** | **3,454** | **2,979** | **660** | **7,669** | **18.1** | **52.5** | **8.6** |

**All Countries**

| Year | Referred | Abandoned | Withdrawn & Other | Negative | Positive | Finalized | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|---|---|
| 2008 | 34,800 | 1,041 | 2,733 | 6,784 | 7,554 | 18,112 | 52.7 | 20.8 | 41.7 |
| 2009 | 33,970 | 1,367 | 4,335 | 9,796 | 11,154 | 26,652 | 53.2 | 21.4 | 41.9 |
| 2010 | 22,543 | 1,637 | 4,873 | 13,642 | 12,305 | 32,457 | 47.4 | 20.1 | 37.9 |
| 2011 | 24,981 | 1,756 | 3,395 | 16,122 | 12,983 | 34,256 | 44.6 | 15.0 | 37.9 |
| 2012 | 20,233 | 1,266 | 3,431 | 14,448 | 10,294 | 29,439 | 41.6 | 16.0 | 35.0 |
| **Total** | **136,527** | **7,067** | **18,767** | **60,792** | **54,290** | **140,916** | **47.2** | **18.3** | **38.5** |

*SOURCE: IRB ATIP Request No. A-2013-00193*

** Includes both principal and dependant claims*

**Table 2: Statistical overview -- Principal applicant RPD refugee decisions, Hungary and all countries (2008-2012)***

**Hungary**

| Year | Abandoned | Withdrawn | Negative | Negative (No Credible Basis) | Positive | Total | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|---|---|
| 2008 | 5 | 20 | 7 | 0 | 1 | 33 | 12.5 | 75.8 | 3.0 |
| 2009 | 39 | 109 | 4 | 0 | 2 | 154 | 33.3 | 96.1 | 1.3 |
| 2010 | 67 | 437 | 41 | 7 | 16 | 568 | 25.0 | 88.7 | 2.8 |
| 2011 | 125 | 458 | 257 | 15 | 75 | 930 | 21.6 | 62.7 | 8.1 |
| 2012 | 76 | 659 | 752 | 20 | 142 | 1,649 | 15.5 | 44.6 | 8.6 |
| **Total** | **312** | **1,683** | **1,061** | **42** | **236** | **3,334** | **17.6** | **59.8** | **7.1** |

**All Countries**

| Year | Abandoned | Withdrawn | Negative | Negative (No Credible Basis) | Positive | Total | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|---|---|
| 2008 | 794 | 1,981 | 3,962 | 221 | 5,237 | 12,195 | 55.6 | 22.8 | 42.9 |
| 2009 | 1,108 | 2,917 | 5,977 | 205 | 7,316 | 17,523 | 54.2 | 23.0 | 41.8 |
| 2010 | 1,278 | 3,028 | 8,467 | 356 | 8,164 | 21,293 | 48.1 | 20.2 | 38.3 |
| 2011 | 1,323 | 2,192 | 9,562 | 503 | 8,640 | 22,220 | 46.2 | 15.8 | 38.9 |
| 2012 | 940 | 2,100 | 8,475 | 437 | 6,849 | 18,801 | 43.5 | 16.2 | 36.4 |
| **Total** | **5,443** | **12,218** | **36,443** | **1,722** | **36,206** | **92,032** | **48.7** | **19.2** | **39.3** |

*SOURCE: IRB ATIP Request No. A-2013-01523*

** Excluding cases decided on grounds other than negative, negative (no credible basis), positive, and abandonded / withdrawn*

Tables 1 and 2 offer statistical overviews of outcomes in refugee claims from Hungary and from all countries between 2008 and 2012. The first table includes both principal applicants and their dependants (*e.g.*, a family of six making a claim together is counted as six separate decisions). It therefore offers a snapshot of all refugee-claim outcomes. The data from this table is drawn from IRB Country Reports, which are quarterly statistical summaries prepared by the IRB.[137] The second table and all remaining tables in this article include only data about principal-applicant refugee determinations (*e.g.*, a family of six making a claim together is counted as a single decision). Table 2 therefore provides an overview of outcomes in all refugee-claim decisions without considering how many individuals were affected by any particular decision. The data for this table is based on information contained in various fields in the IRB's database for principal-claimant refugee decisions between 2008 and 2012.[138]

Four points from these statistical overviews are worth emphasizing.

[137] ATIP IRB Request No. A-2013-00193.
[138] ATIP IRB Request No. A-2013-01523.

First, as shown in Table 1, Hungary was a significant source country for refugee claimants in Canada between 2008 and 2012. In total, 11,333 Hungarian refugee claims were referred to the IRB, representing 8.3% of all claims during this period. The number of Hungarian refugee claims increased from 2008 to 2011, when it peaked at 4,423 claims, representing 17.7% of all claims made that year. In 2012, the numbers of claims dropped significantly.[139]

Second, Table 1 shows that 660 Hungarians were granted refugee protection in Canada between 2008 and 2012.[140] In our view, this figure demonstrates a major problem with the rhetoric of 'bogus' Hungarian refugee claimants discussed above: disparaging an entire group as 'bogus', when hundreds of members of that group have been recognized by the IRB as having well-founded fears of persecution, compounds the mistreatment of an already-marginalized group of people.

Third, as Table 2 indicates, it was rare for the IRB to declare that refugee claims from Hungary had no credible basis. The IRB is required to make such a declaration in denying a refugee claim when it is of the view "that there was no credible or trustworthy evidence on which it could have made a favourable decision."[141] Only 1.3% of Hungarian refugee determinations were declared to have no credible basis, a figure somewhat lower than the equivalent figure for all countries during the same period (1.9%). This is further evidence against assertions that Hungarian refugee claims during this period were 'bogus'.

Fourth, it must be acknowledged that large numbers of Hungarian refugee claims were not successful between 2008 and 2012. As shown in Table 1, the recognition rate for all Hungarian refugee claimants decided on their merits was 18.1%. This compares to a 47.2% recognition rate for claimants from all countries during the same period. In addition, 52.5% of Hungarian refugee claims were not decided on their merits because they were declared abandoned or withdrawn. This is an unusually high abandonment/withdrawal rate, as the equivalent figure for claimants from all countries is only 18.3%.

[139] This trend continued in 2013, with only 198 Hungarian claims referred, representing 1.9% of all claims referred that year. IRB ATIP Request No. A-2013-02901.
[140] According to the 2013 IRB Country Report, a further 406 Hungarians were granted refugee protection in Canada in 2013. IRB ATIP Request No. A-2013-02901.
[141] IRPA, *supra* note 111, s 107(2).

Taken together, between 2008 and 2012, only 8.6% of finalized Hungarian principal applicant refugee determinations resulted in the claimant being accorded refugee protection, whereas 38.5% of claimants from all countries succeeded overall. In other words, while it is incorrect to make blanket statements about Hungarian claims being 'bogus', it would be fair to say that, in a large majority of Hungarian refugee claims finalized between 2008 and 2012, claimants did not obtain refugee protection.

The rest of this article explores both the causes and the implications of the patterns evident in these two tables.

### *3.3. Claim Type*

In debates about Hungarian refugee claims, there has been some dispute about whether, in speaking about these claims, one is essentially speaking about Hungarian Romani claimants. The reason for the controversy is that, as discussed above, political actors often singled out Hungarian refugee claimants as making 'bogus' claims with the intent of abusing Canadian social programs. In doing so, some political actors were careful to avoid speaking explicitly about Hungarian Roma.[142] Nonetheless, because everyone hearing such statements understood that most Hungarian refugee claimants are Romani, these political actors were able to convey the message that Hungarian Roma were abusing the refugee determination system while avoiding saying this outright. This is significant because, had these actors referred explicitly to Roma, they would have been exposed to claims of racism and of drawing on the same stereotypes that animate anti-Roma sentiments in countries like Hungary.

Unfortunately, the IRB did not systematically gather data on claim type or on the ethnicity of refugee claimants during the period of the study. According to data provided in response to access to information requests, in the 3,334 Hungarian principal applicant decisions between 2008 and 2012 under

[142] For example, an article in the *Toronto Star* in 2013 initially reported that Minister of Immigration Jason Kenney spoke out against "bogus Roma refugees". After the accuracy of this reporting was challenged, the article was revised to say that the Minister had in fact spoken about "bogus refugee claimants and singled out claimants from Hungary." L. Brown, "Parkdale Schools Mourn Deported Roma Students", *Toronto Star* (6 October 2013, updated 7 October 2013).

consideration in this study, claim type information is available in the IRB's database for only 81 cases.[143] Of these 81 cases, the claim type is recorded as involving alleged persecution on account of Romani ethnicity in 90.1%, on account of gender in 6.1%, and on account of criminality in 3.7% of the cases. This would, at first glance, suggest that a high percentage of Hungarian claims between 2008 and 2012 involved allegations of persecution on account of Romani ethnicity. However, because claim-type information is not available in the IRB's database for the vast majority (97.5%) of Hungarian principal-applicant refugee claims decided during this period, and because it is unclear to us in what circumstances the IRB chose to gather claim type information, we have no way of knowing whether the cases with claim-type information available constitute a representative sample of all Hungarian cases decided during this period.

**Table 3: Claim type in random sample of principal applicant Hungarian decisions (merits) (2008-2012)***

| Type | Positive | Negative | Total | Percent of Total (%) | Recognition Rate (Merits) (%) |
|---|---|---|---|---|---|
| Roma** | 24 | 58 | 82 | 85.4 | 29.3 |
| Other | 1 | 13 | 14 | 14.6 | 7.1 |
| **Total** | **25** | **71** | **96** | **100.0** | **26.0** |

*SOURCE: IRB ATIP Request No. A-2013-00778*

** Excluding 4 cases (3 no data provided; 1 not involving Hungary)*

*** Including cases where claimants were Roma, but who feared persecution on a variety of grounds*

To supplement this potentially unrepresentative sample, we obtained written reasons for decisions (and in cases where no written reasons were issued, other documents describing the claim) that allowed us to determine the claim type for a random sample of 96 Hungarian principal applicant refugee cases decided on their merits between 2008 and 2012.[144] As can be seen in Table 3, claimants were Romani in 85.4% of the cases. It should be noted that some of these cases involved multiple grounds of alleged persecution (*e.g.*, gender and Romani ethnicity, sexual orientation and Romani ethnicity, etc.). The

[143] IRB ATIP Request No. A-2013-01523 & IRB ATIP Request No. A-2014-00705.

[144] IRB ATIP Request No. A-2013-00778. The documents requested were: (1) written reasons for decisions, and (2) screening forms or in chambers decisions forms where there were no written reasons. The sample we requested initially included 100 Hungarian cases decided on the merits between 2008 to 2012. When we received the documents requested, we excluded four cases from the sample, three because no data on claim type was available in the documents provided, and one because it was not a Hungarian case.

remaining 14.6% of cases involved various claim types, including gender, sexual orientation, and criminality. Interestingly, the recognition rate in cases involving Roma (29.3%) was higher than for the other claim types in Hungarian cases in this sample (7.1%).

Based both on the cases in the IRB's database where claim type information is recorded, and on the random sample of Hungarian principal-applicant cases decided on the merits that we reviewed, it seems clear that the vast majority of refugee claims made in Canada by Hungarians between 2008 and 2012 involved Romani claimants. Thus, when political actors spoke about Hungarian claimants during this period, they were speaking by and large about Hungarian Romani claimants, and their comments must be understood in that racialized context.

### *3.4. Grounds for Denial*

**Table 4: Reasons in Sample of Hungarian Roma Principal Applicant Decisions (Merits only) (2008-2012)***

| Outcome and reasons** | Number | Percent of Total (%) | Percent of Denied (%) |
|---|---|---|---|
| Refugee Status Denied | 58 | 70.7 | n/a |
| State protection | 56 | 68.3 | 96.6 |
| Discrimination v persecution | 25 | 30.5 | 43.1 |
| General negative credibility | 25 | 30.5 | 43.1 |
| Internal flight alternative | 1 | 1.2 | 1.7 |
| External flight alternative (EU) | 0 | 0.0 | 0.0 |
| Roma ethnicity not established | 0 | 0.0 | 0.0 |
| Exclusion | 0 | 0.0 | 0.0 |
| Refugee Status Granted | 24 | 29.3 | n/a |
| **Total** | **82** | **100.0** | **n/a** |

*SOURCE: IRB ATIP Request No. A-2013-00778*

** Sample of 100 Hungarian cases requested, 18 excluded (1 not Hungarian, 3 no data provided, 14 not Roma)*

*** Cases may have multiple reasons for refusal*

As we have seen, while many Hungarian refugee claimants obtained refugee protection between 2008 and 2012, many others did not. To understand the reasons offered by the IRB to justify outcomes in these claims, we reviewed the written reasons (and where reasons were unavailable, other documents describing the claim) in the random sample of 96 Hungarian refugee decisions examined in the previous

section. Table 4 sets out the frequency of particular types of reasons, including specific grounds of denial, in the 82 refugee claims in our sample that involved Hungarian Roma.[145]

### 3.4.1. State Protection

The most frequent reason offered for refusing refugee protection in our sample of Hungarian Romani refugee claims related to the availability of state protection. To succeed with a refugee claim under section 96 of the *Immigration and Refugee Protection Act*, a claimant must demonstrate a well-founded fear of persecution due to race, religion, nationality, political opinion, or membership in a particular social group.[146] Establishing a well-founded fear of persecution requires, among other things, demonstrating that protection by state authorities against the feared persecution is not available in the claimant's home country.[147] Case law suggests that, absent a complete state breakdown, state protection is presumed to be forthcoming - and, as a result, claimants bear the burden of rebutting this presumption.[148] There is also case law suggesting that claimants who come from 'democratic' countries bear an especially heavy burden, in the sense that it is more difficult to rebut this presumption.[149]

As can been seen in Table 4, in 68.3% of our sample of Hungarian Romani decisions (or 96.6% of the negative Hungarian Romani decisions), the IRB refused to accord refugee protection at least partly because claimants failed to rebut the presumption of state protection. During the 2008-2012 period, however, the IRB granted refugee protection to hundreds of Hungarian Roma - including 29.3% of the Hungarian Romani cases in our sample. In these cases, claimants successfully rebutted the presumption of

[145] IRB ATIP Request No. A-2013-00778. This request involved 100 randomly selected Hungarian cases decided on the merits between 2008 to 2012 (the same cases used for Table 3). Of the 100 cases, three were excluded from the sample because no data on claim type was available in the documents provided, one was excluded because it did not involve Hungary, and 14 were excluded because they did not involve Romani claimants.
[146] IRPA, *supra* note 111, s 96. Canada also provides protection to persons in need of protection, as defined in section 97. This section drops the required connection to specified grounds of persecution, but adds other limitations. No Hungarian Romani refugee claims in our sample were denied on the basis that the harm feared was unrelated to a Refugee Convention ground. As a result, their claims were assessed under section 96 rather than section 97.
[147] *Canada (AG) v Ward*, [1993] 2 SCR 689 at para 25 [*Ward*].
[148] *Ibid* at para 50-51.
[149] *Hinzman v Canada (MCI)*, 2007 FCA 171 at para 57; *Flores Carrillo v Canada (MCI)*, 2008 FCA 94.

state protection. Thus, it would appear that the IRB did not have a consistent answer to the question of whether Hungarian authorities offered Roma protection against persecution between 2008 and 2012.

In considering the lack of consensus at the IRB regarding the availability of state protection, it is important to keep in mind that the characteristics of individual claims may impact the state-protection analysis. For example, claimants facing multiple intersecting forms of persecution (*e.g.*, persecution on account of both ethnicity and gender) may encounter distinct barriers in accessing state protection. Along similar lines, many factors could either facilitate or limit the ability of individual claimants to access state protection (*e.g.*, education, language skills, social capital, resources, etc.). Therefore, in analyzing the availability of state protection, the IRB must be attentive to the particular circumstances of each claimant. As Federal Court Justice Zinn has stated regarding Hungarian Roma cases: "[e]ach decision turns on its own facts [...], which explains why many claims are denied on the basis of state protection while others succeed, despite being determined on the basis of the same national documentation."[150]

That having been said, in many of the cases we reviewed, the allegations and evidence of anti-Roma persecution and the alleged failure of Hungarian authorities to do enough to prevent this persecution were similar, and yet the state protection findings varied. Indeed, having reviewed many Hungarian Romani IRB and Federal Court cases that address this issue, we often found it impossible to differentiate cases that came down on either side of this issue.

Part of the problem is that the country-conditions evidence available to the IRB was mixed. Federal Court Justice Gagné describes the lack of clarity in Hungarian country-conditions evidence in the following terms:

> Quite obviously, the documentary evidence regarding the adequacy of anti-discrimination state action in Hungary is contradictory in many respects and the question remains unresolved in recent decisions of the Board's and in this Court's recent jurisprudence. [...] [T]he objective documentary evidence allows for a determination either way.[151]

In addition to the problem of inconclusive country conditions evidence, there was also controversy over the legal test for determining the availability of state protection during the period of our

[150] *Ignacz v Canada (CIC)*, 2013 FC 1164 at para 2.
[151] *Nagy v Canada*, 2013 FC 299 at para 23.

study. This controversy related to the fact that failures in law enforcement are inevitable, and, therefore, no country can offer perfect protection to everyone all the time.[152] Given the inevitability of imperfect state protection, the question became how much failure of state protection must be demonstrated to rebut the presumption, especially in circumstances where the state is at least attempting to provide protection. Case law has proposed a variety of tests to answer this question, including: whether the state is making serious efforts at providing protection,[153] whether those efforts are translating into effective protection,[154] whether there is protection at the operational level,[155] whether the level of protection is adequate,[156] and whether there is operationally adequate protection.[157] Notice that the focus of these tests varies. Some focus on whether the state is trying to provide protection, others focus on whether claimants will actually be protected, and still others focus on whether the level of protection meets a particular standard. The different focus of these tests is especially significant in the context of Hungarian Romani refugee claims because of the mixed evidence noted above. Thus, whether Hungarian Romani claimants were able to rebut the presumption of state protection may have depended in part on which of these tests were applied.

Given both the contradictory country-conditions evidence and the controversy over the proper legal test for assessing that evidence, it is perhaps not surprising that there was no consensus at the IRB as to whether Hungarian Roma could reasonably expect protection against persecution in Hungary. Moreover, as we have noted, the individual circumstances of claimants further complicate matters, such that, even with the same country-conditions evidence and the same legal test, the result of the state-protection analysis may vary from claimant to claimant. One thing, however, is clear from our sample of cases: success in Hungarian Romani refugee claims between 2008 and 2012 appeared to depend largely on whether claimants were able to rebut the presumption of state protection.

---

[152] *Canada (MEI) v Villafranca*, [1992] FCJ no 1189 (QL) (CA).
[153] *Ibid.*
[154] *Mohacsi v Canada (MCI)*, [2003] 4 FCR 771 at para 56.
[155] *Gilvaja v Canada (MCI)*, 2009 FC 598 at para 39.
[156] *Hercegi v Canada (MCI)*, 2012 FC 250 at para 5; *Jaroslav v Canada (MCI)*, 2011 FC 634 para 74-75.
[157] *EYMV v Canada (MCI)*, 2011 FC 1364 at para 15-16

### 3.4.2. Discrimination versus persecution

Another common reason cited for refusing refugee protection in our sample of Hungarian Romani decisions relates to whether claimants feared persecution or discrimination. To meet the refugee definition under section 96 of the *Immigration and Refugee Protection Act*, a claimant must show that the mistreatment they fear amounts to persecution, which has been defined as serious mistreatment that violates core human rights.[158] For the purposes of the refugee definition, discrimination does not amount to persecution, though multiple instances of discrimination and harassment that are not individually violations of core human rights may cumulatively amount to persecution.[159]

In 30.5% of the cases in our sample of Hungarian Romani refugee decisions (or 43.1% of the negative Hungarian Romani refugee decisions), refugee claims were denied at least in part because claimants failed to demonstrate that the harm they feared constituted persecution. In virtually all of the decisions in our sample, the IRB acknowledged that conditions in Hungary are difficult for Roma. However, the IRB often found that the mistreatment personally experienced by the claimants involved discrimination that did not reach the level of persecution. These findings regarding discrimination versus persecution, however, were seldom determinative. After making such findings, the IRB typically went on to consider whether, if returned to Hungary, claimants would face persecution on account of their ethnicity despite only having experienced discrimination in the past. This forward-looking risk analysis typically turned on the question of state protection. Thus, while discrimination versus persecution was an issue in many Hungarian Romani cases in our sample, it was less often determinative than the availability of state protection.[160]

---

[158] *Lebedev v Canada (MCI)*, 2007 FC 728 at para 25; J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 104-105.

[159] *Bobrik v Canada (MCI)*, [1994] F.C.J. No. 1364 (QL) at para 22; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, UNHCR, 1992) at para 51-55.

[160] Only two Hungarian Roma cases in our sample were denied partly because the IRB found that the claimants feared discrimination rather than persecution without an alternative finding that state protection was available. TA9-14522 (22 June 2012); TB1-05181 (24 May 2012).

### 3.4.3. General negative credibility

A third common reason offered for refusing refugee protection in our sample related to whether claimants were generally credible. Refugee claimants bear the burden of proving that they meet the refugee definition.[161] To try to meet this burden, claimants usually introduce a variety of evidence, including general evidence relating to conditions in their home countries and individual evidence that corroborates their allegations. In addition to documentary evidence, claimant testimony plays a central role in most refugee determinations because documentary evidence is seldom available for many key aspects of the stories recounted by claimants.[162]

In assessing refugee claimant evidence - including claimant testimony - the IRB is exempt from rules of evidence that apply in other areas of law and instead may "receive and base a decision on evidence that is [...] considered credible or trustworthy in the circumstances."[163] Case law establishes that claimant testimony is presumed true unless a good reason exists for doubt, and that, if the IRB doubts claimant testimony, it must articulate reasonable justifications for this doubt based on the available evidence.[164] That being said, the standard of proof in refugee law for factual findings is the balance of probabilities, and claimants bear the burden of proof, which together mean that claimants must demonstrate that they are more likely than not to be credible.[165]

In our sample of Hungarian Romani claims, 30.5% of claimants were found to be generally not credible. A variety of reasons were offered to support these negative credibility determinations. It was, for example, common for the IRB to point out inconsistencies between versions of stories recounted by claimants in various stages of the refugee determination process. The IRB frequently pointed to contradictions in details between the version of the claimant's stories told to an immigration officer when the refugee claim was first made, the written narrative submitted by the claimant, and claimant testimony at the refugee hearing. The IRB also often complained that claimants added important facts during their

[161] UNHCR, *supra* note 159 at 196.
[162] M. Jones & S. Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) at 241.
[163] IRPA, *supra* note 111, s 170.
[164] *Maldonado v Canada (MEI)*, [1980] 2 FC 302 (CA) at para 5.
[165] *Orlien v Canada (MEI)*, [1992] 1 FC 492 (CA)

testimony that, if true, should have been (but were not) included in their written narratives, thus casting doubt on whether the testimony was truthful. The IRB also doubted claimant testimony when it was considered vague, lacking in detail, or implausible.

While general negative credibility determinations were not uncommon in our sample of Hungarian Romani decisions, in most cases where the IRB found that the claimants' stories of mistreatment were untrue, the IRB nonetheless went on to consider whether they would face anti-Roma persecution if returned to Hungary. This then typically led the IRB to consider the matter of state protection - and, as we have seen, in 96.6% of the negative Hungarian Roma decisions in our sample, the IRB found that state protection was available. Thus, as with IRB findings related to discrimination versus persecution, negative credibility determinations were seldom determinative.[166]

It would, therefore, be fair to say that credibility posed challenges for a significant proportion of the Hungarian Romani refugee claimants in our sample, even though negative credibility determinations were usually not the only grounds for denying claims in these cases. We would also hasten to add, however, that in the majority of Hungarian Romani cases in our sample (69.5%), there was no negative credibility determination. In our view, the latter provides further evidence against assertions that Hungarian Romani refugee claims during this period were 'bogus'.

#### 3.4.4. Other grounds of refusal

State protection, discrimination versus persecution, and general negative credibility findings were, by a substantial margin, the main grounds offered for denying refugee claims in our sample of Hungarian Romani cases. We would, however, like to say a little about other grounds of refusal that were infrequently or never cited in the cases in our sample.

[166] Only two Hungarian Romani cases in our sample involved a general negative credibility finding that did not also include a finding that state protection was available. These were the same two cases where the IRB found that the claimants faced discrimination rather than persecution without going on to make a finding regarding the availability of state protection. See above, note 160.

First, only one Hungarian Romani refugee claim in our sample was denied, in part because the claimant had a viable internal flight alternative.[167] To meet the refugee definition under section 96 of the *Immigration and Refugee Protection Act*, claimants must establish a well-founded fear of persecution throughout their entire country. If refugee claimants can avoid persecution by relocating to another region of their country, and if conditions are such that it would not be unreasonable to expect relocation, then their claims will be denied due to the availability of an internal flight alternative.[168] The only Hungarian Romani claim in our sample denied partly on the basis of an internal flight alternative involved a claimant who alleged that he faced anti-Roma persecution in the small town in which he lived.[169] The IRB found that he could reasonably relocate to Budapest where, if he faced mistreatment on the basis of his ethnicity, he could approach Hungarian authorities for protection.[170] Thus, the one Hungarian Romani case in our sample denied partly on the basis of an internal flight alternative could also be considered a state protection finding (*i.e.*, state protection was available to the claimant in the proposed internal flight alternative). It would, therefore, seem that the availability of an internal flight alternative was not a major impediment for most Hungarian Romani refugee claimants during the period of our study.

Second, no Hungarian Romani refugee claims in our sample were denied on the basis that, as nationals of an EU country, claimants could relocate to another EU country to avoid persecution in Hungary.[171] In other words, none of the claims in our sample were denied on the basis of an "external flight alternative."[172] The fact that no claims were denied on this basis reflects that the refugee definition only requires a well-founded fear of persecution in the claimant's country or countries of nationality,[173]

---

[167] VA8-02053 (26 August 2011).
[168] *Rasaratnam v Canada (MEI)*, [1992] 1 FC 706 (CA); *Thirunavukkarasu v Canada (MEI)*, [1994] 1 FC 589 (CA).
[169] VA8-02053, *supra* note 167 at para 6-8.
[170] *Ibid* at para 18-24.
[171] Some Hungarian Roma in our sample (usually children and spouses of principal applicants) had claims denied on the basis that they were nationals of countries other than Hungary, and that they would not face persecution in their other countries of nationality. We did not gather statistics on this as we were primarily interested in how the IRB assessed claims regarding Hungary (rather than claims regarding other countries of nationality).
[172] We borrow this language from one of the positive Romani cases in our sample, where the RPD found that "the claimants do not have a viable external flight alternative in the European Union as the right of residence is conditional on the attention of work within a tight deadline". VB0-02549 (14 December 2011). The term has also been used in recently reported case law. See e.g., *Hermann v Canada (MCI)*, 2014 FC 266.
[173] *Ward*, supra note 147 at para 88-96.

not in other countries to which they could potentially relocate without automatically enjoying citizenship rights.[174] We raise this point because EU mobility rights often arise in debates about Hungarian Romani refugee claims, but as a legal matter, such mobility rights are irrelevant.[175] Moreover, even if EU mobility rights were legally relevant, it should be noted that Hungarian Roma may not, in fact, be able to safely relocate to other EU countries. To begin with, there are restrictions on EU mobility rights,[176] and many Roma were deported from EU countries for failing to comply with these restrictions during the period of our study.[177] In addition, it is questionable whether Hungarian Roma would be protected against persecution even with legal status in some other EU countries.[178]

Third, none of the Hungarian Romani refugee claims in our sample were denied on the basis that claimants failed to establish that they were, in fact, Romani. Indeed, the matter seldom arose at all. Very few cases explicitly addressed why the IRB believed the claimant's assertions about their Romani ethnicity, and no cases explicitly disbelieved those assertions. Although the matter did not arise in our sample, it has arisen in reported cases,[179] and the Federal Court has cautioned against resorting to "stereotypes and assumptions" to assess Romani ethnicity and urged decision-makers not to "fixate on skin, hair and eye colour, which demonstrates minimal understanding of ethnicity."[180] At any rate, based on our sample, failure to substantiate a Hungarian Romani identity does not appear to be a common reason for refusing refugee protection.

---

[174] *Katkova v Canada (MCI)*, [1997] FCJ No 549. The case law distinguishes between countries of "potential" citizenship and countries where the claimant has a "pre-existing right" to citizenship. See *Crast v Canada (MCI)*, 2007 FC 146 at para 19-20.
[175] Macklin, *supra* note 125 at 109-113.
[176] *Ibid* at 111-112.
[177] S. Erlanger, "France intensifies effort to expel Roma, raising questions", *New York Times* (20 August 2010) A4.
[178] See e.g. Amnesty International, "Roma in Europe: Demanding Justice and Protection in the Face of Violence" (8 April 2014), online: < http://www.amnesty.org/en/news/roma-europe-demanding-justice-and-protection-face-violence-2014-04-08>.
[179] See e.g., *Varga v Canada (MCI)*, 2013 FC 494 [*Varga*]; *Darabos v Canada (MCI)*, 2008 FC 484; *Galyas v Canada (MCI)*, 2013 FC 250.
[180] *Ibid* (*Varga*) at para 17 and 20. There were cases in our sample where the "visibility" of the claimant's Romani ethnicity to potential persecutors was treated as relevant in terms of assessing the likelihood that the claimants would face persecution. These cases involved problematic reliance on stereotypes about what makes Romani ethnicity "visible". See e.g. VA8-02053, *supra* note 167 at para 5 & 18 (where the IRB notes that the claimant has a "light complexion with blue eyes, but alleges that he has facial features that makes him be recognized as someone with a Roma ethnicity" and then goes on to find that the claimant's "Roma background is not immediately visible to most").

Fourth, none of the cases in our sample of Hungarian Romani refugee claims were refused due to exclusion provisions. Under these provisions, a person who would otherwise meet the refugee definition can be excluded from refugee protection on the basis of having committed serious non-political crimes outside Canada, crimes against humanity or war crimes, or acts that are contrary to the principles and purposes of the United Nations.[181] Given the frequency with which criminality arises as a theme in debates about Hungarian Romani refugee claims, we think it is worth emphasizing that, based on our sample, it appears that Hungarian Romani refugee claimants were seldom excluded from refugee protection due to serious criminality between 2008 and 2012.

### *3.5. Institutional Bias*

We were curious about whether, beyond the legal reasons identified in the previous section, there were other factors that affected outcomes in Hungarian Romani refugee claims during the period of our study. To begin answering this question, we asked ten interviewees (five lawyers and five staff members at non-governmental organizations with experience assisting Hungarian Roma in navigating the refugee-determination system) what they thought accounted for low success rates in Hungarian Romani refugee claims. Eight of the ten interviewees raised concerns related to institutional bias against Hungarian Roma at the IRB.[182]

In explaining how this institutional bias operates, several interviewees suggested that decision-makers at the IRB were influenced by negative portrayals of Hungarian Roma as 'bogus' refugee claimants, particularly through negative comments made by Minister of Citizenship and Immigration Jason Kenney. For example:

> [T]he acceptance rate used to be rather high... And then when the Minister began the public defamation of the Roma, that they were frauds and cheats and here for economic reasons, the numbers just dropped dramatically. So part of the problem was the political voice of prejudice.[183]

[181] IRPA, *supra* note 111, s 98.
[182] Interviews 1-6 & 9-10.
[183] Interview 10.

> [T]he Minister started to speak about the Roma claims, and talking about bogus refugee claims [...]. [This] rhetoric had to have had a chilling effect on the board members.[184]

> [I]t's very difficult to believe that the refugee board could be completely shielded from the political opinion of the Minister [...] The discrimination faced by the Roma obviously is, even apart from what the Minister says, one of those baseline factors that is bound to affect all but a few particularly scrupulous Board Members. I think it's just sort of there, in the culture.[185]

Another interviewee went further, contending not only that decision-makers were subconsciously influenced by negative portrayals of Hungarian Romani refugee claimants, but also that some may have denied these claims out of concern for their careers.[186] That interviewee noted that, during the period of our study, IRB decision-makers were appointed and re-appointed through processes largely controlled by the Minister.[187] As a result, this argument runs, decision-makers may have avoided granting Hungarian Romani refugee claims partly out of fear that they would not be re-appointed. In this interviewee's words, "I think it had a chilling effect and it sent a message to the Board Members that if you want to be renewed, you toe the party line."[188]

Another institutional-bias argument raised by some interviewees related to decision-makers copying long passages from reasons for denying other Hungarian Romani cases rather than writing unique reasons engaging with the specific circumstances of each case:

> You see a lot of the decisions tend to copy each other for precedents [...] finding that there is protection, [that] Roma don't face persecution, and so on [...]. And certainly those precedents are coming from somewhere, even if it's from other Members but definitely it looked like there was a… I don't know if it's enough to establish institutional bias in the legal sense but definitely there was bias on the part of the IRB to want to refuse those claims.[189]

> [Decision-makers] may take shortcuts. [...] [I]nstead of looking at the country evidence [...] and reading it in the context of each case [...] you end up cutting and pasting [...] [and you] have cookie-cutter reasons. [...] [I]nstead of spending [...] 20 hours reading the

[184] Interview 2.
[185] Interview 3.
[186] Interview 4.
[187] For a discussion of the appointment process during the period of the study, and an analysis of how that process arguably left the IRB vulnerable to allegations of institutional bias, see, J. Bonisteel, "Ministerial Influence at the Canadian Immigration and Refugee Board: The Case for Institutional Bias" (2010) 27:1 Refuge 103.
[188] Interview 4.
[189] Interview 1.

> documents, they look at precedents from colleagues and say "well ok this is how we do it", so that kind of perpetuates the boilerplate reasons.[190]

In considering the views expressed by our interviewees about institutional bias, it is worth recalling our earlier discussion of Canada's response to the first stream of Hungarian Roma from 1998 to 2002.[191] As noted, the 1998 Hungarian Roma lead case - which severely reduced success rates for Hungarian Romani refugee claimants - was overturned in 2006 by the Federal Court of Appeal on the basis of a reasonable apprehension of bias.[192] The court found that it was reasonable to infer that the lead case was "tainted" by a motivation "to reduce the percentage of positive decisions in claims for refugee status by Hungarian Roma" and was "calculated to deter Roma from leaving for Canada in order to claim refugee status."[193]

If this type of institutional bias against Hungarian Romani refugee claimants existed at the IRB in 1998, could there, as most of our interviewees suggest, have been a similar bias between 2008 and 2012? We believe there are good reasons to be concerned about this possibility.

As we have seen, during the period of this study, cracking down on alleged abuse of the refugee-determination system was a major policy objective of the government, and Hungarian Roma were repeatedly held up as the prime example of this alleged abuse. At the same time, Minister of Citizenship and Immigration Jason Kenney demonstrated that he held little regard for institutional independence. One especially troubling incident involved a speech in which Minister Kenney criticized Federal Court judges for second-guessing the decisions of immigration officials and for failing to enthusiastically embrace the government's efforts to toughen the immigration and refugee system.[194] In response, Canadian Bar Association President Rod Snow suggested that public criticism by a cabinet minister of "judges who

[190] Interview 2.
[191] See section 2.3. above.
[192] *Kozak*, *supra* note 83.
[193] *Ibid* at para 65.
[194] Citizenship and Immigration Canada, "Speaking notes for the Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism at an event at the Faculty of Law, University of Western Ontario" (11 February 2011), online: <http://www.cic.gc.ca/english/department/media/speeches/2011/2011-02-11.asp>.

follow the law but not the government's political agenda is an affront to our democracy and freedoms"[195] - a view echoed by Supreme Court of Canada Chief Justice Beverley McLachlin.[196] In this context, would it be surprising if decision-makers at the IRB, who, unlike judges, did not enjoy security of tenure, felt pressure to adhere to the views of the Minister on whose good graces their careers depended?

There is also other evidence that provides cause for concern with regard to institutional bias. In our sample of Hungarian Romani refugee decisions, lengthy passages were often copied word for word from other decisions - with no indication that these passages were copied. Moreover, a document that we obtained from the IRB through an access-to-information request indicates that Hungarian Romani decisions were circulated among decision-makers at the IRB.[197] That document, which is undated, was written by someone involved in managing a team of decision-makers at the IRB - likely a Coordinating Member - working on Hungarian refugee claims. The document discusses meetings that occurred when a second team of decision-makers was assigned to hear Hungarian refugee claims:

> [I]n order to have consistency and no variance [we] held a joint meeting to discuss the issues [and] also provided CM [the Coordinating Member of the other team] with several decisions of my team that had been upheld by [the] Federal Court -- which the new team found useful.[198]

There are, to be sure, good reasons for decision-makers working on similar cases to share decisions, most notably in order to enhance consistency in decision-making. However, there are also serious risks posed by this practice, especially in a context where the decisions are not publicly available, as is the case for most refugee determinations. One risk is related to a bias in favor of decisions denying refugee protection. Most positive decisions during the period of our study did not have written reasons,[199] thus the circulated reasons were more likely to be negative precedents than positive precedents. Along similar lines, if the circulated decisions were selected because they had been upheld on judicial review, they were even more likely to be precedents for denying refugee claims because only a handful of

[195] Rod Snow, Letter to Jason Kenney re: Remarks to the University of Western Ontario (22 February 2011), online: <http://www.cba.org/CBA/submissions/pdf/11-12-eng.pdf>.
[196] R. Foot, "Chief Justice Supports Criticism of Kenney", *National Post* (13 August 2011).
[197] ATIP 2013-00619
[198] *Ibid* at 1245.
[199] Rehaag, "Role of Counsel", *supra* note 136 at 82-83.

positive refugee decisions are judicially reviewed.[200] If these mostly negative decisions were circulated among decision-makers - and then substantially copied without attribution - then the decisions essentially played the same role as the 1998 lead case - that is to say, they offered non-binding guidance in Hungarian Romani cases in a manner that reduced success rates in these cases. The most troubling aspect of this non-binding guidance is that it is non-transparent. Those outside the IRB have no idea what cases have been circulated internally, and there is no oversight to ensure that these cases offer a fair representation of a particular group of claims. This lack of transparency is compounded when decision-makers, guided by these disproportionately negative cases, fail to provide copies of the cases to claimants in advance - arguably breaching the claimant's constitutional right to know the case against them and to offer a response.[201]

In our view, if a decision-maker wishes to draw on unpublished refugee cases, at a minimum, those unpublished cases should be communicated in advance to the claimant, who should have an opportunity to explain whether their circumstances can be differentiated. Moreover, to avoid the perception of institutional bias, it is essential that both negative and positive precedents be shared with decision-makers and with claimants. Unfortunately, it seems likely that neither of these conditions were met with regard to Hungarian Romani refugee claims during the period of this study. Moreover, this occurred in a context where decision-makers might - in light of Minister Kenney's negative comments - reasonably be concerned about their career prospects should they grant large numbers of Hungarian Romani refugee claims. Taken together, we agree with our interviewees that there are good reasons to be worried about the fairness and impartiality of decision-making regarding Hungarian Romani refugee claims during this period.

[200] S. Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1 at 24.
[201] *Singh v Canada (MEI)*, [1985] 1 SCR 117 at para 57-58.

*3.6. Consistency at the Immigration and Refugee Board*

While institutional bias at the IRB is a concern, partly due to problematic practices aimed at enhancing consistency in decision-making, there also appear to be serious problems relating to inconsistent decision-making during the same period. As already discussed, the reasons offered by the IRB for outcomes in Hungarian Romani refugee claims involve some degree of inconsistency, most notably with regard to conflicting findings on the availability of state protection. In addition to these sorts of inconsistencies, several of our interviewees raised concerns about troubling inconsistencies in patterns of decisions made by particular decision-makers.[202] As one interviewee put it: "The big disparity is in who the judge is. There are judges who don't give positives and there are judges who give positives."[203]

One way to assess these impressions regarding disparities in decision-making across adjudicators is to look at variations in recognition rates.[204] Using data obtained through an access-to-information request,[205] we examined two sets of variations in recognition rates in all principal-applicant Hungarian refugee claims between 2008 and 2012: one involving variations across IRB offices, and the other involving variations across individual decision-makers.

**Table 5: Outcomes in principal applicant final RPD decisions for Hungarian claimants, by region (2008-2012)***

| Region** | Abandoned / Withdrawn | Negative *** | Positive | Total | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|
| Central | 1,709 | 936 | 164 | 2,809 | 14.9 | 60.8 | 5.8 |
| Western | 139 | 101 | 32 | 272 | 24.1 | 51.1 | 11.8 |
| Eastern | 147 | 66 | 40 | 253 | 37.7 | 58.1 | 15.8 |
| **Total** | **1,995** | **1,103** | **236** | **3,334** | **17.6** | **59.8** | **7.1** |

*SOURCE: IRB ATIP Request No. A-2013-01523*

** Excluding cases decided on grounds other than negative, positive, abandonded and withdrawn*

*** Based on first letter of RPD number*

**** Includes negative, no credible basis*

[202] Interviews 4, 5 & 9.
[203] Interview 9.
[204] For a general examination of variations in recognition rates at the IRB, including a discussion of methodologies that can be used to explore those variations, see S. Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 Ottawa Law Review 335.
[205] ATIP IRB Request No. A-2013-01523.

Table 5 describes outcomes in Hungarian principal-applicant refugee claims (broken down by the region where the claim was filed) decided between 2008 and 2012. As the table shows, 84.3% of the 3,334 principal applicant Hungarian refugee claims finalized during this period were filed in Central Region (Ontario) - compared to only 8.2% filed in Western Region and 7.6% in Eastern Region. The table also indicates that recognition rates and overall success rates in these cases varied significantly across regions. Hungarian principal applicants were 2.0 times as likely to succeed overall in Western Region (11.8%) compared to applicants in Central region (5.8%), and they were 2.7 times as likely to succeed in Eastern Region (15.8%) compared to Central Region (5.8%). Of course, one should be cautious about inferring that the variations are caused by regional differences in decision-making practices, as there could be a number of other factors at play. That being said, the large variations do raise questions about whether a case that would succeed in one region may nonetheless fail in another.

| Table 6: Board members (20+ cases ) in principal applicant final RPD decisions for Hungarian claimants, by recognition rate (merits only) (2008-2012)* | | | | |
|---|---|---|---|---|
| **Board Member**** | **Negative***** | **Positive** | **Total** | **Recognition Rate (Merits) (%)** |
| DUCHEINE, VIVIANE (Montreal) | 6 | 21 | 27 | 77.8 |
| MASON, LESLEY (Toronto) | 14 | 14 | 28 | 50.0 |
| BAFARO, ROBERT (Toronto) | 30 | 15 | 45 | 33.3 |
| LOWE, DAVID (Toronto) | 35 | 13 | 48 | 27.1 |
| ATKINSON, KEN (Toronto) | 56 | 20 | 76 | 26.3 |
| BADOWSKI, JOHN (Toronto) | 23 | 8 | 31 | 25.8 |
| MCCAFFREY, MICHAEL (Toronto) | 39 | 13 | 52 | 25.0 |
| KULAR, SUSAN (Toronto) | 44 | 9 | 53 | 17.0 |
| AHARA, ROSLYN (Toronto) | 101 | 16 | 117 | 13.7 |
| PAQUETTE-NEVILLE, LOUISE (Toronto) | 53 | 8 | 61 | 13.1 |
| MCMILLAN, KAREN (Toronto) | 21 | 3 | 24 | 12.5 |
| AGOSTINHO, LUIS F. (Toronto) | 37 | 4 | 41 | 9.8 |
| GREENSIDE, PATRICIA (Toronto) | 20 | 2 | 22 | 9.1 |
| CRYER, DOUGLAS (Toronto) | 72 | 6 | 78 | 7.7 |
| FIORINO, PASQUALE A. (Toronto) | 68 | 4 | 72 | 5.6 |
| ROBINSON, PAUL (Toronto) | 26 | 1 | 27 | 3.7 |
| BRYCHCY, ANNA (Montreal) | 35 | 1 | 36 | 2.8 |
| ROSE, ELANA NANCY (Toronto) | 39 | 1 | 40 | 2.5 |
| MCBEAN, DAVID (Toronto) | 24 | 0 | 24 | 0.0 |
| ROBINSON, EDWARD (Toronto) | 49 | 0 | 49 | 0.0 |
| PETTINELLA, MICHELE (Toronto) | 96 | 0 | 96 | 0.0 |
| Other Board Members (1-19 Cases) | 215 | 77 | 292 | 26.4 |
| **Total** | **1,103** | **236** | **1,339** | **17.6** |
| | | | | |
| *SOURCE: IRB ATIP Request No. A-2013-01523* | | | | |
| ** Excluding cases decided on grounds other than negative, negative no credible basis, and positive* | | | | |
| *** Reflects names listed in the IRB database without no consolodation of multiple listings for individual Board Member names* | | | | |
| **** Includes negative, no credible basis decisions* | | | | |

Table 6 provides details on the outcomes in principal-applicant Hungarian refugee claims finalized on their merits between 2008 and 2012, broken down by the IRB Member making the decision. As illustrated in the table, 21 IRB Members deciding at least 20 cases each adjudicated the large majority (78.2%) of these cases. The table also shows very large variations in recognition rates depending on which IRB Member decided the case, even when only comparing IRB Members working in the same office. Thus, for example, in the Toronto office, claimants were in luck if their cases were assigned to Lesley Mason (50.0%, 28 cases), Robert Barafo (33.3%, 45 cases) or David Lowe (27.1%, 48 cases). However they were decidedly unlucky if their cases were assigned to Michelle Pettinella (0%, 96 cases), Edward Robinson (0%, 49 cases) or David McBean (0%, 24 cases).

Given these dramatic variations in grant rates between decision-makers in the same office hearing claims from the same country, we think there are good reasons to worry that outcomes in some cases depended to a significant degree on who was assigned to hear the case. This obviously raises serious fairness concerns.

### *3.7. Quality of Counsel*

Fairness problems in Hungarian Romani refugee claims are not, however, related solely to the actions of government officials or institutions such as the IRB. Some of these problems instead involve professionals who are supposed to act in the best interests of refugee claimants. Indeed, all ten of our interviewees expressed serious concerns about quality of counsel in Hungarian Romani refugee claims. The following comments are typical:

> [M]any lawyers make quite a big deal about who are the refugee judges, the process, the panel members, all that. But I think the single most important thing is the lawyers.[206]

> There were some counsel who took a large number of claims [and] poorly prepared them [...]. I think that could go a long way as well to explaining the low approval rate.[207]

> [T]here seemed to be representatives who [...] weren't interested in [...] doing a good job or in truthfully or honestly representing their clients.[208]

> [T]here are some really terrible lawyers out there.[209]

The interviewees also largely agreed about the specific types of quality-of-counsel issues that arose in Hungarian Romani refugee claims. Many of these issues related to claimant narratives, which are key documents submitted early in the refugee-determination process that set out the claimant's account of his or her fears of persecution. All ten interviewees indicated that some lawyers prepared inadequate narratives, including brief boilerplate narratives that failed to address central aspects of the claims, for Hungarian Romani clients. Interviewees also reported that lawyers frequently left claimants to prepare

[206] Interview 10.
[207] Interview 1.
[208] Interview 7.
[209] Interview 3.

their own narratives without adequate instruction,[210] asked clients to sign blank narratives,[211] and failed to review narratives with clients prior to submitting them.[212] Some interviewees also suggested that other supporting documents, such as country-conditions information, medical reports, and police reports, were not submitted despite being provided to counsel,[213] and that counsel failed to instruct clients on what types of supporting documents they should seek out.[214]

Another common set of quality-of-counsel concerns raised by our interviewees related to how lawyers set up their practice. Several interviewees, for example, expressed concern about high volumes of cases taken on by some lawyers.[215] Many also suggested that lawyers relied excessively on non-lawyer assistants - including translators or consultants - or on inexperienced junior lawyers.[216] In addition, some interviewees reported that clients were often unable to reach their lawyers,[217] were not adequately prepared by their lawyers for their hearings,[218] or never met with their lawyers until their refugee hearings.[219] Some also indicated that lawyers failed to even show up at hearings.[220]

We were curious about whether these concerns about quality of counsel were shared by the IRB, so we made an access-to-information request seeking records that referred to quality of counsel or inadequate representation involving Hungarian refugee claims during the period of our study.[221] The IRB provided over 1,000 pages of various types of documents responsive to our request. Among these documents were emails written by decision-makers and staff at the IRB outlining problematic behavior of counsel. For example, in the context of allegations about a law firm allegedly failing to forward important documents to the IRB, a staff member asked whether a complaint should be made about the "mismanagement" of the firm, and noted that decision-makers "often run into problems stemming [from]

[210] Interviews 2, 8 & 9.
[211] Interviews 2 & 10.
[212] Interviews 8 & 9.
[213] Interviews 3 & 6.
[214] Interview 1.
[215] Interviews 3, 6, 8 & 9.
[216] Interviews 2-6 & 8.
[217] Interviews 1, 6 & 8.
[218] Interviews 1-3 & 9.
[219] Interviews 1, 3-6 & 8.
[220] Interviews 2 & 6.
[221] ATIP IRB Request No. A-2013-00619.

the firm's internal administration."[222] Similarly, an email from an IRB Member described a hearing that had been postponed because of allegations of inadequate counsel. These allegations included many of the concerns about narratives raised by our interviewees. The email concludes: "As you know this has happened repeatedly on the Hungarian cases. [...] I have heard a number of times that the [narrative] is not one the claimants have seen. It is evident to me from the [narratives] that a template is being used over and over."[223] In addition to electronic correspondence, the IRB provided us with other documents detailing steps taken to reduce delays in the refugee-determination process caused by problematic counsel in Hungarian cases,[224] as well as documents from many Hungarian refugee claims featuring allegations of inadequate counsel.[225]

**Table 7: Volume categories for counsel of record and outcomes in principal applicant final RPD decisions for Hungarian claimants (2008-2012)***

| Counsel Volume Category** | Abandoned / Withdrawn | Negative *** | Positive | Total | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|
| 201+ Cases (3 Counsel) | 775 | 305 | 59 | 1,139 | 16.2 | 68.0 | 5.2 |
| 51-200 (8 Counsel) | 364 | 202 | 47 | 613 | 18.9 | 59.4 | 7.7 |
| 11-50 Cases (30 Counsel) | 295 | 268 | 60 | 623 | 18.3 | 47.4 | 9.6 |
| 2-10 Cases (76 Counsel) | 93 | 148 | 41 | 282 | 21.7 | 33.0 | 14.5 |
| 1 Case (106 Counsel) | 38 | 51 | 17 | 106 | 25.0 | 35.8 | 16.0 |
| No Counsel Listed | 430 | 129 | 12 | 571 | 8.5 | 75.3 | 2.1 |
| **Total** | **1,995** | **1,103** | **236** | **3,334** | **17.6** | **59.8** | **7.1** |

*SOURCE: IRB ATIP Request No. A-2013-01523*
** Excluding cases decided on grounds other than negative, positive, and abandonded / withdrawn*
*** Reflects actual names listed in the IRB database without consolodation of multiple listings for individual counsel names*
**** Includes negative, no credible basis decisions*

The concerns regarding quality of counsel expressed by our interviewees and by the IRB are consistent with our quantitative data. Using information obtained from the IRB for counsel of record listed in all Hungarian principal-applicant refugee claims finalized between 2008 and 2012, we examined whether outcomes varied depending on who served as counsel of record. Table 7 shows that success rates were higher when counsel of record worked on relatively few Hungarian claims compared to counsel who worked on large numbers of such claims. For example, claimants represented by counsel involved in ten

[222] *Ibid* at 474.
[223] *Ibid* at 1231.
[224] *Ibid* at 1232 & 1244
[225] See e.g., *Ibid* at 668 (TB0-11190), 729 (TA9-22821), 791 (TA9-21368), 886 (TB0-17436), 887 (TB0-03861), 906 (TB0-05610), 986 (TB1-07145), 1023 (TB1-17415), 1117 (TB0-10892).

or fewer Hungarian cases were 2.9 times as likely to succeed compared to claimants represented by counsel in 201 or more Hungarian cases. The table also shows that a small number of high-volume lawyers were involved in a significant proportion of Hungarian refugee claims decided in this period: 34.2% of these cases involved just three counsel, and 52.5% involved eight counsel.

**Table 8: High volume (25+ Decisions) counsel of record and outcomes in principal applicant final RPD decisions for Hungarian claimants, by volume (2008-2012)***

| Counsel** | Abandoned / Withdrawn | Negative*** | Positive | Total | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|
| (1) HOHOTS, VIKTOR (ON) (LSUC Hearing) | 403 | 95 | 6 | 504 | 5.9 | 80.0 | 1.2 |
| (2) FARKAS, JOSEPH (ON) (LSUC Hearing) | 223 | 137 | 26 | 386 | 16.0 | 57.8 | 6.7 |
| (3) IVANYI, PETER (ON) | 149 | 73 | 27 | 249 | 27.0 | 59.8 | 10.8 |
| (4) BHATTI, ROGER (BC) | 66 | 31 | 17 | 114 | 35.4 | 57.9 | 14.9 |
| (5) FINE, DANIEL (ON) | 70 | 18 | 9 | 97 | 33.3 | 72.2 | 9.3 |
| (6) JASZI, ELIZABETH (ON) (LSUC Hearing) | 80 | 14 | 1 | 95 | 6.7 | 84.2 | 1.1 |
| (7) YOUNES, DIANA (ON) | 18 | 51 | 6 | 75 | 10.5 | 24.0 | 8.0 |
| (8) TAHERI, DJAWID (ON) | 65 | 7 | 1 | 73 | 12.5 | 89.0 | 1.4 |
| (9) KORMAN, MICHAEL (ON) | 25 | 28 | 2 | 55 | 6.7 | 45.5 | 3.6 |
| (10) SILCOFF, MAUREEN (ON) | 16 | 29 | 7 | 52 | 19.4 | 30.8 | 13.5 |
| (11) RODRIGUES, ROGER (ON) | 24 | 24 | 4 | 52 | 14.3 | 46.2 | 7.7 |
| (12) VALLIERES, ALAIN (QC) | 20 | 12 | 8 | 40 | 40.0 | 50.0 | 20.0 |
| (13) VALOIS, STEPHANIE (QC) | 24 | 9 | 7 | 40 | 43.8 | 60.0 | 17.5 |
| (14) MANZARARU, LEONARD (QC) | 22 | 3 | 11 | 36 | 78.6 | 61.1 | 30.6 |
| (15) GRICE, JOHN (ON) | 26 | 7 | 1 | 34 | 12.5 | 76.5 | 2.9 |
| (16) WANG, YAQIAN (ON) | 9 | 23 | 1 | 33 | 4.2 | 27.3 | 3.0 |
| (17) GOLDMAN, JEFFREY (ON) | 9 | 14 | 8 | 31 | 36.4 | 29.0 | 25.8 |
| (18) HEGYI, ILDIKO (ON) (Consultant) | 14 | 15 | 2 | 31 | 11.8 | 45.2 | 6.5 |
| (19) SARKOZI, JOZEF (ON) (Consultant) | 10 | 13 | 2 | 25 | 13.3 | 40.0 | 8.0 |
| Other Counsel (Fewer than 25 Cases) | 292 | 371 | 78 | 741 | 17.4 | 39.4 | 10.5 |
| No Counsel Listed | 430 | 129 | 12 | 571 | 8.5 | 75.3 | 2.1 |
| **Total** | **1,995** | **1,103** | **236** | **3,334** | **17.6** | **59.8** | **7.1** |

*SOURCE: IRB ATIP Request No. A-2013-01523*

** Excluding cases decided on grounds other than negative, positive, and abandonded / withdrawn*

*** Reflects actual names listed in the IRB database without consolodation of multiple listings for individual counsel names*

**** Includes negative, no credible basis decisions*

**Table 9: High volume (25+ Decisions) counsel of record and outcomes in principal applicant final RPD decisions for Hungarian claimants, by overall success rate (2008-2012)***

| Counsel** | Abandoned / Withdrawn | Negative*** | Positive | Total | Recognition Rate (Merits) (%) | Abandoned / Withdrawn Rate (%) | Overall Success Rate (%) |
|---|---|---|---|---|---|---|---|
| (14) MANZARARU, LEONARD (QC) | 22 | 3 | 11 | 36 | 78.6 | 61.1 | 30.6 |
| (17) GOLDMAN, JEFFREY (ON) | 9 | 14 | 8 | 31 | 36.4 | 29.0 | 25.8 |
| (12) VALLIERES, ALAIN (QC) | 20 | 12 | 8 | 40 | 40.0 | 50.0 | 20.0 |
| (13) VALOIS, STEPHANIE (QC) | 24 | 9 | 7 | 40 | 43.8 | 60.0 | 17.5 |
| (4) BHATTI, ROGER (BC) | 66 | 31 | 17 | 114 | 35.4 | 57.9 | 14.9 |
| (10) SILCOFF, MAUREEN (ON) | 16 | 29 | 7 | 52 | 19.4 | 30.8 | 13.5 |
| (3) IVANYI, PETER (ON) | 149 | 73 | 27 | 249 | 27.0 | 59.8 | 10.8 |
| (5) FINE, DANIEL (ON) | 70 | 18 | 9 | 97 | 33.3 | 72.2 | 9.3 |
| (7) YOUNES, DIANA (ON) | 18 | 51 | 6 | 75 | 10.5 | 24.0 | 8.0 |
| (19) SARKOZI, JOZEF (ON) (Consultant) | 10 | 13 | 2 | 25 | 13.3 | 40.0 | 8.0 |
| (11) RODRIGUES, ROGER (ON) | 24 | 24 | 4 | 52 | 14.3 | 46.2 | 7.7 |
| (2) FARKAS, JOSEPH (ON) (LSUC Hearing) | 223 | 137 | 26 | 386 | 16.0 | 57.8 | 6.7 |
| (18) HEGYI, ILDIKO (ON) (Consultant) | 14 | 15 | 2 | 31 | 11.8 | 45.2 | 6.5 |
| (9) KORMAN, MICHAEL (ON) | 25 | 28 | 2 | 55 | 6.7 | 45.5 | 3.6 |
| (16) WANG, YAQIAN (ON) | 9 | 23 | 1 | 33 | 4.2 | 27.3 | 3.0 |
| (15) GRICE, JOHN (ON) | 26 | 7 | 1 | 34 | 12.5 | 76.5 | 2.9 |
| (8) TAHERI, DJAWID (ON) | 65 | 7 | 1 | 73 | 12.5 | 89.0 | 1.4 |
| (1) HOHOTS, VIKTOR (ON) (LSUC Hearing) | 403 | 95 | 6 | 504 | 5.9 | 80.0 | 1.2 |
| (6) JASZI, ELIZABETH (ON) (LSUC Hearing) | 80 | 14 | 1 | 95 | 6.7 | 84.2 | 1.1 |
| Other counsel (fewer than 25 cases) | 292 | 371 | 78 | 741 | 17.4 | 39.4 | 10.5 |
| No counsel listed | 430 | 129 | 12 | 571 | 8.5 | 75.3 | 2.1 |
| **Total** | **1,995** | **1,103** | **236** | **3,334** | **17.6** | **59.8** | **7.1** |

*SOURCE: IRB ATIP Request No. A-2013-01523*

** Excluding cases decided on grounds other than negative, positive, and abandonded / withdrawn*

*** Reflects actual names listed in the IRB database without consolodation of multiple listings for individual counsel names*

**** Includes negative, no credible basis decisions*

Tables 8 and 9 break down the success rates for individual counsel of record who were involved in at least 25 Hungarian principal-applicant refugee claims between 2008 and 2012. As these tables show, the success rates of individual counsel in Hungarian cases vary significantly, even when comparing counsel working in a single province. For example, in Ontario, Jeffrey Goldman (25.8%, 31 cases), Maureen Silcoff (13.5%, 52 cases) and Peter Ivanyi (10.8%, 249 cases) succeeded far more frequently than Elizabeth Jaszi (1.1%, 95 cases), Viktor Hohots (1.2%, 504 cases) and Djawid Taheri (1.4%, 73 cases). Of course, as with variations in recognition rates across IRB offices, one should be cautious about drawing inferences about the causes of these variations - and in particular about whether differences in counsel success rates are a product of differing quality of legal representation. We acknowledge that there

are many factors that might produce these variations. Nonetheless, the combination of significantly below-average success rates and very high volumes of cases does, in our view, raise serious concerns.[226]

Another troubling finding evident in Tables 8 and 9 is that three of the six highest-volume lawyers (including the two highest-volume lawyers), who were, together, listed as counsel of record in 29.6% of the Hungarian principal-applicant refugee claims finalized between 2008 and 2012, are currently facing disciplinary proceedings at the Law Society of Upper Canada (LSUC). All three have below-average success rates in Hungarian claims, and two have the lowest overall success rates in Hungarian claims of all lawyers listed as counsel of record in at least 25 such claims. The main allegations against all three lawyers in the LSUC proceedings involve inadequate legal service provided to multiple refugee-claimant clients. Viktor Hohots and Elizabeth Jaszi are accused of, among other things, failing to properly prepare documents submitted by refugee claimants (especially narratives setting out the basis of claims), asking claimants to sign blank documents, missing deadlines, failing to prepare clients for their refugee hearings, and failing to keep clients advised as to the status of their files.[227] Joseph Farkas is accused of having failed to properly supervise a non-lawyer who prepared refugee claims in his office and of failing to properly serve several refugee-claimant clients.[228]

It should be emphasized that the allegations in these disciplinary proceedings have not yet been proven. However, in *Galyas v Canada (MCI)*, the Federal Court found that the highest-volume lawyer, Viktor Hohots, provided incompetent counsel.[229] Specifically, the court found that Mr. Hohots' law office provided incompetent legal counsel in submitting a vague and very brief narrative in a Hungarian Romani refugee claim:

> [T]here can be no disputing the inadequacies that appear on the face of the [...] narrative [...]. Competent counsel would have known that the Applicant's narrative does not comply with [...] expectations [...] and that it would be extremely detrimental to the

[226] There is also cause for concern regarding some lower volume counsel. For example, 10 of the 30 counsel involved in 11 to 25 Hungarian refugee claims did not succeed with a single case, whereas 3 counsel within the same volume range had success rates over 25%.
[227] Law Society Hearing Panel, Notice of Application re: Hohots (21 February 2014), File No LCN 22/14; Law Society Hearing Panel, Notice of Application re: Jaszi (6 June 2014), File No LCN 57/14.
[228] Law Society Hearing Panel, Notice of Application re: Farkas (10 July 2013), File No LCN 83/13.
[229] 2013 FC 250 [*Galyas*].

> Applicant at the hearing. [...] [The IRB] consistently and relentlessly draws negative credibility findings from a failure to include important incidents [...]. In that regard, the Applicant's [narrative] is a negative credibility finding waiting to happen.[230]

**Table 10: Word counts in narratives for samples of Hungarian principal applicant RPD decisions on merits (2008-2012)***

| Samples | Number of Cases in Sample | Average Word Count in Narratives | Recognition Rate (Merits) (%) ** | Overall Success Rate (%)** |
|---|---|---|---|---|
| (1) HOHOTS, VIKTOR (ON) (LSUC Hearing) | 23 | 487 | 5.9 | 1.2 |
| (2) FARKAS, JOSEPH (ON) (LSUC Hearing) | 25 | 529 | 16.0 | 6.7 |
| (3) IVANYI, PETER (ON) | 22 | 1,938 | 27.0 | 10.8 |
| (4) BHATTI, ROGER (BC) | 24 | 1,463 | 35.4 | 14.9 |
| All Counsel Hungary Sample | 45 | 1,131 | 17.6 | 7.1 |
| All Counsel Hungary Sample (Positive) | 10 | 1,633 | n/a | n/a |
| All Counsel Hungary Sample (Negative) | 35 | 987 | n/a | n/a |

*SOURCE: IRB ATIP Request No. A-2013-00779*

** Five separate samples. Samples 1-4 were 25 narratives each, selected randomly from among Hungarian cases decided on the merits where the relevant counsel was listed as counsel of record. Sample 5 was 50 narratives randomly selected from all Hungarian cases decided on the merits. Not all requested narratives were provided (i.e. 2 missing from Hohots sample, 3 missing from Ivanyi sample, 2 missing from Bhatti sample, and 5 missing from All Counsel sample).*

*** Recognition rates and overall success rates are for all Hungarian cases, not for the cases in the samples (see Tables 8 and 9).*

Because of the frequent concerns expressed about the quality of narratives submitted by high-volume counsel in Hungarian claims, we made an access-to-information request to obtain copies of narratives submitted in samples of Hungarian refugee claims.[231] Table 10 sets out the word counts in five samples. The first four samples were randomly selected from Hungarian cases in which the four highest-volume counsel were listed as counsel of record, and the fifth sample was randomly selected from all Hungarian principal-applicant cases, irrespective of who was listed as counsel of record. As is evident in the table, the narratives submitted in cases where Viktor Hohots or Joseph Farkas was listed as counsel were very brief (509 words on average) compared to the narratives in cases where Peter Ivanyi or Roger Bhatti were listed as counsel (1,690 words on average). This is a point of some concern, given that the former had below-average recognition rates and are facing LSUC disciplinary proceedings. The table also

[230] *Ibid*. at para 86. See also, *Ivansik v Canada (MCI)*, IMM-2552-13 (13 June 2014), where the Department of Justice conceded that several high volume lawyers, including Viktor Hohots and Elizabeth Jaszi, provided incompetent counsel.
[231] IRB ATIP Request No. A-2013-00779.

indicates that, in our sample of Hungarian cases with all counsel, positive cases had on average much longer narratives (1,633 words) than negative cases (987 words).

In addition to these troubling quantitative findings, we must say that we were unimpressed with the quality of large numbers of narratives in our samples. In particular, we believe that most of the brief narratives suffer from the same flaws that led the Federal Court to call the narrative submitted in *Galyas* inadequate on its face. Indeed, many of these narratives appear to have been prepared with complete disregard for what would need to be established at a refugee hearing in order for a claimant to succeed. Most of the brief narratives fail to address what steps claimants took to try to obtain state protection against persecution in Hungary, or alternatively, why they reasonably believed that taking such steps would be futile. As such, these narratives make it extremely difficult for the claimant to rebut the presumption of state protection, which, as we saw above, is the main reason offered by the IRB for rejecting Hungarian Romani refugee claims. Most of the brief narratives also fail to set out in sufficient detail the mistreatment suffered by the claimants, even though they hint at such mistreatment. Therefore, they are likely to result in a finding that the claimants suffered discrimination rather than persecution, which is, as we saw above, another common reason for the IRB to reject Hungarian Romani refugee claims. Finally, most of the brief narratives contain allegations that are vague and incomplete, and are thus, to use the Federal Court's words in *Galyas*, "negative credibility finding[s] waiting to happen."[232] In other words, most of the brief narratives we reviewed were inadequate to the task that any experienced counsel should have known would be central to success in the claim: rebutting the presumption of state protection, demonstrating that the claimant faced persecution rather than discrimination, and establishing that the claimant is credible.

Based both on the patterns in success rates and on our review of the samples of narratives, we are of the view that there was a serious and systemic problem regarding quality of counsel in large numbers of Hungarian Romani refugee claims during the period of our study - and, in particular, that many narratives were prepared by counsel in a manner that virtually guaranteed that the refugee claims would

[232] *Galyas*, *supra* note 229 at para 86.

fail. We therefore agree with all of our interviewees that quality of counsel likely played a significant role in the very low success rates for Hungarian Romani refugee claimants between 2008 and 2012.

### *3.8. Abandoned and Withdrawn Claims*

A final aspect of Hungarian Romani refugee claims made in Canada between 2008 and 2012 that we would like to explore is the frequency of withdrawn or abandoned claims - with the former meaning that claimants actively asked the IRB to discontinue their claims, and the latter meaning that the IRB declared claims abandoned after claimants failed to complete a mandatory step in the process. During the period of this study, withdrawal/ abandonment rates in Hungarian Romani claims played a prominent role in debates both about these claims and about Canada's refugee determination system more generally. For example, in 2010, Minister of Citizenship and Immigration Jason Kenney, speaking in Parliament about the need for reforms to Canada's refugee determination system, said:

> [T]he system [...] is broken [...] with our number one source country [i.e. Hungary], a European Union democracy, from which 97% of claimants go on to abandon or withdraw their own claims. Therefore, it is imperative that we find a way to deter abuse [...] [of] Canada's generosity.[233]

Similarly, in another statement in Parliament the same year, Minister Kenney said:

> [Hungary] has become our number one source country for asylum claims. Ninety-seven per cent [...] go on to abandon or withdraw their claims after they are filed saying by their own admission that they actually do not need Canada's protection. [...] Of the 3% of claims that went on to adjudication at the IRB, three, not 3%, but three of the 2,500 asylum claims from Hungary were accepted as being in need of protection. That is an acceptance rate of nearly 0%.[234]

These statistics frequently cited by Minister Kenney were misleading. The full figures are available in Table 1, above. As can be seen in this table, the Minister was correct to say that, in 2009, the abandonment and withdrawal rate was 97% of finalized Hungarian decisions, and that of all the Hungarian cases finalized, only three succeeded with their applications. However, he neglected to mention that the IRB chose to hold hearings on the merits in only eight Hungarian cases in 2009 - and

[233] House of Commons Debates, 40th Parl, 3d Sess, No 63 (15 June 2010) at 1515.
[234] House of Commons Debates, 40th Parl, 3d Sess, No 36 (29 April 2010) at 1110.

that three of those eight cases succeeded. That means that the recognition rate for Hungarian refugee claims in 2009 was 37.5%. Moreover, if one looks to the recognition rates for the year before, when more Hungarian cases were decided on their merits, Hungarian claimants succeeded in 62.9% of cases decided on the merits. This is a rather far cry from the "acceptance rate of nearly 0%" cited by the Minister. Moreover, of the approximately 2,500 cases from Hungary before the IRB in 2009, only 267 (around 10%) were withdrawn or abandoned that year. The rest were simply pending. In other words, the statistics that the Minister frequently pointed to as evidence of abuse of Canada's refugee determination system by Hungarian claimants were themselves 'bogus'.

Still, as we have acknowledged, a large proportion (52.5%) of the 7,669 Hungarian refugee claims finalized between 2008 and 2012 were withdrawn or abandoned. This is much higher than the average abandonment/withdrawal rate for claims from all countries finalized during the same period (18.3%). As a result, any serious analysis of Hungarian Romani refugee claims during this period must address this phenomenon.

We put the question of what accounts for high abandonment/withdrawal rates to our interviewees. The most frequent explanation our interviewees offered was that, confronted with very low success rates for Hungarian refugee claimants reported in the media, many lost hope that their claims would be successful and decided that it was not worth waiting for the refugee-determination process to run its course.[235] As one interviewee put it: "I've talked to people who just gave up hope. [...] [T]hey just said 'look, we've seen the statistics, we've read the newspapers, we've heard and there's no hope for us here.'"[236]

Several interviewees also suggested that this sense of hopelessness was compounded by Minister Kenney's negative comments about Hungarian refugee claimants.[237] For example, one interviewee explained that "[t]wo and a half years is a long time to wait for a hearing in an environment where the

[235] Interview 1, Interview 3, Interview 4, Interview 5, Interview 6, Interview 7, Interview 10.
[236] Interview 10.
[237] Interview 2, Interview 4, Interview 5, Interview 6, Interview 10.

Minister's saying you're bogus, we're going to reject you anyway."[238] Another interviewee went further, saying

> [w]hat encouraged people to give up was the language of people being called bogus refugees and criminals, because they felt they weren't accepted or wanted in Canada, that they were being essentially treated the same way as they were being treated back home in Hungary.[239]

Another set of reasons that our interviewees offered for claims being withdrawn or abandoned related to counsel, including some of the concerns around quality of counsel addressed in the prior section of this article.[240] For example:

> [The] biggest reason that I see [...] [was] lawyers and immigration consultants not doing their job in terms of helping prepare people for their claims [...] [I]t seems like they just abandon them.[241]

> [L]ack of communication with the lawyers might have made people feel that there's no hope for the case, that no one's really helping them, that their cases aren't seen as worthwhile.[242]

> [T]hey were treated [badly] by lawyers or by professionals, that was often times very, very discouraging and very sad, and they decided to go back.[243]

These concerns about counsel seem consistent with our quantitative data. As can be seen in Table 7, above, claimants with high-volume counsel were much more likely to abandon or withdraw their claims than claimants with lower-volume counsel (*e.g.*, 68.0% for counsel in 201 or more Hungarian cases compared to 33.0% for counsel in two to ten Hungarian cases). Moreover, as is evident in Tables 8 and 9, abandonment and withdrawal rates for individual high-volume lawyers vary significantly. For instance, three high-volume counsel currently facing LSUC disciplinary proceedings, Elizabeth Jaszi (84.2%, 95 cases), Viktor Hohots (80.0%, 504 cases), and Joseph Farkas (57.8%, 386 cases), had much higher abandonment/withdrawal rates than other high-volume counsel, such as Jeffrey Goldman (29.0%, 31 cases) and Maureen Silcoff (30.8%, 52 cases). Moreover, the three high-volume lawyers facing LSUC

[238] Interview 4.
[239] Interview 6.
[240] Interview 1, Interview 2, Interview 6, Interview 7, Interview 8, Interview 10.
[241] Interview 6.
[242] Interview 2.
[243] Interview 8.

disciplinary proceedings served as counsel of record in 35.4% of all abandoned and withdrawn Hungarian refugee claims between 2008 and 2012. In our view - and in light of our conclusions in the last section - these figures raise serious concerns about the possible role of quality-of-counsel problems in the large numbers of Hungarian refugee claims withdrawn or abandoned during the period of our study.

In addition to a sense of hopelessness and concerns about quality of counsel, our interviewees also pointed to a variety of other reasons for Hungarian claimants abandoning and withdrawing claims. These included difficult living conditions in Canada that did not live up to the claimants' expectations,[244] homesickness[245] and culture shock.[246] Several of the reasons offered involved concerns about family. For example, one interviewee reported that claimants withdrew or abandoned their claims after other family members were deported from Canada.[247] Along similar lines, another interviewee suggested that claimants withdrew or abandoned claims because they needed to return to Hungary to deal with the illness and death of family members.[248]

Finally, a number of our interviewees pointed out that many Hungarian Romani refugee claimants who abandoned or withdrew claims did not ultimately move back to Hungary, but instead went to other European Union countries[249] - even if, as noted earlier in this article, their legal status in these countries might have been precarious.

Taken together, we think the phenomenon of high abandonment/withdrawal rates (but not as high as misleadingly suggested by Minister Kenney) is more complex than Minister Kenney's assertions about these claims being 'bogus' would have it. There were a variety of reasons why claimants may have withdrawn or abandoned their claims that have little to do with whether the claimants did, in fact, have a

[244] Interview 6. Interview 9.
[245] Interview 7.
[246] Interview 6
[247] Interview 1.
[248] Interview 6,
[249] Interview 8, Interview 9, Interview 10.

well-founded fear of persecution in Hungary - not the least of which is what one of our interviewees called Minister Kenney's "campaign against refugees and particularly Roma refugees."[250]

*4. CONCLUSION*

As this study has shown, between 2008 and 2012, over 11,000 Hungarians made refugee claims in Canada, primarily on the basis that they feared persecution on account of their Romani ethnicity. While hundreds succeeded with their refugee claims, most did not. Instead, they encountered racist rhetoric that drew on stereotypes about Roma being fraudsters, beggars, and criminals, and which presented Hungarian Romani refugee claimants as 'bogus'. These stereotypes have now been enshrined in Canada's new refugee-determination process, which limits the procedural and substantive rights of refugee claimants from designated countries of origin, including Hungary, on the theory that asylum seekers from these countries are taking advantage of Canadian generosity.

Our study has also found that Hungarian Romani refugee claimants in Canada between 2008 and 2012 encountered a refugee-determination process for which there are reasons to be concerned about institutional bias. The same refugee-determination process also appears to have been unable to deliver consistent decision-making - and there is good reason to fear that outcomes came down to the luck of the draw in terms of which decision-maker was assigned to hear the case. Moreover, many Hungarian Romani refugee claimants entrusted their refugee claims to lawyers for whom there are reasons to be concerned about the quality of services they provided.

In short, between 2008 and 2012, most Hungarian Romani refugee claimants found no refuge in Canada from the mistreatment they experienced in Hungary.

We want to be clear that we are not suggesting that all Hungarian Roma who made refugee claims during the period of our study actually met the refugee definition, as it is currently defined in Canada's refugee determination system. We recognize that this definition involves constraining legal tests, and that not all Hungarian Romani refugee claims are able to meet these tests.

[250] Interview 5.

That having been said, we think it is obvious that Roma have been mistreated in Hungary for centuries, and that they continue to be a severely marginalized minority. Even if, due to the narrowness of the refugee definition, some Hungarian Romani refugee claimants were not entitled to refugee protection in Canada during the period of our study, they were nonetheless entitled to access a fair refugee-determination process. They should have received high-quality legal assistance, and, perhaps most importantly, they should not have been made the target of anti-refugee rhetoric on the part of government actors and others.

One of our interviewees offered this reflection on her experience accompanying the latest stream of Hungarian Roma as they made their refugee claims in Canada between 2008 and 2012:

> It's just heart-breaking. [...] You see the wreckage of families, the terrible uncertainties that they face, the attendant health questions, the breakdowns, the stress, the waste of years of people's lives. But I think the worst part for me is to see a whole group of people that have never experienced justice and they have this one little hope that Canada might be a place of justice and that is crushed. Then they say, well, that's how we've always been treated, and how we always will. And that's a terrible, terrible thing.[251]

We think Canada needs to learn from the experience of the latest stream of Hungarian Romani refugee claimants. The lesson to be learned, however, is not the one often cited by proponents of Canada's new refugee-determination system. Instead, the lesson to be learned is that Canada still has some distance to go to fully embrace respect for the human rights of those seeking refuge from hatred, racism, and xenophobia.[252] When the next stream of Hungarian Roma - or another marginalized group - come to Canada seeking refuge, the country must do better.

---

[251] Interview 10.

[252] In 2011, Minister Kenney attended the unveiling of Daniel Libeskind's *Wheel of Conscience* at Canada's immigration museum at Pier 21 in Halifax. The *Wheel of Conscience* is a memorial to Jews fleeing the Nazi regime onboard the MS. St. Louis, who were turned away from Canada in 1939 -- many of whom were killed in the holocaust. The *Wheel of Conscience* attempts to show interconnections between hatred, racism, xenophobia and anti-Semitism, which led to Canada's failure to assist Jews fleeing the Nazis. At the unveiling Minister Kenney said: "We dedicate ourselves to teaching future generations about the injustices and xenophobia of our own history and to ensuring that they are never repeated." Citizenship and Immigration Canada, "Speaking notes for the Honourable Jason Kenney" (20 January 2011), online: <http://www.cic.gc.ca/english/department/media/speeches/2011/2011-01-20.asp>.