



Osgoode Hall Law Journal

Volume 52
Issue 3 *Volume 52, Issue 3 (Summer 2015)*

Article 1

1-1-2016

No Refuge: Hungarian Romani Refugee Claimants in Canada

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Citation Information

Rehaag, Sean; Beaudoin, Julianna; and Danch, Jennifer. "No Refuge: Hungarian Romani Refugee Claimants in Canada." *Osgoode Hall Law Journal* 52.3 (2015) : 705-774.

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No Refuge: Hungarian Romani Refugee Claimants in Canada

Abstract

From 2008 to 2012, thousands of Hungarian Roma sought asylum in Canada. Some political actors suggested that their claims were unfounded and demonstrated that Canada's refugee processes were vulnerable to abuse. In contrast, advocates for refugees argued that persecution against Roma was rampant in Hungary and noted that hundreds of Hungarian Roma were granted refugee status in Canada. Much of this debate has occurred in an evidentiary vacuum. This article fills this vacuum through a qualitative and quantitative study of Hungarian Romani refugee claims. First, the context of the study is discussed. Then, the article explores the experiences of Hungarian Roma within Canada's refugee determination system between 2008 and 2012. The article ends with concluding remarks, focusing on particularly troubling findings from the study, including the impact of anti-refugee rhetoric, institutional bias, inconsistent decision making, and problems related to quality of counsel.

Keywords

Romanies; Refugees--Legal status, laws, etc.; Canada

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No Refuge: Hungarian Romani Refugee Claimants in Canada[†]

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& JENNIFER DANCH***

From 2008 to 2012, thousands of Hungarian Roma sought asylum in Canada. Some political actors suggested that their claims were unfounded and demonstrated that Canada's refugee processes were vulnerable to abuse. In contrast, advocates for refugees argued that persecution against Roma was rampant in Hungary and noted that hundreds of Hungarian Roma were granted refugee status in Canada. Much of this debate has occurred in an evidentiary vacuum. This article fills this vacuum through a qualitative and quantitative study of Hungarian Romani refugee claims. First, the context of the study is discussed. Then, the article explores the experiences of Hungarian Roma within Canada's refugee determination system between 2008 and 2012. The article ends with concluding remarks, focusing on particularly troubling findings from the study, including the impact of anti-refugee rhetoric, institutional bias, inconsistent decision making, and problems related to quality of counsel. Entre 2008 et 2012, des milliers de Roms de Hongrie ont demandé l'asile au Canada.

Certaines personnalités politiques ont prétendu que ces demandes étaient sans fondement et ne servaient qu'à démontrer la vulnérabilité du droit d'asile au Canada. Par contre, les défenseurs des demandeurs d'asile ont soutenu que les Roms étaient couramment persécutés en Hongrie et que des centaines de Roms hongrois avaient déjà acquis le statut

[†] 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 Krista Antonio, Caitlin Beresford, Ian Brittain, Angelica Buggie, Amedeo Clivio, Nadia Halum, Joshua Patlik, and Jennifer Yoon Lee for their able research assistance. The authors would also like to express their gratitude to the interviewees who agreed to participate in this research.

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de réfugiés au Canada. Ce débat s'est déroulé en grande partie dans une absence de preuves. Cet article comble ce vide en faisant une étude qualitative et quantitative des assertions des Roms hongrois demandeurs d'asile. Le contexte de l'étude est d'abord discuté, puis l'article détaille la manière dont le système régissant l'accès au droit d'asile a traité les Roms de Hongrie entre 2008 et 2012. L'article se termine par quelques commentaires sur des faits particulièrement troublants soulevés par l'étude, en particulier l'impact du discours anti-réfuégiés, le parti pris institutionnel, l'incohérence du processus décisionnel et certains problèmes découlant de l'incompétence des conseillers juridiques.

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CANADA REVISED ITS REFUGEE DETERMINATION SYSTEM in 2012, dramatically speeding up the process and limiting substantive and procedural rights for some refugee claimants. These revisions include a Designated Countries of Origin (“DCO”) scheme, whereby refugee claimants from countries designated as “safe” go through expedited proceedings and have more limited access to procedural rights, including appeal rights.¹ Proponents argued that these revisions were needed to crack down on alleged abuse of the existing refugee determination system by “bogus” refugee claimants.² Hungarian refugee claimants—most of

1. See Part II(D), below.

2. See e.g. Jason Kenney, “At a News Conference to Announce Royal Assent of the *Protecting Canada's Immigration System Act*” (Speech delivered in Ottawa, 29 June 2012), online: Citizenship and Immigration Canada <www.cic.gc.ca/english/department/media/speeches/2012/2012-06-29.asp>.

whom were Roma—were held out as examples of this alleged abuse.³ Political actors, including then Minister of Citizenship and Immigration, Jason Kenney,⁴ 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.⁵ Hungary was one of the first countries to be designated as safe under the DCO scheme, and subsequent declines in the number of Hungarian refugee claims made in Canada after the system was revised were held out to be an indication that the reforms (and the DCO scheme in particular) had been successful.⁶

Many advocates for refugees, however, contest this story about Hungarian Romani refugee claimants and abuse of the refugee determination system.⁷ 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.⁸ They also argue that the frequency

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3. For a discussion of Hungarian Roma as an oft-cited exemplar of allegedly abusive refugee claims in these debates, see Cynthia Levine-Rasky, Julianna Beaudoin & Paul St Clair, “The Exclusion of Roma Claimants in Canadian Refugee Policy” (2014) 48:1 *Patterns of Prejudice* 67.
 4. Jason Kenney served as Minister of Citizenship and Immigration from 30 October 2008 to 15 July 2013. All references in this article to former Minister Kenney’s statements refer to those made while holding this ministerial position.
 5. See *e.g.* Jason Kenney “At a News Conference to Announce the Initial List of Designated Countries of Origin, Whose Citizens Will Have Their Asylum Claims Expedited for Processing Because They Do Not Normally Produce Refugees” (Speech delivered in Ottawa, 14 December 2012), online: Citizenship and Immigration Canada <www.cic.gc.ca/english/department/media/speeches/2012/2012-12-14.asp> [Kenney, “Designated Countries of Origin”].
 6. See *e.g.* Chris Alexander, “News Conference Regarding Canada’s Asylum System” (Speech delivered in Toronto, 22 January 2014), online: Citizenship and Immigration Canada <news.gc.ca/web/article-en.do?nid=831769>.
 7. See *e.g.* Rick Westhead, “Why the Roma are fleeing Hungary and why Canada is shunning them,” *The Toronto Star* (13 October 2012), online: <www.thestar.com/news/world/2012/10/13/why_the_roma_are_fleeing_hungary_and_why_canada_is_shunning_them.html>; Gina Csanyi-Robah, “Protecting Roma Refugees: A Unique Perspective,” *The Canadian Jewish News* (14 January 2013), online: <www.cjnews.com/index.php?q=node/100453>; Kristen Shane, “Critics urge rethink of Hungary’s safe-country label,” *Embassy Magazine* (23 April 2014), online: <www.embassynews.ca/news/2014/04/22/critics-urge-rethink-of-hungary%E2%80%99s-safe-country-label/45444>.
 8. 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) [on file with author]; Kathleen Harris, “Refugee board approves claimants labelled ‘bogus’ by Ottawa,” *CBC News* (11 July 2014), online: <www.cbc.ca/news/politics/refugee-board-approves-claimants-labelled-bogus-by-ottawa-1.2701153>.

with which Hungarian Romani refugee claims are denied or abandoned is not necessarily proof of abuse of the system and that this may instead be evidence of flaws in the refugee determination system.⁹ Some go further and contend that Romani refugee claimants fled persecution in Hungary only to be confronted with similar mistreatment in Canada.¹⁰

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 that vacuum by setting out the results of a quantitative and qualitative 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. This history includes two recent streams of migration by Hungarian Romani refugee claimants and Canada's response to these claimants. The article then moves on to study the experiences of Hungarian Roma with Canada's refugee determination system between 2008 and 2012. Finally, the article offers concluding remarks focused 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 ("IRB"), and problems related to quality of counsel.

Before moving on to the substance of the article, we would like to note one point about the limited scope of the article and another about terminology. First, in terms of limited scope, we would like to emphasize that the primary aim of the article is modest: We hope that the evidence presented helps to better inform debates about the most recent wave of Hungarian Romani refugee claimants in Canada. Naturally, some readers may be interested in hearing more about the implications of this evidence. For example, what does Canada's treatment of Hungarian Romani refugees tell us about Canadian refugee policy more generally or about particular features of Canada's recently revised refugee determination system in particular? What lessons can be drawn about specific aspects of refugee law, including tests related to the refugee definition? What can we learn from the often-repeated castigation of Hungarian Romani refugee claimants as "bogus"

9. See *e.g.* Cory Ruf, "A taste of tolerance," *UCObserver* (January 2012), online: <www.ucobserver.org/features/2012/01/taste_tolerance>.

10. See *e.g.* Bernie M Farber, Nate Leipziger & Avrum Rosenweig, "Hating the Jew, hating the 'gypsy,'" *National Post* (25 September 2012), online: <news.nationalpost.com/full-comment/bernie-m-farber-et-al-hating-the-jew-hating-the-gypsy>; Karl Nerenberg, "First they demonized the Roma, but I did not speak out because I was not Roma..." (10 December 2012), *Rabble.ca* (blog), online: <rabble.ca/blogs/bloggers/karl-nerenberg/2012/12/first-they-demonized-roma-i-did-not-speak-out-because-i-was-no>.

about the relation between refugee policies on the one hand and political rhetoric and media representations of asylum seekers on the other hand? What does the recent experience of Hungarian Romani refugees tell us about the role of race and racism in Canadian immigration and refugee policy? What should adjudicative institutions learn from this experience in terms of how to deliver more consistent decision making without compromising independence or leading to concerns regarding institutional bias? What do the challenges Hungarian Romani refugee claimants encountered regarding quality of counsel tell us about the relation between access to justice and quality of counsel (in the refugee law context or more generally), and what measures should be taken to improve both? In our view, the evidence presented in this article raises all these questions and more. While we do not attempt to answer these questions, we are confident that future research will engage with these themes—and we hope that our study helps to lay some of the groundwork for that future research.

Second, as far as terminology goes, this article is primarily interested in Hungarian Romani refugee claims from 2008 to 2012. As discussed in detail below, the large majority of refugee claims made by Hungarians in Canada during this period involved Roma—but some were made by other groups.¹¹ In the article, we take care to clearly indicate when we are speaking about Hungarian Romani refugee claims and when we are speaking about Hungarian refugee claims more generally. We refer to the latter in several places either because we are citing others who refer to this category or because we are citing data that is broken down by country of origin but not by ethnicity.

I. CONTEXT

A. THE ROMA IN HUNGARY

The term “Roma” encompasses a range of peoples around the world who share a common heritage originating in India.¹² Many also share a Romani language, with varied dialects.¹³ Romani peoples moved from India across the Byzantine

11. See Part II(C), below.

12. For general historical accounts of Romani peoples, see Angus Fraser, *The Gypsies* (Oxford: Blackwell, 1992); Ian Hancock, *We Are the Romani People* (Hatfield, UK: University of Hertfordshire Press, 2002); David M Crowe, *A History of the Gypsies of Eastern Europe and Russia* (New York: Palgrave Macmillan, 2007) [Crowe, *History*]. For an analysis of recent evidence of a common heritage in India, see Peter Bakker, “Romani Genetic Linguistics and Genetics: Results, Prospects and Problems” (2012) 22:2 *Romani Stud* 91.

13. Yaron Matras, *Romani: A Linguistic Introduction* (Cambridge: Cambridge University Press, 2005).

Empire before entering Europe, where they have been present since the fourteenth century or earlier.¹⁴ Historical documents describe Romani presence in what is now Hungary by the fifteenth century.¹⁵

Today, there are large Romani communities in many European countries, including Hungary. Population estimates vary, but it is generally agreed that around ten to twelve million Roma currently reside in Europe.¹⁶ According to figures collected by the Council of Europe in 2012, Hungary is home to between the fourth- and sixth-largest Romani community in Europe, with a population between 500,000 and 1,000,000 (or 5 to 10 per cent of the Hungarian population).¹⁷

Unfortunately, anti-Roma persecution has deep roots in Hungary, as it does in much of Europe.¹⁸ 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.¹⁹ According to these stereotypes, Roma are nomadic peoples who are reluctant to settle permanently and take up productive jobs, preferring transient lifestyles instead. These stereotypes also take a variety of other forms, ranging from romanticized and sexualized images of travelling ‘Gypsy’ musicians and fortune tellers to explicitly racist characterizations of ‘Gypsies’ as criminals, beggars, and thieves.²⁰

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.²¹ As early as the fifteenth century, many European countries passed laws expelling Roma from their territories and

14. Istvan Kemény, “History of Roma in Hungary” in Istvan Kemény, ed, *Roma of Hungary* (Boulder, Colo: Social Science Monographs, 2005) 1 at 1.

15. *Ibid.*

16. European Commission, “EU and Roma,” online: <ec.europa.eu/justice/discrimination/roma/index_en.htm>.

17. Council of Europe, “Estimates on Roma population in European countries” (July 2012), online: <rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680088ea9>.

18. Margaret Brearley, “The Persecution of Gypsies in Europe” (2001) 45:4 *Am Behav Sci* 588; Council of Europe, “Human rights of Roma and Travellers in Europe” (February 2012), online: <www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf> [COE, “Human rights”].

19. *Ibid.* at 31.

20. Council of Europe, “Dosta! Enough! Go beyond prejudice, meet the Roma!” online: <dosta.org/media/PREMS_45213_GBR_1490_DOSTA_TOOLKIT_A5.pdf>.

21. Dimitrina Petrova, “The Roma: Between a Myth and the Future” (2003) 70:1 *Soc Res* 111 at 119-25.

continued to do so well into the eighteenth century.²² Other countries went further, passing laws enslaving all Roma.²³ 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, or wearing traditional clothing.²⁴ Further laws banned the Hungarian word for Roma (Cigány), prohibited the Roma from intermarrying, outlawed use of the Romani language, and ordered that Romani children be taken away from their families.²⁵ Migration was a key strategy through which Roma sought to avoid such persecutory laws.²⁶

European attacks on Romani communities continued in Hungary and across Europe throughout the eighteenth and nineteenth centuries. They reached an apex in the twentieth century during the Holocaust, given that Hungarian Romani children as Porrajmos (“the Devouring”).²⁷ Estimates of the number of Roma killed by the Nazis vary greatly, ranging from 250,000 to 1,500,000 or more.²⁸ Irrespective of the uncertainty around the numbers, it is clear that the Nazis intended to eliminate the entire Romani population across Europe.²⁹ 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.³⁰ Thousands of Hungarian Roma were murdered,³¹ and far more would have been killed had the Nazis won World War II.³² After WWII, the mistreatment of Hungarian Roma continued, albeit to a lesser extent, during

22. *Ibid.* See also Zoltan Barany, “The East European Gypsies in the Imperial Age” (2001) 24:1 *Ethnic & Racial Stud* 50 at 58; Vanja Ljubic et al, “Romaphobia: A Unique Phenomenon?” (2012) 22:2 *Romani Stud* 141.

23. Hancock, *supra* note 12 at 21.

24. Kemény, *supra* note 14 at 15-16.

25. *Ibid.*

26. Crowe, *History*, *supra* note 12 at xvii.

27. See generally Guenter Lewy, *The Nazi Persecution of the Gypsies* (New York: Oxford University Press, 2000).

28. Petrova, *supra* note 21 at 130. See also David M Crowe, “The Roma Holocaust” in Bernard Schwartz & FC DeCoste, eds, *The Holocaust’s Ghost: Writings on Art, Politics, Law and Education* (Edmonton: University of Alberta Press, 2000) 179 at 197 [Crowe, “Roma Holocaust”].

29. Barry A 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.

30. Kemény, *supra* note 14 at 47-48.

31. *Ibid.* at 48. See also Crowe, “Roma Holocaust,” *supra* note 28 at 193.

32. Kemény, *supra* note 14 at 48.

the imposition of Communism under Soviet rule.³³ Hungarian Roma were not included in land redistribution, meaning they could neither own nor farm on land of their own.³⁴ Communism did provide employment opportunities for many Roma, but Romani families were still much poorer than the average Hungarian under Soviet rule.³⁵

Since the collapse of Communism in 1989, anti-Roma sentiment in Hungary has increased dramatically.³⁶ Roma have experienced skyrocketing unemployment rates due to workplace discrimination and the elimination of many Communist-era industries in which Roma had predominated.³⁷ Hungarian Roma are also disproportionately subject to police enforcement activities.³⁸ Furthermore, abysmally low education rates are especially worrisome³⁹—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.⁴⁰ Other troubling economic and social indicators for Roma in Hungary include massive poverty rates, substandard housing, excessive reliance on government transfers, poor health metrics, and low representation rates in political institutions.⁴¹

Roma in Hungary have also been confronted with mounting racist rhetoric and violence, all too often with the support of the Hungarian political leadership.⁴² The European Roma Rights Centre has documented dozens of incidents between

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33. Michael Stewart, “Communist Roma policy 1945–89 as seen through the Hungarian case” in Will Guy, ed, *Between Past and future: the Roma of Central and Eastern Europe* (Hatfield, UK: University of Hertfordshire, 2001) 71 at 86-87.
34. Kemény, *supra* note 14 at 49.
35. *Ibid* at 52-60.
36. COE, “Human rights,” *supra* note 18 at 13.
37. Andrey Ivanov, *The Roma in Central and Eastern Europe: Avoiding the Dependency Trap* (2002) at 21, 31-37, online: United Nations Development Programme <www.undp.org/content/dam/rbec/docs/Avoiding-the-dependency-trap.pdf>.
38. COE, “Human rights,” *supra* note 18 at 80-84.
39. UNICEF, “Towards Roma Inclusion: A Review of Roma Education Initiatives in Central and South-Eastern Europe” (February 2010) at 12, online: <www.unicef.org/ceecis/ROMA_PAPER_FINAL_LAST.pdf>; Christian Brüggemann, *Roma Education in Comparative Perspective: Findings from the UNDP/World Bank/EC Regional Roma Survey* (2012), online: United Nations Development Programme <www.romaeducationfund.hu/sites/default/files/documents/bruggemann_2012_roma_education_in_comparative_perspective_undp_bratislava_0.pdf>.
40. *Ibid* at 63-71; *Horváth and Kiss v Hungary*, No 11146/11, [2013] ECHR 92, 57 EHRR 31.
41. Ivanov, *supra* note 37 at 2-5, 47.
42. Amnesty International, “Violent Attacks against Roma in Hungary: Time to Investigate Racial Motivation” (10 November 2010) 1 at 9-11, online: <www.amnesty.nl/sites/default/files/public/rap_hungary_violent_attacks_against_roma.pdf>.

2008 and 2012, in which Hungarian Roma were subject to racist attacks, some of which resulted in deaths.⁴³ Far-right extremist groups, including the Hungarian Guard, have conducted paramilitary marches in Romani neighbourhoods protesting “Gypsy criminality” while openly deploying Nazi imagery.⁴⁴ 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.⁴⁵ Moreover, many leading Hungarian political figures support both the Hungarian Guard and its replacements. For example, in 2010, the Chair of the Jobbik party—an extreme 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.⁴⁶ 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 amounted to concentration camps.⁴⁷ More recently, Zsolt Bayer—a founding member of Hungary’s ruling Fidesz party—said, “Most 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.”⁴⁸

Although some institutions at the national, European, and international levels have taken steps to try to protect the human rights of Hungarian Roma,⁴⁹ international human rights bodies and non-governmental organizations report that the mistreatment of Hungarian Roma continues.⁵⁰ For example, a recent

43. European Roma Rights Centre, “Attacks against Roma in Hungary: January 2008-September 2012” (1 October 2012), online: <www.errc.org/cms/upload/file/attacks-list-in-hungary.pdf>.

44. *Vona v Hungary*, No 35943/10, [2013] IV ECHR 653 at paras 65-67.

45. COE, “Human rights,” *supra* note 18 at 48. See also US, Overseas Security Advisory Council, *Hungary 2014 Crime and Safety Report* (14 March 2014), online: <www.osac.gov/pages/ContentReportPDF.aspx?cid=15321>.

46. COE, “Human rights,” *supra* note 18 at 48.

47. *Ibid* at 42.

48. Carl Rowlands, “Hungary’s rabid right is taking the country to a political abyss,” *The Guardian* (5 February 2013), online: <www.theguardian.com/commentisfree/2013/feb/05/hungary-right-political-abyss>.

49. For an outline of these measures, see *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai*, UNGAOR, 20th Sess, UN Doc A/HRC/20/33/Add.1 (2012) at paras 29-33.

50. *Ibid* at paras 34-41. See also EC, Parliament, *European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)*, 2012/2130(INI) (3 July 2013), online: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+V0//EN>; Amnesty International, “Hungary: Murder convictions are ‘wake-up call’ over hate crimes against Roma” (6 August 2013), online: <www.amnesty.org/en/articles/news/2013/08/hungary-roma-trial-verdict>.

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.⁵¹ The report went on to conclude:

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.⁵²

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 the following section will show, this ongoing mistreatment in Hungary has prompted large numbers of Roma to flee and seek refuge in other countries, including Canada.

B. HISTORY OF HUNGARIAN ROMA MIGRATION TO CANADA

Canada has been home to Romani communities since at least the end of the nineteenth century,⁵³ though the size of those communities today is not entirely clear. In the 2011 Canadian National Household Survey, 5,255 respondents identified as Romani.⁵⁴ Census data, however, are notorious for under-counting

51. "Accelerating Patterns of Anti-Roma Violence in Hungary" (February 2014) at 42-43, online: <fxb.harvard.edu/wp-content/uploads/sites/5/2014/02/FXB-Hungary-Report_Released-February-4-2014.pdf>.

52. *Ibid* at 43.

53. See Ronald Lee, "Post-Communism Romani Migration to Canada" (2000) 13:2 Cambridge Rev Int'l Aff 51 at 51-52. See also Claudia Smith, *Gypsies, Preachers and Big White Bears: One Hundred Years on Country Roads* (Burnstown, Ont: General Store Publishing House, 1998).

54. Statistics Canada, *2011 National Household Survey: Data Tables* (4 March 2014), online: <www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAILED=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=0&PID=105396&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0&VNAMEE=&VNAMEF> [Statistics Canada].

Romani populations.⁵⁵ The Roma Community Centre in Toronto offers a much higher estimate of the Canadian Roma population, at around 80,000.⁵⁶ Data on the Canadian population of Roma with Hungarian heritage are 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 partly of Hungarian heritage.⁵⁷ As we have seen, Roma constitute between 5 and 10 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).⁵⁸ Scholars have identified several streams or waves of Hungarian immigration to Canada starting in the latter half of the nineteenth century, and there are controversies over the degree to which each stream involved refugees or economic migrants.⁵⁹ 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.⁶⁰ The definition also includes a number of other restrictions, such as the requirement that state protection against persecution

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55. See Patrick Simon, "Collecting Ethnic Statistics in Europe: A Review" (2012) 35:8 *Ethnic & Racial Stud* 1366 at 1385-86. See also Andrea Krizsán, "Group Self-Determination, Individual Rights, or Social Inclusion? Competing Frames for Ethnic Counting in Hungary" (2012) 35:8 *Ethnic & Racial Stud* 1392 at 1400-1401.
56. Christine Walsh & Brigitte Krieg, "Roma Identity: Contrasting Constructions" (2007) 39:1&2 *Can Ethnic Stud* 169 at 173.
57. Statistics Canada, *supra* note 54.
58. For a critique of these labels (i.e., refugee versus economic migrant) in contemporary mixed migration contexts, see Roger Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization" (2007) 20:2 *J Refugee Stud* 172.
59. See generally Nándor Dreisziger, "The 1956–1957 Refugee Movement in the Context of Hungarian Immigration to Canada Since the Late 19th Century" in Christopher Adam et al, eds, *The 1956 Hungarian Revolution: Hungarian and Canadian Perspectives* (Ottawa: University of Ottawa Press, 2010) 194.
60. *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, art 1(A)(2) (entered into force 22 April 1952) [*Refugee Convention*]. For a comprehensive discussion of the refugee definition under international law, see James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: University of Cambridge Press, 2014).

be unavailable in a person's country of nationality.⁶¹ As a result, 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 cannot be characterized reasonably as economic migrants.⁶² To complicate matters further, some such migrants may qualify for various forms of subsidiary protection⁶³ or for humanitarian immigration programs⁶⁴ despite not qualifying for refugee protection under international law. Notwithstanding this complexity, however, debates about Hungarian immigration to Canada often come down to a simplistic refugee versus economic migrant dichotomy.

Perhaps the best 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.⁶⁵ During the three-week uprising, Hungary's borders were opened and more than 200,000 Hungarians fled.⁶⁶ Today, most would 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.⁶⁷

At any rate, when the Hungarian refugee crisis erupted in 1956, Canada had not yet signed the 1951 Refugee Convention and had no official refugee determination system in place.⁶⁸ Nonetheless, within days, Canadian immigration officials were dispatched to Europe, regular immigration screening procedures

61. See Part II(D)(1), below.

62. For a discussion of the restricted refugee definition and the complexity of motivations for migration, see T Alexander Aleinikoff, "From 'Refugee Law' to the 'Law of Coerced Migration'" (1994) 9:4 *Am U J Int'l L & Pol'y* 25.

63. For example, in some circumstances, Canada provides protection to people facing risks to their lives or risks of torture or cruel and unusual treatment regardless of whether those risks relate to the refugee definition. See *Immigration and Refugee Protection Act*, SC 2001, c 27, s 97 [*IRPA*].

64. For example, in some circumstances, foreign nationals may acquire permanent residence due to humanitarian and compassionate considerations falling outside the refugee definition. See *IRPA*, *ibid*, s 25.

65. See generally János M Rainer, "The Hungarian Revolution of 1956: Causes, Aims, and Course of Events" in Adam et al, *supra* note 59, 12. See also Robert H Keyserlingk, ed, *Breaking Ground: The 1956 Hungarian Refugee Movement to Canada* (Toronto: York Lanes Press, 1993).

66. *Ibid* at 1.

67. Dreiszigler, *supra* note 59 at 202.

68. Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 2nd ed (Toronto: University of Toronto Press, 2010) at 345.

were truncated, transportation was organized, and over 37,000 Hungarians ultimately arrived in Canada in less than a year.⁶⁹

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.⁷⁰ It is worth noting, however, that the government was reluctant to offer resettlement until community organizations agreed to shoulder most of the financial burden.⁷¹ Moreover, the resettlement efforts largely reflected traditional national interests, including advancing the Cold War anti-Communist agenda and fuelling the expanding Canadian economy.⁷² It is also important to emphasize that, in a period of openly racist Canadian immigration policies,⁷³ the majority of those resettled were both Christian and white.⁷⁴ 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."⁷⁵

Notwithstanding the racist attitudes of Canadian immigration officials at the time, some Hungarian refugees selected for resettlement to Canada in 1956 were Roma.⁷⁶ Unfortunately, while Canada's response to Hungarian refugees in 1956 has attracted substantial academic attention, little is known about Roma who were included among this group, partly because many would have been reluctant to disclose their ethnicity out of fear of discrimination and partly because Canada

69. *Ibid* at 346. See also Stephanie Bangarth, "Migrating Magyars and Canadian Inclusiveness: Responses of the State and Voluntary Organizations to the Hungarian Refugees, 1956–1958" (2007) 10 *Eger J Am Stud* 11 at 13.

70. Greg Donaghy, "An Unselfish Interest?": Canada and the Hungarian Revolution, 1954–1957" in Adam et al *supra* note 59, 256 at 269.

71. Stephanie Bangarth, "Citizen Activism, Refugees, and the State: Two Case Studies in Canadian Immigration History" in Catherine Briggs, ed, *Modern Canada: 1945 to Present* (Toronto: Oxford University Press, 2014) 17 at 21.

72. Kelley & Trebilcock, *supra* note 68 at 346; Harold Troper, "Canada and Hungarian Refugees: The Historical Context" in Adam et al, *supra* note 59, 176.

73. Canada's immigration policies were explicitly racist until at least 1967, when formal bars on immigration based on race were finally removed with the creation of the immigration points system. See Kelley & Trebilcock, *supra* note 68 at 357.

74. Troper, *supra* note 72 at 190–91.

75. Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orpen Dennys, 1987) at 67.

76. Lee, *supra* note 53 at 53.

chose not to gather this information.⁷⁷ To this day, however, many Canadian Roma cite 1956 as a pivotal point in their family histories.⁷⁸

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 300 Hungarian refugees came to Canada each year.⁷⁹ From 1967 to 1984, an average of 400 Hungarians immigrated to Canada yearly,⁸⁰ some through family-reunification programs and others as refugees.⁸¹ 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.⁸² For much of this period, merely being 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.⁸³ By 1990, with the end of the Soviet period, concerns about economic migrants exploiting this class⁸⁴ led to its elimination.⁸⁵

The key points in all of this are that, until the end of the Soviet era, Hungarian Roma came to Canada as part of the regular streams of Hungarian immigration and 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 fall of the Soviet Union, however, that quickly changed.

C. 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. This meant that Hungarian citizens could travel to Canada without obtaining prior permission from the

77. Levine-Rasky, Beaudoin & St Clair, *supra* note 3 at 74.

78. Julianna Beaudoin, *Challenging Essentialized Representations of Romani Identities in Canada* (PhD Thesis, University of Western Ontario, 2014) at 118-21 [unpublished].

79. C Michael Lanphier, “Canada’s Response to Refugees” (1981) 15:1 Int’l Migr Rev 113 at 120.

80. Citizenship and Immigration Canada, “Citizenship and Immigration statistics archives (1966 to 1996)” (5 June 2015), online: <epe.lac-bac.gc.ca/100/202/301/immigration_statistics-ef/index.html> [CIC, “Statistics”].

81. Dreisziger, *supra* note 59 at 218, n 18.

82. CIC, “Statistics,” *supra* note 80.

83. Lanphier, *supra* note 79 at 117-18.

84. See *e.g.* David Matas, “The Self-Exiled Class” (1990) 9:4 Refuge 22.

85. Kelley & Trebilcock, *supra* note 68 at 396.

Canadian government.⁸⁶ 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.⁸⁷

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.⁸⁸ At first, recognition rates in these cases were very high: Around 70% of the approximately two hundred Hungarian refugee claims decided on the merits in 1998 resulted in grants of refugee protection.⁸⁹ In the same year, all published Hungarian refugee determinations involved persecution on account of Romani ethnicity, and all were positive decisions.⁹⁰

However, in 1999, in anticipation of increased numbers of Hungarian Romani refugee claims, the IRB decided a lead case.⁹¹ Lead cases are tools for enhancing consistency in refugee determinations by providing non-binding guidance in cases involving similar facts.⁹² This lead case found that Hungarian Roma do not face persecution and instead enjoy state protection in Hungary. The decision was overturned by the Federal Court of Appeal (“FCA”) in 2006 due to a reasonable apprehension of bias.⁹³ Relying in part on emails exchanged within the IRB and with other government agencies, the 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

86. “Hungarian Visitors Won’t Need Visas,” *The Globe and Mail* (11 October 1994) A4.

87. See generally Levine-Rasky, Beaudoin & St Clair, *supra* note 3; Lee, *supra* note 53; Gerald Kernerman, “Refugee Interdiction Before Heaven’s Gate” (2008) 43:2 *Government & Opposition* 230 at 245-47.

88. Levine-Rasky, Beaudoin & St Clair, *supra* note 3 at 85. See also UNHCR, *Statistical Yearbook 2002: Trends in Displacement, Protection and Solutions* (Geneva: UNHCR, 2004) at 117, online: <www.unhcr.org/4a07e87d6.html> (Annex 1, Table C.1).

89. *Ibid.*

90. *Re MNO*, [1998] CRDD No 36 (QL) (IRB); *Re UPE*, [1998] CRDD No 82 (QL) (IRB); *Re YSC*, [1998] CRDD No 26 (QL) (IRB); *Re HQW*, [1998] CRDD No 30 (QL) (IRB).

91. *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at para 10, [2006] 4 FCR 377 [*Kozak*]. See also *Re ASS*, [1999] CRDD No 1 (QL) (IRB); *Re FNS*, [1999] CRDD No 2 (QL) (IRB).

92. *Kozak*, *supra* note 91 at paras 7-9.

93. *Ibid* at paras 58-65.

exercise that may seem to have been partly motivated by a desire by [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.⁹⁴

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. In the year the lead case was decided, 1999, Hungarian refugee claim recognition rates dropped precipitously (from around 70% in 1998 to around 16% in 1999) and remained low for years (around 25% from 1999 to 2002).⁹⁵ 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 2001.⁹⁶

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 1,900 per year from 1998 to 2002 to an average of less than 100 per year from 2003 to 2007.⁹⁷ Nonetheless, it should be noted that from 1998 to 2002, over 1,000 Hungarians were granted refugee protection in Canada.⁹⁸

D. 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 pressure from international trading partners,⁹⁹ Canada once again dropped the visa requirement for Hungarian citizens.¹⁰⁰ As a result, the number of Hungarian

94. *Ibid* at para 65.

95. Levine-Rasky, Beaudoin & St Clair, *supra* note 3 at 85.

96. *Regulations Amending the Immigration Regulations, 1978*, SOR/2001-525.

97. Levine-Rasky, Beaudoin & St Clair, *supra* note 3 at 85.

98. *Ibid*.

99. Jan Sliva, “Visa requirements must go, EU warns Canada,” *Toronto Star* (18 September 2007) AA2.

100. *Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2008-54*.

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 2012.¹⁰¹ Statistics regarding the number of claims made and the outcomes of these claims are discussed in detail below. Suffice it to say that while hundreds of these claims succeeded, most did not, and many were withdrawn or abandoned.¹⁰²

Canada's reaction to the most recent stream of Hungarian refugee claimants involved troubling racial overtones. Hungarian refugee claimants during this period, who were largely Romani,¹⁰³ were regularly decried as "bogus" refugee claimants.¹⁰⁴ The Minister of Citizenship and Immigration, 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.¹⁰⁵ 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:

[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.¹⁰⁶

Hungarian Romani refugee claimants were also accused of coming to Canada to take advantage of social programs. According to Minister Kenney, Hungarian claimants come to Canada not because they "need our protection" but rather "to benefit from the generosity of Canada's social welfare system."¹⁰⁷ He also told a Senate Committee that Hungarian refugee claimants come to Canada because of

101. See Table 1 in Part II(B), below.

102. *Ibid.*

103. See Part II(C), below.

104. For an overview (and a critique) of this way of framing Romani refugee claims, see Petra Molnar Diop, "The 'Bogus' Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada's Bill C-31" (2014) 30:1 *Refuge* 67.

105. 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, 1620; House of Commons, *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No 31 (26 April 2012) at 1535, 1620; House of Commons, *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No 46 (31 May 2012) at 1600.

106. Kenney, "Designated Countries of Origin," *supra* note 5.

107. *Ibid.* Kenney was speaking about "EU claimants," but this is a euphemism, as most EU claimants during this period were Hungarian Roma.

programs such as the GST rebate, the Child Tax Benefit, welfare, public housing, and health care.¹⁰⁸ As he put it, “[T]here is a wide series of benefits that people can obtain, which appears to be a significant factor in that migration.”¹⁰⁹ 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.”¹¹⁰ The report also states that “it is a widely accepted assumption that many of these individuals are taking advantage of Canada’s refugee processing system, social assistance, and other benefits.”¹¹¹

Not only did government officials assert that Hungarian Romani refugee claimants were fraudsters who came to Canada to abuse welfare and other social programs, 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, possession of property obtained by crime, fraud and forgery, and assault.”¹¹² To whom exactly this is “known” 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.¹¹³ The criminal investigation that the Minister referred to ended up resulting in several convictions.¹¹⁴ There was intense media coverage of the convictions, and the Romani heritage of the perpetrators was widely

108. House of Commons, *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, 41st Parl, 1st Sess (18 June 2012).

109. *Ibid.*

110. Canada Border Services Agency, “Project SARA: International and Domestic Activities: Final Report” (Ottawa: CBSA, 31 January 2012) at 7 [on file with authors] [“Project SARA”]. The report was ostensibly about all Hungarian refugee claimants, but the report notes that most such claimants are Romani (*ibid* at 5).

111. *Ibid* at 12.

112. *Ibid* at 7.

113. *House of Commons Debates*, 40th Parl, 3rd Sess, No 36 (29 April 2010) at 1110.

114. “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), online: <www.thestar.com/news/canada/2014/07/22/canada_deports_20_members_of_hungarian_human_trafficking_ring.html>.

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.¹¹⁵

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:

Don't believe the stereotypes about us that we're criminals. ... There was one case in Hamilton 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 still 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.¹¹⁶

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 "gyped" me.

Well, the Gypsies have gyped 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 [...].

115. For an analysis of the media coverage of this incident, including a finding that 70 per cent of all negative headlines from Roma-focused articles in 2012 focused on this single criminal case, see Beaudoin, *supra* note 78 at 195.

116. House of Commons, *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No 39 (3 May 2012) at 1815 [emphasis added].

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.¹¹⁷

In our view, all of this—the dire warnings about large influxes of Hungarian Roma allegedly involving widespread abuse of Canadian generosity as well as welfare fraud and criminality—links directly to racial stereotypes that have been prevalent in Europe for centuries, which is to say stereotypes about Roma as beggars, criminals, and thieves. As such, the reactions to the latest wave of Hungarian Romani refugee claimants in Canada can be understood as a kind of racial panic.¹¹⁸

The reactions can also be understood as part of a broader phenomenon of retrenchment from Canada's obligations under international refugee law, particularly with regard to so-called self-selected refugees.¹¹⁹ Over the past several decades, political actors have increasingly deployed a 'good refugee' (i.e., genuine refugee) versus 'bad refugee' (i.e., illegal economic migrant) dichotomy.¹²⁰ According to this view, 'good refugees' are those who wait patiently in refugee

117. D Ish et al, "Sun News Network re The Source (Theft Ring)" (9 September 2013), online: Canadian Broadcast Standards Council <www.cbcs.ca/sun-news-network-re-the-source-theft-ring>. 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*).

118. This is not a new phenomenon. For an analysis of a similar racial panic regarding prior groups of migrants, see Sherene H Razack, "Making Canada White: Law and the Policing of Bodies of Colour in the 1990s" (1999) 14:1 CJLS 159.

119. For a general discussion of Canada's retrenchment for respect for the human rights of refugees, see Efrat Arbel & Alletta Brenner, "Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion" (November 2013), online: Harvard Immigration and Refugee Law Clinical Program <harvardimmigrationclinic.files.wordpress.com/2013/11/bordering-on-failure-harvard-immigration-and-refugee-law-clinical-program1.pdf>; Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008); Donald Galloway, "Rights and the re-identified refugee: an analysis of recent shifts in Canadian law" in Susan Kneebone, Dallal Stevens & Loretta Baldassar, *Refugee Protection and the Role of Law: Conflicting Identities* (Abingdon, UK: Routledge, 2014) 36.

120. For discussions of this dichotomy, see Alison Mountz, "Human Smuggling, the Transnational Imaginary, and Everyday Geographies of the Nation-State" (2003) 35:3 *Antipode* 622; Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement" (2005) 36 *Colum HRL Rev* 365 [Macklin, "Disappearing"]. See also Diop, *supra* note 104.

camps abroad and who are selected for resettlement to Canada either through government or private sponsorship programs. ‘Bad refugees’ by contrast are those who come to the country uninvited and take advantage of Canada’s inland refugee claim system to ‘jump the queue.’ To get to Canada—and specifically to evade interdiction mechanisms that Canada uses to prevent refugees from gaining access to Canadian territory and thereby to Canada’s inland refugee determination system—‘bad refugees’ often use false documents or the services of human smugglers. As a result, ‘bad refugees’ are regularly associated with criminality. At the same time, claimants who come from countries for which interdiction strategies are unworkable—for example, countries where the economic and political costs of imposing visa restrictions are very high—are typically constructed as fraudsters, often by pointing to examples of claims that were denied from that country. Regardless of the specific reasons for denial, these ‘bad refugees’ are regularly called “bogus” and associated with fraud. Audrey Macklin terms this phenomenon the discursive disappearance of refugees.¹²¹ This discursive disappearance of refugees has been accompanied by policies that literally make refugees disappear, as the Canadian state has increasingly sought to crack down on ‘bad refugees,’ either by creating new mechanisms to prevent their arrival in Canada or by establishing harsh policies to discourage them from coming to the country in the first place.¹²² The result is that in a period where the number of refugees around the world is at a decades long high, the number of asylum seekers arriving in Canada is lower than it has been in many years.¹²³ The response to Hungarian Roma—who have been presented as archetypal ‘bad refugees’—can be understood as one instance of this broader phenomenon.

121. “Disappearing,” *supra* note 120.

122. *Ibid.* See also Diop, *supra* note 104; Janet Dench & François Crépeau, “Interdiction at the Expense of Human Rights: A Long-term Containment Strategy” (2003) 21:4 *Refugee* 2; Andrew Brouwer and Judith Kumin, “Interception and Asylum: When Migration Control and Human Rights Collide” (2003) 21:4 *Refugee* 6.

123. For example, according to the United Nations High Commissioner for Refugees, by the end of 2013, the number of people forcibly displaced around the world was at the highest level in more than five decades. See *UNHCR Statistical Yearbook 2013* (Geneva: UNHCR, 2014) at 6, online: <www.unhcr.org/54cf9bd69.html>. In the same year, Canada received 10,356 applications for refugee protection (*ibid.* at 104). During the prior fifteen years, the number of claims in Canada ranged from a high of 44,038 in 2001 to a low of 20,223 in 2012. See UNHCR, *Statistical Yearbook 2001: Refugees, Asylum-seekers and Other Persons of Concern - Trends in Displacement, Protection and Solutions* (Geneva: UNHCR, 2002) at 113, online: <www.unhcr.org/4a02e3406.html>. See also *UNHCR Statistical Yearbook 2012* (Geneva: UNHCR, 2013) at 97, online: <www.unhcr.org/52a7213b9.html>.

At any rate, regardless of how the reaction to the arrival of Hungarian Romani refugee claimants ought to be understood, what matters for our purposes is that, as early as 2010, the government was actively seeking out measures to deter further Hungarian Roma from seeking refugee protection in Canada. Various options were considered. Re-imposing the visa requirement was put forward as a possibility,¹²⁴ but this proved not to be viable in light of negotiations regarding a free trade deal between Canada and the European Union (“EU”).¹²⁵ Another option reportedly considered was the mass detention of Hungarian Romani refugee claimants pending the determination of their claims.¹²⁶

Ultimately, the measure selected by the government to, among other things, deter the arrival of Hungarian Romani refugee claimants was to reform Canada’s refugee determination system.¹²⁷ The new system, which came into effect in December 2012,¹²⁸ purportedly aims to discourage unfounded refugee claims by speeding up the process and by limiting the procedural and substantive rights

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124. See e.g. “Project SARA,” *supra* note 110 at 54-55; Heather Scofield, “Visa clampdown near for Hungarian visitors; Ottawa considers move to stem a rising tide of refugee applications,” *Toronto Star* (9 January 2010) A8; Peter O’Neil, “Hungary visa restrictions not ruled out, minister says,” *National Post* (7 September 2010) A4.
125. See e.g. Anca Gurzu, “Visas to once again top Canada-EU agenda,” *Embassy* (5 May 2010), online: <www.embassynews.ca/news/2010/05/05/visas-to-once-again-top-canada-eu-agenda/38889>; Bruce Campion-Smith, “Visa spat threatens Canada-EU trade deal,” *Toronto Star* (27 April 2012) B1.
126. “Federal government mulls detaining Roma refugee claimants,” *CBC News* (18 August 2012), online: <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. See *IRPA*, *supra* note 63, ss 20.1, 55(3.1). Tellingly, the only groups that have thus far been designated have been Roma. See Wilson Ring & Rob Gillies, “Canada targets Romanians smuggling Gypsies,” *Yahoo News* (5 December 2012), online: <news.yahoo.com/canada-targets-romanians-smuggling-gypsies-013031013.html>
127. *Balanced Refugee Reform Act*, SC 2010, c 8; *Protecting Canada’s Immigration System Act*, SC 2012, c 17. For an overview of the revised refugee determination system, see Jacqueline Swaisland & Lorne Waldman, *Canada’s Refugee Determination Procedure: A Guide for the Post Bill C-31 Era* (Markham, Ont: LexisNexis, 2013). For explicit links between these reforms and Hungarian refugee claims, see “Project SARA,” *supra* note 110 at 55. See also Part II(H), below.
128. *Order Fixing December 15, 2012 as the Day on which Certain Sections of the Act Come into Force*, SI/2012-94, (2012) C Gaz II, 2980 (*Immigration and Refugee Protection Act*); *Order Fixing December 15, 2012 as the Day on which Certain Sections of the Act Come into Force*, SI/2012-95, (2012) C Gaz II, 2982 (*Protecting Canada’s Immigration System Act*); *Order fixing December 15, 2012 as the Day on which Certain Sections of the Act Come into Force*, SI/2012-96, (2012) C Gaz II, 2984 (*Balanced Refugee Reform Act*).

of various groups of refugee claimants, including claimants from Designated Countries of Origin (“DCO”).¹²⁹ Under the new system, claimants from DCOs are subject to expedited refugee claim processing timelines,¹³⁰ cannot appeal negative refugee determinations to the Refugee Appeal Division of the IRB,¹³¹ do not benefit from an automatic stay on removal pending Federal Court review of their refugee determinations,¹³² and are subject to restrictions on access to Pre-Removal Risk Assessments (a pre-deportation procedure to assess new risks that have arisen since the time of a person’s refugee claim).¹³³ They are also denied access to publicly funded health care, even while their refugee claims are pending.¹³⁴ Similarly, DCO claimants are ineligible for work permits,¹³⁵ and recent legislation has authorized provinces to deny social assistance to refugee claimants.¹³⁶ To no one’s surprise, Hungary was one of the first countries to be listed as a DCO. Thus, Hungarian Romani refugee claimants are now subject to all of these limitations.¹³⁷

All of these features of the revised refugee determination system have come under sustained critique from human rights organizations,¹³⁸ lawyers’

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129. Citizenship and Immigration Canada, “Backgrounder — Designated Countries of Origin” (1 February 2013), online: <www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp>.
130. *IRPA*, *supra* note 63, s 111.1(2). See also *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.9 [*IRPA Regs*].
131. *IRPA*, *supra* note 63, s 110(2)(d.1).
132. *IRPA Regs*, *supra* note 130, s 231(2).
133. *IRPA*, *supra* note 63, ss 112(2)(b)-(c).
134. *Order Respecting the Interim Federal Health Program*, 2012, SI/2012-26, (2012) C Gaz II, 1135, s 4(3), as amended by *Order Amending the Order Respecting the Interim Federal Health Program*, 2012, SI/2012-49, (2012) C Gaz II, 1799.
135. *IRPA Regs*, *supra* note 130, s 206(2).
136. This policy was initially put forward in a private members bill. See 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).
137. Notice (Order Designating Countries of Origin), (2012) C Gaz I, 3379. It was then included in an omnibus budget bill. See *A second Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*, SC 2014, c 39, s 173.
138. Canadian Council for Refugees, “Protect Refugees from Bill C-31: Joint statement” (March 2012), online: <ccrweb.ca/sites/ccrweb.ca/files/coalitionstatementc31.pdf>; Canadian Civil Liberties Association, “Bill C-31: An Unjustified Assault on the Rights of People in Danger” (19 June 2012) [on file with authors]; Amnesty International Canada, “Unbalanced Reforms: Recommendations with respect to Bill-31” (17 April 2012), online: <www.amnesty.ca/sites/default/files/ai_brief_bill_c_31_to_parliamentary_committee_0.pdf>.

associations,¹³⁹ and legal academics.¹⁴⁰ The Federal Court has gone so far as to hold that the restrictions on publicly funded health care for DCO claimants are unconstitutional.¹⁴¹ The constitutionality of the DCO regime more generally is currently before the courts.¹⁴²

Thus far, the government has been unmoved by these critiques.¹⁴³ Instead, Canadian officials celebrate the reforms and insist that they were necessary to deter “bogus” Hungarian refugee claims.¹⁴⁴ 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.¹⁴⁵ 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, and the following message: “[P]eople who make a claim without sound reasons will be processed faster and removed faster.”¹⁴⁶ Only a few months earlier, the same town was the site of a

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139. Canadian Bar Association, National Immigration Law Section, “Bill C-31: *Protecting Canada’s Immigration System Act*” (April 2012), online: <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: <www.carl-acadr.ca/articles/32>.
140. See e.g. Jennifer Bond & David Wiseman, “Shortchanging Justice: The Arbitrary Relationship between Refugee System Reform and Federal Legal Aid Funding” (2014) 91:3 *Can Bar Rev* 583; Audrey Macklin, “A safe country to emulate? Canada and the European refugee” in Hélène Lambert, Jane McAdam & Maryellen Fullerton, eds, *The Global Reach of European Refugee Law* (Cambridge: Cambridge University Press, 2013) 99 [Macklin, “Safe Country”]; Catherine Dauvergne, “It’s wrong to shut door on European refugees,” *The Vancouver Sun* (28 February 2012) A9.
141. *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, 244 ACWS (3d) 73.
142. *YZ v Canada (Minister of Citizenship and Immigration)*, 2015 FC 892, 387 DLR (4th) 676.
143. The government is, for example, appealing the Federal Court decision. Debra Black, “Federal court 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.
144. Chris Alexander “Speaking notes for Chris Alexander, Canada’s Citizenship and Immigration Minister at the News Conference Regarding Canada’s Asylum System” (Speech delivered in Toronto, 22 January 2014), online: <news.gc.ca/web/article-en.do?nid=831769>.
145. Nicholas Keung, “Roma refugees: Canadian billboards in Hungary warn of deportation,” *Toronto Star* (25 January 2013), online: <www.thestar.com/news/canada/2013/01/25/roma_refugees_canadian_billboards_in_hungary_warn_of_deportation.html>.
146. *Ibid.*

march by thousands of Jobbik party supporters wielding torches and chanting “Gypsy crime! Gypsy criminals!”¹⁴⁷

Ultimately, all of this—the anti-Roma rhetoric in Canada, the low success rates in Hungarian Romani refugee claims, and the revised refugee determination process—dramatically 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.

II. THE STUDY: HUNGARIAN ROMANI REFUGEE CLAIMS (2008–2012)

A. METHODOLOGY

Research about Canadian refugee law decision making must confront several methodological challenges. The biggest challenges are that refugee hearings are closed to the public¹⁴⁸ and that only a small and non-representative proportion of IRB refugee determinations are published.¹⁴⁹ 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 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 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

147. Marton Dunai, “Thousands rally in anti and pro Roma marches in Hungary,” *National Post* (17 October 2012), online: <news.nationalpost.com/news/thousands-rally-in-anti-and-pro-roma-marches-in-hungary>.

148. *IRPA*, *supra* note 63, s 166(c).

149. Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49:1 *Osgoode Hall LJ* 71 at 82-83 [Rehaag, “Role of Counsel”].

organizations and with refugee lawyers who had personal knowledge of the experience of Hungarian Romani refugee claimants. We conducted the interviews in person, by telephone, and by Skype between November 2013 and March 2014. 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 data sets 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, and other information). In addition to analyzing 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 of that information.

Before we set out the results of those analyses, two methodological limitations in our research bear emphasizing. First, the quantitative aspects of this study offer only descriptive analysis. That is, we summarize data sets of refugee determinations, including data sets that provide various data points for the entire population of Hungarian Romani refugee claims finalized from 2008 to 2012. We do not conduct regression analysis or other types of tests for statistical significance. We have chosen not to do so for a variety of reasons. Some relate to possible confounding variables for which we cannot control, which could make statistical tests unreliable. Others relate to challenges in interpreting statistical tests in contexts where one has data on a full population rather than data for a sample of that population. Because the quantitative aspects of the study offer only descriptive statistics, we want to emphasize that we are not attempting to make any causal claims or inferences based on the quantitative data.

Second, 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 were remaining despite having been ordered to leave. Interviewing such claimants would have posed both practical and ethical challenges, and we decided not to pursue such interviews. Still, 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.

B. STATISTICAL OVERVIEW

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 dependents (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 are drawn from IRB Country Reports, which are quarterly statistical summaries prepared by the IRB.¹⁵⁰ 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).¹⁵¹ Table 2 therefore provides an overview of outcomes in all refugee claim decisions without considering how many individuals were affected by any particular decision.¹⁵² The data for this table are based on information contained in various fields in the IRB's database for principal claimant refugee decisions between 2008 and 2012.¹⁵³

Four points from these statistical overviews are worth emphasizing. First, as shown in Table 1, Hungary was a major source country for refugee claimants

150. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-00193 [on file with authors].

151. The data used to generate Tables 2 and 5-9 and the data used to generate the random samples for Tables 3-4 and 10 include 76 principal applicant file numbers that are listed twice and 1 principal applicant file number that is listed three times (compared to 3,258 principal applicant file numbers that are listed only once). There are a variety of circumstances that can lead to multiple listings. For example, if a denied refugee claim is overturned on judicial review and sent back for re-determination, there will be two listings: one for the initial denial and one for the re-determination. Similarly, if a refugee claim is declared abandoned, subsequently reopened, and then denied on the merits, there will be two listings: one for the initial abandonment and one for the subsequent denial.

152. There are advantages and disadvantages to including all applicants or only principal applicants in one's analysis. The former approach gives a better picture of how an entire group of applicants fare in the refugee determination system because it includes all applicants belonging to that group. It also reduces problems related to women and children disappearing from one's analysis in a context where husbands or fathers are frequently listed as the principal applicants for families. The latter gives a better picture of refugee decision making, including reasons for decisions and grant rates of individual decision makers or individual counsel. For example, under this approach, rates are not distorted by a single decision for a large family.

153. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-01523 [on file with authors].

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)*

Year	Hungary						Overall Success Rate (%)
	Abandoned	Withdrawn	Negative	Negative (No Credible Basis)	Positive	Total	
2008	5	20	7	0	1	33	3.0
2009	39	109	4	0	2	154	1.3
2010	67	437	41	7	16	568	2.8
2011	125	458	257	15	75	930	8.1
2012	76	659	752	20	142	1,649	8.6
Total	312	1,683	1,061	42	236	3,334	7.1
Year	All Countries						Overall Success Rate (%)
	Abandoned	Withdrawn	Negative	Negative (No Credible Basis)	Positive	Total	
2008	794	1,981	3,962	221	5,237	12,195	42.9
2009	1,108	2,917	5,977	205	7,316	17,523	41.8
2010	1,278	3,028	8,467	356	8,164	21,293	38.3
2011	1,323	2,192	9,562	503	8,640	22,220	38.9
2012	940	2,100	8,475	437	6,849	18,801	36.4
Total	5,443	12,218	36,443	1,722	36,206	92,032	39.3

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

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

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 precipitously.¹⁵⁴

Second, Table 1 shows that 660 Hungarians were granted refugee protection in Canada between 2008 and 2012.¹⁵⁵ 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.”¹⁵⁶ 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%. 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

154. This trend continued in 2013, with only 198 Hungarian claims referred, representing 1.9% of all claims referred that year. See Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-02901 at 12 [on file with authors] [ATIP Request No A-2013-02901].

155. According to the 2013 IRB Country Report, a further 406 Hungarians were granted refugee protection in Canada in 2013. See ATIP Request No A-2013-02901, *ibid.*

156. *IRPA*, *supra* note 63, s 107(2).

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.

C. CLAIM TYPE

There has been some dispute about whether, in debates about Hungarian refugee claims, one is essentially speaking about Hungarian Romani claimants. The reason for the controversy is that, as discussed above, political actors have 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.¹⁵⁷ 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 noteworthy 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, information on claim type¹⁵⁸ is available in the IRB’s database for only 81 cases out of the 3,334 Hungarian principal applicant decisions between 2008 and 2012 under

157. 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.” See Louise Brown, “Parkdale schools mourn deported Roma students,” *Toronto Star* (6 October 2013), online: <www.thestar.com/yourtoronto/education/2013/10/06/parkdale_schools_mourn_deported_roma_students.html>.

158. The IRB’s database includes the fields “Claim Basis Category” and “Claim Basis Type”—the latter being a subset of the former. These fields categorize the grounds on which the claim was forwarded. “Roma” is one Claim Basis Type subcategory of the “Race/Ethnicity” Claim Basis Category. For a discussion of the IRB’s claim type data, including limits on the reliability of this data, see Sean Rehaag, “Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations” (2011) 23:2 *CJWL* 627 at 639-40.

consideration in this study.¹⁵⁹ The claim type is recorded as involving alleged persecution on account of Romani ethnicity in 90.1% of these 81 cases, on account of gender in 6.1% and on account of criminality in 3.7%. 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 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

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 claimant's identified ethnicity for a random sample¹⁶⁰ of 96 Hungarian principal applicant

159. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-01523 [on file with authors]; Immigration and Refugee Board, Access to Information and Privacy Request No A-2014-00705 [on file with authors].

160. All random samples referred to in this article were generated using statistical software. A list of all cases matching the criteria we wanted to sample from was generated (*e.g.*, a list of all Hungarian principal applicant claims finalized on the merits between 2008 and 2012). Statistical software (STATA's sample command) was then used to randomly select the desired number of cases from that list. The relevant documents from these specific randomly selected cases were then requested from the IRB.

refugee cases decided on their merits between 2008 and 2012.¹⁶¹ As can be seen in Table 3, claimants were identified as 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, Romani ethnicity, et cetera). The remaining 14.6% of cases involved various claim types, including gender, sexual orientation, and criminality. In these cases, the claimant's ethnicity was seldom explicitly addressed. Interestingly, the recognition rate in cases involving Roma (29.3%) was higher than for the other 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 our random sample of 96 Hungarian principal applicant cases decided on the merits, 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.

161. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-00778 [on file with authors] [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 one hundred Hungarian cases decided on the merits between 2008 and 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.

D. GROUNDS FOR DENIAL

TABLE 4: REASONS FOR DENIAL IN RANDOM SAMPLE OF HUNGARIAN ROMANI PRINCIPAL APPLICANT DECISIONS (MERITS) (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

* Numbers add up to more than the total because 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 Part I(B), above. 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.¹⁶²

1. STATE PROTECTION

The most frequent reason offered for refusing refugee protection in our sample of Hungarian Romani refugee claims was the availability of state protection.

162. ATIP Request No A-2013-00778, *supra* note 161. Of the 96 cases included in our sample (see Table 3, above), 14 were excluded because they did not involve Romani claimants.

To succeed with a refugee claim under section 96 of the Immigration and Refugee Protection Act (“IRPA”), a claimant must demonstrate a well-founded fear of persecution due to race, religion, nationality, political opinion, or membership in a particular social group.¹⁶³ 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.¹⁶⁴ Case law suggests that, absent a complete state breakdown, state protection is presumed to be forthcoming. As a result, claimants bear the burden of rebutting this presumption.¹⁶⁵ 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.¹⁶⁶

As can be 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 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 have an impact on 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 obtaining state protection. Along similar lines, many factors could facilitate or limit the ability of individual claimants to obtain state protection (e.g., education, language skills, social capital, or resources). Therefore, in

163. *IRPA*, *supra* note 63, s 96. Canada also provides protection to persons in need of protection, as defined in s 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 s 96 rather than s 97.

164. *Canada (AG) v Ward*, [1993] 2 SCR 689 at para 25, 103 DLR (4th) 1 [*Ward*].

165. *Ibid* at paras 50-51.

166. *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 57, 282 DLR (4th) 413; *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paras 26, 32, [2008] 4 FCR 636.

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: “Each 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.”¹⁶⁷ Nevertheless, the allegations and evidence of anti-Roma persecution and the alleged failure of Hungarian authorities to do enough to prevent it were similar in many of the cases we reviewed, 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 evidence of country conditions 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.¹⁶⁸

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 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.¹⁶⁹ 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,¹⁷⁰ whether those efforts are translating

167. *Ignacz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1164 at para 2, 235 ACWS (3d) 1057.

168. *Nagy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 299 at para 23, 227 ACWS (3d) 527.

169. *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334, 37 ACWS (3d) 1259 (FCA).

170. *Ibid.*

into effective protection,¹⁷¹ whether there is protection at the operational level,¹⁷² whether the level of protection is adequate,¹⁷³ and whether there is operationally adequate protection.¹⁷⁴ Notice that the focus of these tests varies. Some focus on whether the state is trying to provide protection, others on whether claimants will actually be protected, and still others on whether the level of protection meets a particular standard. The different foci of these tests are especially relevant 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 is clear from our sample of cases, however: 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.

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 IRPA, a claimant must show that the mistreatment they fear amounts to persecution,

171. *Mobacsi v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FCR 772 at para 56, 231 FTR 276.

172. *Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 at para 39, 178 ACWS (3d) 201.

173. *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at para 5, 211 ACWS (3d) 946; *Jaroslav v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634 at paras 74-75, 204 ACWS (3d) 139.

174. *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at paras 15-16, 209 ACWS (3d) 648.

which has been defined as serious mistreatment that violates core human rights.¹⁷⁵ 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.¹⁷⁶

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 experienced by the claimants involved discrimination that did not reach the level of persecution. These findings regarding discrimination versus persecution were seldom determinative, however. 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.¹⁷⁷

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.¹⁷⁸ 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

175. *Lebedev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 728 at para 25, [2008] 2 FCR 585. See also James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 104-105.

176. *Bobrik v Canada (Minister of Citizenship and Immigration)*, 50 ACWS (3d) 850 at 85 FTR 13 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, 1979) at 13-14, paras 51-55 [UNHCR, *Handbook*].

177. 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. See ATIP Request No A-2013-00778, *supra* note 161 at 385 (RPD File No TA9-14522, 22 June 2011); *ibid* at 951 (RPD File No TB1-05181, 24 May 2012).

178. UNHCR, *Handbook, supra* note 176 at 38, para 196.

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.¹⁷⁹

In assessing refugee claimant evidence—including claimant testimony—the IRB is not bound by “legal or technical 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.”¹⁸⁰ Case law establishes that claimant testimony is presumed true unless a good reason exists for doubt, and if the IRB doubts claimant testimony, it must articulate reasonable justifications for this doubt based on the available evidence.¹⁸¹ That being said, the standard of proof for factual findings in refugee law is the balance of probabilities, and claimants bear the burden of proof; together, these points mean that claimants must demonstrate that they are more likely than not to be credible.¹⁸²

Claimants were found generally not credible in 30.5% of our sample of Hungarian Romani claims. A variety of reasons were offered to support these negative credibility determinations. It was common, for example, 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 story 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 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

179. Martin Jones & Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) at 241.

180. *IRPA*, *supra* note 63, ss 170(g)-(h).

181. *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at para 5, 1 ACWS (2d) 167.

182. *Orelien v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 592, 30 ACWS (3d) 890.

protection, and as we have seen, the IRB found that state protection was available in 96.6% of the negative Hungarian Roma decisions in our sample. Thus, like IRB findings related to discrimination versus persecution, negative credibility determinations were seldom determinative.¹⁸³

It would therefore be fair to say that credibility posed challenges for many 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, this fact provides further evidence against assertions that Hungarian Romani refugee claims during this period were “bogus.”

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.

First, only one Hungarian Romani refugee claim in our sample was denied at least in part because the claimant had a viable internal flight alternative.¹⁸⁴ To meet the refugee definition under section 96 of the IRPA, 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 them to do so, their claims will be denied due to the availability of an internal flight alternative.¹⁸⁵ The only Hungarian Romani claim in our sample denied partly on this basis involved a claimant who alleged that he faced anti-Roma persecution in the small town in which he lived.¹⁸⁶ The IRB found that he could

183. 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.

184. ATIP Request No A-2013-00778, *supra* note 161 at 94 (RPD File No VA8-02053, 26 August 2011).

185. *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, 31 ACWS (3d) 139; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FCR 589, 109 DLR (4th) 682 (FCA).

186. ATIP Request No A-2013-00778, *supra* note 161 at 94, paras 6-8 (RPD File No VA8-02053, 26 August 2011).

reasonably relocate to Budapest where, if he faced mistreatment on the basis of his ethnicity, he could approach Hungarian authorities for protection.¹⁸⁷ 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. It would seem, therefore, 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.¹⁸⁸ In other words, none of the claims in our sample was denied on the basis of an “external flight alternative.”¹⁸⁹ The fact that no claims were denied on this basis reflects the principle that the refugee definition only requires a well-founded fear of persecution in the claimant’s country or countries of nationality,¹⁹⁰ not in other countries to which the claimant could potentially relocate without automatically enjoying citizenship rights.¹⁹¹ We raise this point because EU mobility rights often arise in debates about Hungarian Romani refugee claims, but such mobility rights are irrelevant as a legal matter.¹⁹² Moreover, even if EU mobility rights were legally relevant, it should be noted that Hungarian Roma may not actually be able to relocate safely to other EU countries. To begin with, there are restrictions on

187. *Ibid* at paras 18-24.

188. 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).

189. 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 [sic].” See ATIP Request No A-2013-00778, *supra* note 161 at 79-80, VBO-02549 (14 December 2011). The term has also been used in recently reported case law. See *e.g. Hermann v Canada (Minister of Citizenship and Immigration)*, 2014 FC 266, 239 ACWS (3d) 464.

190. *Ward*, *supra* note 164 at paras 88-96.

191. *Katkova v Canada (Minister of Citizenship and Immigration)* (1997), 130 FTR 192, 71 ACWS (3d) 347 (FCTD). 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 (Minister of Citizenship and Immigration)*, 2007 FC 146 at paras 19-20, 308 FTR 241.

192. Macklin, “Safe Country,” *supra* note 140 at 109-13.

EU mobility rights,¹⁹³ and many Roma were deported from EU countries for failing to comply with these restrictions during the period of our study.¹⁹⁴ In addition, it is questionable whether Hungarian Roma would be protected against persecution in some other EU countries, even with legal status.¹⁹⁵

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.¹⁹⁶ 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."¹⁹⁷ 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.

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.¹⁹⁸ Given the frequency with

193. *Ibid* at 111-12.

194. Steven Erlanger, "France Intensifies Effort to Expel Roma, Raising Questions," *New York Times* (20 August 2010) A4.

195. See e.g. Amnesty International, "Roma in Europe: Demanding justice and protection in the face of violence" (8 April 2014), online: <www.amnesty.org/en/articles/news/2014/04/roma-europe-demanding-justice-and-protection-face-violence>.

196. See e.g. *Varga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 494, 227 ACWS (3d) 1135 [*Varga*]; *Darabos v Canada (Minister of Citizenship and Immigration)*, 2008 FC 484, 81 Admin LR (4th) 269; *Galyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 250, 429 FTR 1 [*Galyas*].

197. *Varga*, *supra* note 196 at paras 17, 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. ATIP Request No A-2013-00778, *supra* note 161 at 94, paras 5, 18 (RPD File No VA8-02053, 26 August 2011) (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" [sic]).

198. *IRPA*, *supra* note 63, s 98.

which criminality arises as a theme in debates about Hungarian Romani refugee claims, we think it is worth emphasizing that our sample suggests that Hungarian Romani refugee claimants were seldom excluded from refugee protection due to serious criminality between 2008 and 2012.

E. INSTITUTIONAL BIAS

We were curious whether other factors, beyond the legal reasons identified in Part II(D), above, 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.¹⁹⁹

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.²⁰⁰

[...]

[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.²⁰¹

[...]

199. Interviews of staff at non-governmental organizations and refugee lawyers who have personal knowledge of the experience of Hungarian Romani refugee claimants [on file with authors] [Interviews] (Interviews 1-6, 9-10). As noted in Part II(A), above, the interviews were conducted in person, by telephone, and by Skype between November 2013 and March 2014. While we can see how whether the interviewee is a lawyer or a worker in a community organization might be of interest to the reader, we have decided against providing this information; given the size of the community, this information might identify one or more of our interviewees.

200. *Ibid* at 108 (Interview 10).

201. *Ibid* at 20 (Interview 2).

[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.²⁰²

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.²⁰³ That interviewee noted that, during the period of our study, IRB decision makers were appointed and reappointed through processes controlled largely by the Minister.²⁰⁴ 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 reappointed. 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."²⁰⁵

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.²⁰⁶

[...]

[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. . . . [T]here's a concern about the board using cookie-cutter reasons in the Roma cases. . . . [I]nstead of spending . . . 20 hours reading the documents, they look

202. *Ibid* at 31 (Interview 3).

203. *Ibid* (Interview 4).

204. 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 Jacqueline Bonisteel, "Ministerial Influence at the Canadian Immigration and Refugee Board: The Case for Institutional Bias" (2010) 27:1 *Refuge* 103.

205. Interviews, *supra* note 199 at 50 (Interview 4).

206. *Ibid* at 3-4 (Interview 1).

at precedents from colleagues and say well “ok this is how we do it”, so that kind of perpetuates the boilerplate reasons.²⁰⁷

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 2002.²⁰⁸ As noted, the 1998 Hungarian Roma lead case—which severely reduced success rates for Hungarian Romani refugee claimants—was overturned in 2006 by the FCA on the basis of a reasonable apprehension of bias.²⁰⁹ 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.”²¹⁰

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, cracking down on alleged abuse of the refugee determination system was a major policy objective of the government during our study period, and Hungarian Roma were repeatedly held up as the prime example of this alleged abuse. At the same time, the 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.²¹¹ In response, the Canadian Bar Association President, Rod Snow, suggested that public criticism by a cabinet minister of “judges who follow the law but not the government’s political agenda is an affront to our democracy and freedoms”²¹²—a view echoed by Supreme

207. *Ibid* at 20-21 (Interview 2).

208. See Part II(C), above.

209. *Kozak*, *supra* note 91.

210. *Ibid* at para 65.

211. Jason Kenney, “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” (Speech delivered in London, Ont, 11 February 2011), online: Citizenship and Immigration Canada <www.cic.gc.ca/english/department/media/speeches/2011/2011-02-11.asp>.

212. Letter from Rod Snow to Jason Kenney (22 February 2011), online: <www.cba.org/CBA/submissions/pdf/11-12-eng.pdf>.

Court of Canada Chief Justice Beverley McLachlin.²¹³ 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.²¹⁴ 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.²¹⁵

There are, to be sure, good reasons for decision makers who are working on similar cases to share decisions, most notably in order to enhance consistency in decision making. However, this practice also poses serious risks, especially in a context where the decisions are not publicly available—as is the case for most refugee determinations. One risk is a bias in favor of decisions denying refugee protection. Most positive decisions during the period of our study lacked written reasons;²¹⁶ thus, the circulated reasons were more likely to be negative 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 very few positive refugee decisions are judicially reviewed.²¹⁷ If these mostly negative decisions

213. Richard Foot, “Chief Justice supports criticism of Kenney,” *National Post* (13 August 2011), online: <news.nationalpost.com/news/canada/chief-justice-supports-criticism-of-kenney>.

214. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-00619 [on file with authors].

215. *Ibid* at 1245.

216. Rehaag, “Role of Counsel,” *supra* note 149 at 82-83.

217. Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38:1 *Queen’s LJ* 1 at 24.

were circulated among decision makers and then substantially copied without attribution, then they 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 claimants’ constitutional right to know the case against them and to offer a response.²¹⁸

In our view, if a decision maker wishes to draw on unpublished refugee cases, then 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 was 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.

F. 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

218. *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 117 at paras 57-58, 17 DLR (4th) 422.

particular decision makers.²¹⁹ As one interviewee put it: “The big disparity is in who is the judge. There are judges who don’t give positives and there are judges who give positives”²²⁰

One way to assess these impressions regarding disparities in decision making across adjudicators is to look at variations in recognition rates. Prior research has used electronic data from the IRB’s internal database, obtained through access to information procedures, to examine such variations.²²¹ According to this research, in 2006, “refugee claim grant rates fluctuated dramatically across individual IRB adjudicators ... Some ... granted refugee status in virtually all claims they hear; others granted refugee status rarely if at all.”²²²

For the present study, we followed a similar methodology. Using data obtained through an access to information request,²²³ 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 with outcomes other than negative, positive, abandoned and withdrawn

** Based on first letter of RPD number

*** Includes negative, no credible basis

219. Interviews, *supra* note 199 (Interviews 4-5, 9).

220. *Ibid* at 102 (Interview 9).

221. Sean Rehaag, “Troubling Patterns in Canadian Refugee Adjudication” (2008) 39:2 Ottawa L Rev 335.

222. *Ibid* at 362.

223. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-01523/DE [on file with authors].

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 Canada (Ontario), compared to only 8.2% filed in Western Canada and 7.6% in Eastern Canada. The table also indicates that recognition rates and overall success rates in these cases varied substantially across regions. Hungarian principal applicants succeeded twice as often in Western Canada (11.8%) compared to applicants in Central Canada (5.8%) and 2.7 times as often in Eastern Canada (15.8%) compared to Central Canada (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.

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

TABLE 6: BOARD MEMBERS (20+ CASES) IN PRINCIPAL APPLICANT FINAL RPD DECISIONS FOR HUNGARIAN CLAIMANTS, BY RECOGNITION RATE (MERITS ONLY) (2008-2012)*

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 with outcomes other than negative, positive, abandoned and withdrawn

** Reflects names listed in the IRB database without consolidation 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 deciding IRB Member. 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. In the Toronto office, for example, claimants were in luck if their cases were assigned to Lesley Mason (50.0%, 28 cases), Robert Barafo (33.3%, 45 cases), or even 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 some degree on who was assigned to hear the case. This obviously raises serious fairness concerns.

G. 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.²²⁴

[...]

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.²²⁵

[...]

[T]here seemed to be representatives who ... were not interested in ... doing a good job or in truthfully or honestly representing the clients.²²⁶

[...]

[T]here are some really terrible lawyers out there.²²⁷

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, 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 for Hungarian Romani clients, often by including brief boilerplate narratives that failed to address central aspects of the claims. Interviewees also reported that lawyers frequently left claimants to prepare their own narratives

224. Interviews, *supra* note 199 at 107 (Interview 10).

225. *Ibid* at 4 (Interview 1).

226. *Ibid* at 83 (Interview 7).

227. *Ibid* at 33 (Interview 3).

without adequate instruction,²²⁸ asked clients to sign blank narratives,²²⁹ and failed to review narratives with clients prior to submitting them.²³⁰ 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 counsel²³¹ and that counsel failed to instruct clients on what types of supporting documents they should seek out.²³²

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.²³³ Many also suggested that lawyers relied excessively on non-lawyer assistants (including translators or consultants) or on inexperienced junior lawyers.²³⁴ In addition, some interviewees reported that clients were often unable to reach their lawyers,²³⁵ were not adequately prepared by their lawyers for their hearings,²³⁶ or never met with their lawyers until their refugee hearings.²³⁷ Some also indicated that lawyers failed to even show up at hearings.²³⁸

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.²³⁹ 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 behaviour 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] the firm’s internal administration.”²⁴⁰ Similarly,

228. *Ibid* (Interviews 2, 8-9).

229. *Ibid* (Interviews 2, 10).

230. *Ibid* (Interviews 8-9).

231. *Ibid* (Interviews 3, 6).

232. *Ibid* (Interview 1).

233. *Ibid* (Interviews 3, 6, 8-9).

234. *Ibid* (Interviews 2-6, 8).

235. *Ibid* (Interviews 1, 6, 8).

236. *Ibid* (Interviews 1-3, 9).

237. *Ibid* (Interviews 1, 3-6, 8).

238. *Ibid* (Interviews 2, 6).

239. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-00619 [on file with authors].

240. *Ibid* at 474.

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 claims. ... 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.”²⁴¹ 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 cases²⁴² as well as documents from many Hungarian refugee claims featuring allegations of inadequate counsel.²⁴³

241. *Ibid* at 1231.

242. *Ibid* at 1232, 1244.

243. See e.g. *ibid* at 668 (RPD File No TB0-11190); *ibid* at 729 (RPD File No TA9-22821); *ibid* at 791 (RPD File No TA9-21368); *ibid* at 886 (RPD File No TB0-17436); *ibid* at 887 (RPD File No TB0-03861); *ibid* at 906 (FPD File No TB0-05610); *ibid* at 1023 (RPD File No TB1-17415); *ibid* at 1116 (RPD File No TB1-10802).

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 with outcomes other than negative, positive, abandoned and withdrawn

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

*** Includes negative, no credible basis decisions

Prior research based on data obtained from the IRB through access to information procedures suggests that securing counsel—and in particular securing a lawyer with refugee law experience—is correlated with increased success rates in Canada's refugee determination system.²⁴⁴ According to this

244. Rehaag, "Role of Counsel," *supra* note 149.

research, refugee claimants with lawyers were more successful from 2005 to 2009 than claimants who were represented by immigration consultants or who were unrepresented.²⁴⁵ Similarly, claimants who were represented by experienced refugee lawyers—measured in terms of the number of claims in which they served as counsel of record during the period of the study—succeeded more frequently than claimants represented by less experienced counsel.²⁴⁶

The present study employed a similar methodology. 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. In contrast to the findings from the earlier study, we found 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, as Table 7 shows, claimants represented by counsel involved in 10 or fewer Hungarian cases succeeded 2.9 times as frequently as 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 substantial proportion of Hungarian refugee claims decided in this period: 34.2% of these cases involved just three counsel and 52.5% involved eight counsel.

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 greatly, 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

245. *Ibid* at 86-87.

246. *Ibid* at 88-89.

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

TABLE 8: HIGH VOLUME (25+ DECISIONS) COUNSEL OF RECORD AND OUTCOMES IN PRINCIPAL APPLICANT FINAL RPD DECISIONS FOR HUNGARIAN CLAIMANTS, BY VOLUME (2008-2012)*

(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 abandoned / withdrawn

** Reflects actual names listed in the IRB database without consolidation 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

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)*

(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 abandoned / withdrawn

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

*** Includes negative, no credible basis decisions

these variations. Nonetheless, the combination of below-average success rates and very high volumes of cases does, in our view, raise serious concerns.²⁴⁷

Another troubling finding evident in Tables 8 and 9 is that three of the six highest-volume lawyers (including the two highest-volume lawyers) are currently facing disciplinary proceedings at the Law Society of Upper Canada (“LSUC”). Taken together these three lawyers were listed as counsel of record in 29.6% of the Hungarian principal applicant refugee claims finalized between 2008 and 2012. All three have below-average success rates in Hungarian claims, and two (Viktor Hohots and Elizabeth Jaszi) 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.²⁴⁸ 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.²⁴⁹

It should be emphasized that, as of the time of writing, the allegations in these disciplinary proceedings have not been proven. However, in *Galyas v Canada* (MCI), the Federal Court found that the highest-volume lawyer, Viktor Hohots, provided incompetent counsel.²⁵⁰ Specifically, the court found that Mr. Hohots’s 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

247. There is also cause for concern regarding some lower volume counsel. There are 30 counsel who are each listed as counsel of record in 11 to 24 Hungarian principal applicants refugee claims finalized between 2008 and 2010. Of these, 10 did not succeed with a single case, whereas 3 had success rates over 25%.

248. *The Law Society of Upper Canada v Viktor Serbey Hohots* (21 February 2014), Ontario, Law Society Hearing Panel File No LCN 22/14 (amended notice of application) [on file with authors]; *The Law Society of Upper Canada v Erzsebet Jaszi* (29 May 2015), Ontario, Law Society Tribunal Hearing Division File No LCN 57/14 (amended notice of application) [Jaszi] [on file with authors].

249. *The Law Society of Upper Canada v Joseph Stephen Farkas* (10 July 2013), Ontario, Law Society Hearing Panel File No LCN 83/13 (notice of application) [Farkas] [on file with authors].

250. *Galyas*, *supra* note 196.

does not comply with ... expectations ... and that it would be extremely detrimental to the 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.²⁵¹

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
(1) HOHOTS, VIKTOR (ON) (LSUC Hearing)	23	487
(2) FARKAS, JOSEPH (ON) (LSUC Hearing)	25	529
(3) IVANYI, PETER (ON)	22	1,938
(4) BHATTI, ROGER (BC)	24	1,463
(5) All Counsel Hungary Sample	45	1,131
All Counsel Hungary Sample (Positive)	10	1,633
All Counsel Hungary Sample (Negative)	35	987

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).

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.²⁵² Table 10 sets out the word counts in five samples. The first four samples were randomly selected from Hungarian cases in which

251. *Ibid* at para 86. See also *Ivancsik et al v The Minister of Citizenship and Immigration*, (6 June 2014), Canada, FC IMM-2553-13 (Respondent's memorandum of agreement) [on file with authors] (where the Department of Justice conceded that several high-volume lawyers, including Viktor Hohots and Elizabeth Jaszi, provided incompetent counsel).

252. Immigration and Refugee Board, Access to Information and Privacy Request No A-2013-00779 [on file with authors].

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), as compared to the narratives in cases where Peter Ivanyi or Roger Bhatti was listed as counsel (1,690 words on average). This is a point of some concern, given that Hohots and Farkas are facing LSUC disciplinary proceedings for, among other things, submitting inadequate narratives. The table also 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.”²⁵³ 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

253. *Galyas*, *supra* note 196 at para 86.

regarding quality of counsel in large numbers of Hungarian Romani refugee claims during the period of our study. In particular, many narratives were prepared by counsel in a manner that virtually guaranteed that the refugee claims would fail. We therefore agree with all of our interviewees that quality of counsel likely played a role in the very low success rates for Hungarian Romani refugee claimants between 2008 and 2012.

H. 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—the former meaning that claimants actively asked the IRB to discontinue their claims and the latter that the IRB declared claims abandoned after claimants failed to complete a mandatory step in the process. During the period of this study, withdrawal and 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 Kenney spoke in Parliament about the need for reforms to Canada's refugee determination system:

[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.²⁵⁴

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%.²⁵⁵

These statistics frequently cited by Minister Kenney were misleading. The full figures are available in Table 1 in Part II(B), 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 only three of all the finalized Hungarian claims succeeded. However, he neglected to mention that the IRB

254. *House of Commons Debates*, 40th Parl, 3rd Sess, No 63 (15 June 2010) at 1515.

255. *House of Commons Debates*, 40th Parl, 3rd Sess, No 36 (29 April 2010) at 1110.

chose to hold hearings on the merits in only eight Hungarian cases in 2009—and that three of those eight cases succeeded. That means that the recognition rate for Hungarian refugee claims decided on the merits in 2009 was 37.5%. Moreover, if one looks at the recognition rates from 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 far cry from the “acceptance rate of nearly 0%” cited by the Minister. And, 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 or 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 and 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 claimants 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.²⁵⁶ 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.’”²⁵⁷

Several interviewees also suggested that this sense of hopelessness was compounded by Minister Kenney’s negative comments about Hungarian refugee claimants.²⁵⁸ 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 Minister’s saying you’re bogus, we’re going to reject you anyway”²⁵⁹ Another interviewee went further, saying:

What 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,

256. Interviews, *supra* note 199 (Interviews 1, 3-7, 10).

257. *Ibid* at 108 (Interview 10).

258. *Ibid* (Interviews 2, 4-6, 10).

259. *Ibid* at 45 (Interview 4).

that they were being essentially treated the same way as they were being treated back home in Hungary ...²⁶⁰

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 previously in Part II(G), above.²⁶¹ 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 ...²⁶²

[...]

[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.²⁶³

[...]

[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.²⁶⁴

These concerns about counsel seem consistent with our quantitative data. As can be seen in Table 7, above, claimants with high-volume counsel abandoned or withdrew their claims more frequently 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 2–10 Hungarian cases). Moreover, as is evident in Tables 8 and 9, abandonment and withdrawal rates for individual high-volume lawyers vary dramatically. For instance, the 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 and 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 disciplinary proceedings served as counsel of record in 35.4% of all abandoned and withdrawn Hungarian refugee claims between 2008 and 2012. Once again, as with the data on IRB Member grant rates and the data on counsel success rates, we would caution that there are possible confounding variables here: Many factors, including factors

260. *Ibid* at 74 (Interview 6).

261. Interviews, *supra* note 199 (Interviews 1, 2, 6-8, 10).

262. *Ibid* at 74 (Interview 6).

263. *Ibid* at 22 (Interview 2).

264. *Ibid* at 92 (Interview 8).

related to how clients select their counsel, might explain why some counsel have higher abandonment and withdrawal rates than others that may have nothing to do with quality of counsel. That having been said, in our view—and in light of our conclusions in Part II(G), above—these figures provide further reason to be worried that quality of counsel may have played a role 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 that Hungarian claimants abandoned or withdrew claims. These included: difficult living conditions in Canada that did not live up to the claimants' expectations,²⁶⁵ homesickness,²⁶⁶ and culture shock.²⁶⁷ 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.²⁶⁸ Along similar lines, another interviewee suggested that claimants withdrew or abandoned claims because they needed to return to Hungary to deal with the illness or death of family members.²⁶⁹

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 EU countries²⁷⁰—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 and 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 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."²⁷¹

265. Interviews, *supra* note 199 (Interviews 6, 9).

266. *Ibid* (Interview 7).

267. *Ibid* (Interview 6).

268. *Ibid* (Interview 1).

269. *Ibid* (Interview 6).

270. *Ibid* (Interviews 8-10).

271. *Ibid* at 64 (Interview 5).

III. CONCLUSION

As this study has shown, over 11,000 Hungarians made refugee claims in Canada between 2008 and 2012, 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 DCOs—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 stands currently 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.

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 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.²⁷²

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.²⁷³ When the next stream of Hungarian Roma—or another marginalized group—come to Canada seeking refuge, the country must do better. Unfortunately, the recent changes to Canada's refugee determination system—changes that political actors justified with reference to the need to crack down on “bogus” Hungarian Romani refugee claims—do not give much cause for hope.

IV. AFTERWORD

After this article was written, one of the LSUC disciplinary proceedings involving lawyer Viktor Hohots—who took on a high volume of cases from 2008 to 2012—was decided. On 23 February 2015, in an agreed statement of

272. *Ibid* at 113 (Interview 10).

273. 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.” See Jason Kenney, “The Unveiling, at Pier 21, of *The Wheel of Conscience*, a Monument to Commemorate the *MS St Louis*” (Speech delivered in Halifax, 20 January 2011), online: Citizenship and Immigration Canada <www.cic.gc.ca/english/department/media/speeches/2011/2011-01-20.asp>.

facts, Hohots admitted to professional misconduct regarding several Hungarian Romani refugee claimant clients.²⁷⁴ The agreed statement of facts also indicated that, from 2009 to 2012, Hohots had around nine hundred refugee families as clients (representing around four thousand to five thousand individuals) and that he “felt overwhelmed by the demands of his refugee practice.”²⁷⁵ Four junior lawyers that he employed during this period—one of whom quit within two weeks of starting at the firm—also expressed concerns about the firm.²⁷⁶

In a decision issued on 23 April 2015, the LSUC Tribunal found that Hohots had committed professional misconduct by failing to effectively supervise non-lawyers in his office and by failing to competently serve approximately twenty refugee claimants—and specifically, failing to prepare adequate narratives and failing to adequately prepare clients for their hearings.²⁷⁷ In coming to this conclusion, the Tribunal noted that Hohots “conducted a high-volume refugee law practice in which there were systemic failures in the operation of the office. . . . The result was a pattern of conduct in which a large number of the Lawyer’s clients received inadequate service.”²⁷⁸ The Tribunal also found that Hohots “failed to meet virtually all the attributes of a competent lawyer.”²⁷⁹

A penalty hearing was held on 11 May 2015. At that hearing, the tribunal heard two motions for leave to intervene. The first involved Legal Aid Ontario (“LAO”), which argued that LAO had a direct interest in the proceedings because many of the clients who Hohots served were funded by LAO. In addition, LAO argued that it could provide helpful contextual information about Hohots’s legal aid practices and his billing information.²⁸⁰ The second involved Romero House and the Canadian Romani Alliance. These not-for-profit organizations had experience dealing with Hungarian Romani refugee claimants, including concerns regarding quality of counsel. They argued that they were well-placed to provide evidence about the particular vulnerabilities of Hungarian Romani clients and the impact that poor quality legal services has had not just on individual clients

274. *The Law Society of Upper Canada v Viktor Serbey Hohots* (23 February 2015), Ontario, Law Society Hearing Panel File No LCN22/14 (agreed statement of facts).

275. *Ibid* at para 12.

276. *Ibid* at para 18-27.

277. *Law Society of Upper Canada v Hohots*, 2015 ONLSTH 72.

278. *Ibid* at para 26.

279. *Ibid* at para 30.

280. *The Law Society of Upper Canada v Viktor Serbey Hohots* (1 May 2015), Ontario, Law Society Tribunal Hearing Division File No LCN22/14 & LCN15/15 (notice of motion) (motion for limited participation by Legal Aid Ontario).

but on the Hungarian Romani community more generally. They also argued that they could bring a human rights lens to the proceedings.²⁸¹

The LSUC Tribunal denied these motions.²⁸² The penalty hearing proceeded—albeit with disruption when some advocates for refugees left the hearing in protest.²⁸³ Ultimately, the LSUC Tribunal imposed a five-month suspension on Hohots's licence and a two-year prohibition on representing refugee claimants. He was also required to pay a costs award.²⁸⁴ While counsel for the LSUC suggested that the penalty was within the range applied in similar cases, some advocates for refugees argued that the penalty was inadequate—and that systemic changes are needed.²⁸⁵

As of the time of writing, the LSUC disciplinary proceedings involving Elizabeth Jaszi²⁸⁶ and Joseph Farkas²⁸⁷ have not been finalized.

281. *Law Society of Upper Canada v Viktor Serhey Hobots* (1 May 2015), Ontario, Law Society Tribunal Hearing Division File No LCN22/14 & LCN15/15 (notice of motion) (motion for leave to intervene on behalf of Romero House and the Canadian Romani Alliance).

282. Maureen Brosnahan, "Toronto lawyer suspended for five months for misconduct involving Roma refugees," *CBC News* (12 May 2015), online: <www.cbc.ca/news/canada/toronto/toronto-lawyer-suspended-for-five-months-for-misconduct-involving-roma-refugees-1.3071343>.

283. Rachel Mendleson, "Emotions run high at penalty hearing for disgraced refugee lawyer," *Toronto Star* (11 May 2015), online: <www.thestar.com/news/immigration/2015/05/11/emotions-run-high-at-penalty-hearing-for-disgraced-refugee-lawyer.html>.

284. *Ibid.*

285. *Ibid.* See also Brosnahan, *supra* note 282.

286. *Jaszi*, *supra* note 248. According to media reports, Jaszi failed to attend the first day of hearings and has thus been deemed to have admitted the facts submitted in the Notice of Application. See Tali Folkins, "Another lawyer in hot water over services to refugee claimants," *Law Times* (22 June 2015), online: <www.lawtimesnews.com/201506224764/headline-news/another-lawyer-in-hot-water-over-service-to-refugee-claimants>.

287. *Farkas*, *supra* note 249. As of the time of writing, the case has been heard, but no decision has been issued.