

No. 23A_____

In The Supreme Court of the United States

REPUBLIC OF HUNGARY AND MAGYAR ALLAMVASUTAK ZRT., (MAV ZRT.),

Applicants,

v.

ROSALIE SIMON, ET AL.,

Respondents.

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR A WRIT OF CERTIORARI**

December 21, 2023

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To the Honorable John G. Roberts Jr., as Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit:

The Republic of Hungary and Magyar Államvasutak Zrt. (“MÁV”) respectfully request a 30-day extension of time to file their petition for writ of certiorari. This request, if granted, would extend the deadline from January 10, 2024, to February 9, 2024. The Court of Appeals issued its opinion on August 8, 2023 (App. A) and denied rehearing on October 12, 2023 (App. B). This Court has jurisdiction to review the D.C. Circuit’s judgment under 28 U.S.C. § 1254(1).

Background

Three years ago, this Court granted certiorari in this case to resolve a circuit split concerning the expropriation exception in the Foreign Sovereign Immunities Act (“FSIA”). *Simon v. Republic of Hungary*, 141 S. Ct. 187 (2020). On remand, the D.C. Circuit created a new circuit split regarding that same provision. *Compare Simon v. Republic of Hungary*, 77 F.4th 1077, 1104 (D.C. Cir. 2023) (“*Simon III*”), with *Rukoro v. Fed. Republic of Germany*, 976 F.3d 218, 225-26 (2d Cir. 2020). The United States Court of Appeals for the Second Circuit has correctly held that the expropriation exception requires a plaintiff to “trace the proceeds a sovereign received from expropriated property.” *Rukoro*, 976 F.3d at 225-26. In contrast, the D.C. Circuit reached the opposite conclusion, holding “plaintiffs had no such burden” and need not “produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them.” *Simon III*, 77 F.4th at 1118.

The procedural history leading to this circuit split is lengthy. In summary, certain plaintiffs filed a putative class action against Hungary and MÁV (the Hungarian national railway) alleging expropriation of property during World War II. The District Court dismissed that action under the FSIA’s treaty exception. *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 407 (D.D.C. 2014). The D.C. Circuit reversed. *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) (“*Simon I*”). It held that the treaty at issue was inapplicable and that the expropriation exception did not incorporate the “domestic takings rule,” which holds that a sovereign’s taking of property from its own nationals does not implicate international law. *Simon I*, 812 F.3d at 144-45. On remand, the District Court again dismissed, this time based on comity abstention and *forum non conveniens*. *Simon v. Republic of Hungary*, 277 F.3d 42, 67 (D.D.C. 2017). The D.C. Circuit again reversed. *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (“*Simon II*”).

After *Simon II*, this Court granted Hungary’s first petition for certiorari. *Simon v. Republic of Hungary*, 141 S. Ct. 187 (2020). It also granted certiorari in a case raising similar issues regarding the expropriation exception to the FSIA. *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 185 (2020). In *Philipp*, this Court resolved a circuit split by holding that the expropriation exception “refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule.” *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 187 (2021). This Court vacated and remanded this case for further proceedings consistent with *Philipp*. *Republic of Hungary v. Simon*, 592 U.S. 207, 208 (2021).

On remand, the District Court denied Hungary’s motion to dismiss as to nine named plaintiffs who claimed to be Czechoslovakian nationals at the time of the alleged takings. *Simon v. Republic of Hungary*, 579 F. Supp. 3d 91, 97 (D.D.C. 2021). It dismissed the claims of those plaintiffs who were shown to be Hungarian nationals. *Id.* The same District Court dismissed similar claims brought in a separate action. *Heller v. Republic of Hungary*, No. 21-CV-1739 (BAH), 2022 WL 2802351, at *6 (D.D.C. July 18, 2022). The D.C. Circuit consolidated those appeals. *Simon III*, 77 F.4th at 1087. It then issued the opinion on which applicants seek certiorari.

The D.C. Circuit’s opinion addressed the FSIA’s expropriation exception, which refers to “property taken in violation of international law . . . or any property exchanged for such property.” 28 U.S.C. § 1605(a)(3). For the exception to apply, that property must be present in the United States or possessed by an agency or instrumentality of a sovereign defendant, among other requirements. *Id.* In assessing the requisite showing as to “property exchanged for such property,” the D.C. Circuit held that a sovereign bears the burden of proving a negative: “defendants who wish to disclaim property they seized and liquidated must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated.” *Simon III*, 77 F.4th at 1119. The Court further ruled that the “burden of proof in establishing the inapplicability of the FSIA’s exceptions is upon the party claiming immunity.” *Id.* at 1116 (quoting *Transam. S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985)) (alteration omitted). And it held that evidence showing property cannot be traced would “hurt

rather than help the defendants.” *Id.* (quoting *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 105 (D.D.C. 2020)) (alterations omitted).

As described above, this allocation of the burden is contrary to the rule of decision in the Second Circuit. In *Rukoro*, that Court explained the burden as follows: “A defendant seeking sovereign immunity bears the burden of establishing a prima facie case that it is a foreign sovereign.’ The burden next shifts to Plaintiffs to demonstrate a FSIA exception applies.” 976 F.3d at 224 (quoting *Pablo Star Ltd. v. Welsh Gov’t*, 961 F.3d 555, 559-60 (2d Cir. 2020)) (citations omitted). Although the plaintiff bears the “burden of production” as to the exception, the ultimate burden of persuasion remains with the defendant. *Id.*; see also *Pablo Star Ltd.*, 961 F.3d at 560 (“In other words, the ultimate burden of persuasion remains on the party seeking sovereign immunity.”). With the burden properly allocated, evidence that funds were commingled decades earlier is insufficient to show defendants retained property exchanged for expropriated items or that such property is present in the United States. *Id.*; see also *Kuo v. Gov’t of Taiwan*, 802 F. App’x 594, 597 (2d Cir. 2020) (requiring plaintiff to carry the burden of showing property was “specifically purchased” with expropriated funds).

Both the *Rukoro* and *Simon III* decisions recognize that historical commingling would be present in the typical case, and thus the burden question is frequently dispositive. See *Simon III*, 77 F.4th at 1118; *Rukoro*, 976 F.3d at 225-26. Because the Circuit Courts are split as to whether plaintiffs or sovereign defendants bear the

burden of tracing proceeds, Hungary and MÁV seek to present this important issue of sovereign immunity in a petition for certiorari.

Reasons for Granting an Extension of Time

As described above, this case has an exceptionally complex procedural history. It is the subject of three separate decisions from the D.C Circuit, as well as an opinion from this Court. The factual background stretches back decades to World War II, and much of the potentially relevant evidence is located in foreign jurisdictions. It also presents complex and sensitive issues concerning foreign sovereign immunity.

For thirteen years, Hungary and MÁV were represented by Konrad L. Cailteux, Esq., of Weil, Gotshal & Manges LLP. Mr. Cailteux, however, is in the process of retiring from the practice of law. As a result, Hungary and MÁV have sought new counsel, and recently retained the undersigned counsel's firm for further proceedings before both this Court and the District Court. Two additional members of this firm are seeking admission to this Court's bar. In light of the factual and legal complexity presented, an extension of time is necessary for counsel to familiarize themselves with the trial and appellate records, and to prepare the petition for certiorari.

In addition, counsel is responsible for a variety of other time-sensitive and time-consuming matters, including:

- Submission of an application for an emergency temporary restraining order in New York State Supreme Court, with responding and reply papers expected to be due before January 10, 2024 (it is anticipated this matter will be sealed);

- Preparation and coordination with co-defendants and plaintiffs regarding remand packets in a multi-district litigation matter, *In re Blue Cross Blue Shield Antitrust Litigation*, MDL No. 2406, No. 2:13-cv-20000-RDP (N.D. Ala.);
- Response to a motion to dismiss and related cross-motion in *Violet Realty v. Amigone Sanchez*, Index No. 812665/2021 (N.Y. Sup. Ct., Erie Cnty.); and
- Preparation of responses to 44 separate arbitration demands due on January 19, 2024.

Finally, the current deadline falls shortly after the end-of-year holidays, making the press of business more difficult.

WHEREAS Hungary and MÁV respectfully request a 30-day extension of time to file their petition for writ of certiorari, to and including February 9, 2024.

Dated: New York, New York
December 21, 2023

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By 

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