Federal Court  Cour fédérale

Date: 20150304

Docket: IMM-2129-13

Citation: 2015 FC 273

Ottawa, Ontario, March 4, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GABOR MOLNAR,
VIKTORIA BEATA MOLNAR AND
CSILLA MOLNAR

Applicants

and

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants' claim for refugee protection was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). They now apply for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicants seek an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The applicants are a family of three consisting of the male or principal applicant, Gabor Molnar, a female applicant, Viktoria Beata Molnar and their child, Csilla Molnar. They are of Roma ethnicity and are citizens of Hungary. They seek refugee protection from persecution of Roma people by the Jobbik political party in Hungary, an extreme right wing party.

[4] The applicants owned a hair salon in Budapest, Hungary. There were three incidents which formed the basis of the applicants' reasons in leaving Hungary and seeking refuge in Canada. First, on June 20, 2011, the applicants were attacked by three Hungarian Guards in the street. Second, on June 29 or 30, 2011, Hungarian Guards broke into their hair salon and trashed their business. Third, on July 6, 2011, the female applicant was physically assaulted and received injuries which required medical attention. These events occurred concurrently to a meeting of Hungarian Guard members in the area of the applicants' hair salon.

[5] On July 17, 2011, the applicants left Hungry and came to Canada to make claims for refugee protection.

II. Decision Under Review

[6] The hearing took place on March 6, 2013. The Board gave the applicants oral reasons of its negative decision on the same day, ruling that they do not meet the criteria under either section 96 or section 97 of the Act for their refugee claim. It subsequently released its written reasons on April 4, 2013.

[7] In its negative decision, the Board first summarized the key objective evidence pertaining to adverse country conditions. It stated Hungary is a democratic country and acknowledged the living condition of Roma people, noting mostly the persecutory acts against Roma people in Hungary and the anti-Roma and anti-Semitic agenda by the Jobbik party.

[8] The Board reasoned that for a claim to succeed, an applicant "must show that they have taken all reasonable steps to seek protection, taking into account the context of the country of origin, the steps taken and the claimant's interaction with the authorities."

[9] The Board stated the determinative issue in this case is the matter of state protection concerning "the presumption that a country is capable of protecting its citizens." It noted the applicants' legal burden in "rebutting the presumption that adequate state protection exists by edducing [*sic*] clear and convincing evidence that is reliable and probative that satisfies the board on a balance of probabilities." The Board then summarized the applicants' response during the hearing that the applicants did not go to the police at all because in their view, the police would not do anything to help them.

[10] The applicants gave the following reasons at their hearing for this view: the police would not help because some policemen in Hungary belong to the Hungarian Guard or similar organization; the daughter of a prominent leader within the Hungarian Guard is dating a policeman; and past experiences with the police led the applicants to believe that the police would not help them. The Board was of the view that there was not the requisite clear and convincing evidence that on a balance of probabilities, state protection in Hungary is inadequate because the applicants failed to show they have taken all reasonable steps in the circumstances particular to them to seek state protection before seeking international protection.

[11] The Board cited this Court's instruction that "efforts concerning state protection must have actually translated into adequate state protection." It stated "a fair reading" of the documentary evidence showed that criticism of the situation of Roma in Hungary was warranted, especially compared to other EU countries, but that the documentary evidence regarding state protection is mixed. It summarized the progress of 22 cases in Hungary in which Roma were victims of violent attacks between January 2008 and August 2009, demonstrating "the police responded adequately by providing greater protection to affected Roma communities and by arresting and charging the four suspects."

[12] Further, the Board acknowledged the continuation of violence from extremist groups and the amendments made to the Criminal Code in Hungary to criminalize such unauthorized activities. It then made note of the country's efforts in combating corruption.

[13] Finally, the Board concluded that after a "fair reading" and based on the totality of the evidence, although there is evidence to indicate that the police still commit abuses against people, it is reasonable to expect authorities to take action in these cases, that the police are both willing and capable of protecting Roma people and that there are organizations in place to ensure that the police are held accountable. Therefore, the Board was of the view that the presumption of adequate state protection is not rebutted and ruled in the negative against the applicants.

III. Issues

[14] The applicants submit the following issues for my consideration:

> 1. Is the RPD Member's state protection analysis reasonable? Particularly:
>
> a. Did the RPD Member err by focusing on the Applicants' failure to report the attacks to the police without regard to the practical significance of that reporting to the real issue of state protection?
>
> b. Did the RPD Member err by failing to assess contrary evidence regarding the adequacy of state protection for Roma in Hungary?

[15] The respondent argues there is only one issue: "whether the Applicant has raised a "reasonably arguable case" for the success of a future judicial review application."

[16] In my view, there are two issues:

A. What is the standard of review?

B. Did the Board analyze state protection reasonably?

IV. Applicant's Written Submissions

[17] The applicants first highlight the following main areas of evidence in their fact submissions: security of person and increase in anti-Roma rhetoric, discrimination in the police and judicial system, discrimination in education, employment, housing and access to health and social services.

[18] They submit the standard of review is reasonableness because the issue at hand is a question of mixed fact and law.

[19] The applicants argue that the Board in assessing state protection erred in two areas: focusing on the applicants' failure to seek out protection without regard to the practical significance of that reporting to the real issue of state protection and failing to reconcile its findings on the adequacy of state protection for Roma in Hungary with significant contrary evidence before it.

[20] Insofar as the first area is concerned, the applicants submit the Board placed decisive emphasis on the applicants' failure to seek state protection, hence, effectively imposing a duty to seek protection prior to seeking international protection. The applicants argue this is an error because Mr. Justice Russel Zinn in *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421 at paragraphs 10 and 11, [2013] FCJ No 447 [*Majoros*] explained that whether a claimant has sought the state's protection is not a legal requirement for refugee protection. They reference the case of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at

paragraph 19, [1993] SCJ No 74, that when the evidence indicates state protection would not be forthcoming, there is no requirement that a claimant seek the protection of the authorities. The applicants argue in the present case they relied on their previous experience with the police and documentary evidence which indicate state protection for Roma is ineffective.

[21] In support of their position, the applicants cite excerpts from various reports in the documentary evidence. They argue the evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens, yet the Board concluded otherwise.

[22] The applicants argue that in overturning the decision, Justice Zinn in *Majoros* stated at paragraphs 14 to 16 that the Board in that case erroneously focused on the applicants' alleged inadequate reporting to the police without regard to the practical significance of that reporting. They submit such is the case at bar. They quote parts of the decision and submit the Board's treatment of the evidence reverts to a criticism of the applicants' failure to engage the police, with no attention paid to what would have been the practical significance of these interactions. Therefore, the applicants argue the Board erred in placing a legal burden of seeking state protection on the applicants.

[23] Insofar as the second area is concerned, the applicants submit the Board did not consider the effectiveness of the state protection mechanism and did not assess contrary evidence pertaining to the adequacy of state protection for Roma. In arguing so, they rely on *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364, [2011] FCJ No 1663 [*Varela*] and *Olah*

v Canada (Minister of Citizenship and Immigration), 2013 FC 606, [2013] FCJ No 638 [*Olah*] for support.

[24] First, the applicants submit that under *Varela* at paragraph 16, while a state's efforts are relevant to an assessment of state protection, they are "neither determinative nor sufficient." Any efforts must have "actually translated into adequate state protection" at the operational level (citing *Beharry v Canada (Minister of Citizenship and Immigration)* 2011 FC 111 at paragraph ____, [2011] FCJ No 135 [*Beharry*]. They argue in the case at bar, the Board should have assessed how the police response translated into actual protection for Roma today, which shows a deteriorating situation for Roma as previously acknowledged by it.

[25] Second, the applicants submit as required under *Olah*, while the Board was not obligated to mention or rebut each piece of evidence in the decision, the Board should at least explain how it assessed contrary evidence regarding the effectiveness of state protection. The applicants argue the Board failed to do so. In their submissions, they provide the example that for the analysis of the attacks on Roma in 2008 and 2009, the Board should have explained why it disregarded the Immigration and Refugee Board's report on how police showed efforts in bringing high profile crimes to justice, but had a poor record of justice when working on the other serious cases of violence. They further cite the Immigration and Refugee Board's own reports on the prevalence of indiscriminate violence against Roma, the systemic failures in protection and the gap between laws and their implementation.

[26] Last, the applicants submit it was unreasonable for the Board to find adequate state protection exists without explaining how it reached that finding in the face of contrary evidence. Therefore, the applicants argue the Board's state protection analysis is deficient.

V. Respondent's Written Submissions

[27] The respondent submits the standard of review applicable to the Board's findings regarding state protection is reviewable on the standard of reasonableness (see *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354 at paragraphs 25 and 29, [2009] FCJ No 438 [*Mejia*]). It references *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] SCJ No 62 [*Newfoundland Nurses'*] and submits that a Board's reasons do not need to be exhaustive or refer to or explain every element of a decision to be sufficient.

[28] The respondent argues that the applicants' argument ultimately amounts to a disagreement with the Board's assessment of the evidence and such a disagreement does not raise a reviewable error. It references the following cases for the support of its position.

[29] Under *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 30, [2008] FCJ No 399, an applicant seeking to rebut the presumption of state protection must adduce "relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate."

[30] Also, under *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraphs 41 to 45, [2007] FCJ No 584 [*Hinzman*], the more democratic a state is, the more an applicant must do to show that what had been done exhausts the courses of action available.

[31] State protection needs to be adequate, but not perfect (see *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189, 99 DLR (4th) 334 [*Villafranca*]), or not always effective (see *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668 at paragraph 25, [2011] FCJ No 840 [*Kaleja*]; and *Lakatos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1070 at paragraph 14, [2012] FCJ No 1152).

[32] The respondent then submits that in the present case, the Board paid regard to evidence that was before it of the difficulty facing the Roma people in Hungary. The Board also considered contrary evidence; however, this does not nullify the existence of evidence suggesting that state protection is available. Further, the respondent argues the Board applied the context of the country conditions in Hungary to the individual facts of the present case including the fact that there was no attempt by the applicants to seek state protection. It cites *Riczu v Canada (Citizenship and Immigration)*, 2013 FC 888 at paragraph 19, [2013] FCJ No 923 [*Riczu*] that it is "very difficult to argue the state is not protecting you when you do not enable them in anyway …". It further argues that the applicants cannot rebut a presumption by pointing to a subjective reluctance and evidence of discrimination in the country.

[33] The respondent argues that in this case, as in *Riczu*, the Board considered the mixed evidence, noted the shortcomings in state protection as well as the operational availability of it. The Board also considered the applicants' evidence as to their particular attempts to access the operational level of state protection. The determination was thorough in reasoning, that the applicants did not take all reasonable steps in the circumstances to avail themselves of refugee protection. Hence, this makes the decision reasonable as under *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

[34] Further, the respondent submits that the Board considered the applicants' failure to seek state protection in context. The Board did an extended review of country conditions and the availability of state protection and clearly applied it to the applicants' particular circumstances. It distinguishes the *Majoros* case that unlike the case at bar, the Board in *Majoros* erred in firstly focusing on the applicants alleged inadequate reporting to the police with no regard to its practical significance and secondly, focusing almost exclusively on the measures made by the Hungarian government to curb persecution with little or no attention paid to their operational effectiveness.

[35] Then, the respondent submits the Board reasonably assessed the documentary evidence. It argues that the applicants, in arguing the Board did not consider the effectiveness of the state protection mechanism or contrary evidence, have ignored the majority of the decision that was rendered to focus on those very issues. Also, the Board is not required to refer to every piece of documentary evidence; and the issue is whether in examining the record as a whole including the contrary evidence, the decision is reasonable (see *Konya v Canada (Citizenship and*

Immigration), 2013 FC 975 at paragraph 44, [2013] FCJ No 1041). It argues that the decision taken together has to provide the Court with a basis for understanding why the decision at issue was made and it is an error only if there is a failure to deal with contrary evidence where it suggests a lack of consideration. Here, there is no lack of consideration by the Board.

[36] Lastly, the respondent argues the applicants, in advancing their grounds for judicial review, essentially invite the Court to reconsider and reweigh the evidence. That is not the purpose of judicial review and the role of this Court. Here, the Board does not have to accept the truth of the applicants' belief simply because it exists and there is some evidence that supports it; not when there is opposing evidence before it. It submits the Board's decision justifiably falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law and its conclusions supporting the negative disposition are transparent, justifiable and intelligible.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[37] Both parties in this case submit the reasonableness standard should be adopted. I agree. Where the jurisprudence has satisfactorily resolved the standard of review, the analysis need not be repeated (*Dunsmuir* at paragraph 62). The Federal Court of Appeal has determined in *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 36, [2008] FCJ No 399, that the standard of review is reasonableness for the issue of state protection (see also *Mejia* at paragraph 25).

[38] The standard of reasonableness means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47). Here, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (*Newfoundland Nurses'* at paragraph 16). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the Board analyze state protection reasonably?*

[39] The applicants submit that the Board, in assessing state protection, erred in two areas i) focusing on the applicants' failure to seek out protection without regard to the practical significance of that reporting to the real issue of state protection; and ii) failing to reconcile its findings on the adequacy of state protection for Roma in Hungary with significant contrary evidence before the Board. The respondent argues the applicants' arguments rest on a disagreement regarding the weight of the evidence and in response, it submits i) the Board considered the applicants' failure to seek state protection in context; and ii) the Board reasonably assessed the documentary evidence.

[40] In my view, the case at bar is similar to the *Majoros* case. In that case, the applicants were citizens of Hungary who claimed a fear of persecution from the government's right wing movement based on their Roma ethnicity. As the applicants did not seek police protection, the Board concluded that they did not rebut the presumption of state protection. Justice Zinn

overturned the Board's decision because he was of the view that a failure to seek state protection, where such efforts would be futile, does not preclude an application from rebutting the presumption of state protection.

[41] Also, I do not agree with the respondent's reliance on *Hinzman* and *Riczu* because the propositions stated are inaccurate and out of context. In *Hinzman*, the Federal Court of Appeal ruled the United States is a democratic country with a system of checks and balances and the applicant thereby bore a heavy burden to rebut the presumption of adequate state protection there. In *Riczu*, this Court referred to the need of enabling the police to gain protection in the context of assisting the police in identifying who the perpetrator was. Circumstances in those cases differ from the present case.

[42] I will first examine the role of police protection. I agree with the applicants' reliance on case law. In *Majoros* at paragraph 20, Mr. Justice Zinn found in favour of the applicants while indicating the key questions regarding the role of police protection are:

> … how would state protection be more forthcoming if the applicants had followed up with, e.g., the Minorities Ombudsman's Office? Would they be *any* safer or any more protected? Again, instead of treating the applicants' interactions with the police as having evidentiary relevance to the legal issue - *Is state protection available?* - the Board treated the applicants' (in its view) inadequate efforts in relation to the police as a disqualifier for refugee protection. To repeat: that was an error.
>
> [Emphasis in original]

[43] Mr. Justice Zinn outlined at paragraph 10 that the role of seeking the protection of the state in a refugee claim is a *de facto* requirement, not a legal requirement:

> … whether a claimant has sought, or *diligently* sought the state's protection is - properly speaking - not a legal requirement for refugee protection. Rather, it goes to whether the claimant has provided the "clear and convincing" *evidence* that is needed to displace the presumption of state protection. Because of the strong presumption of state protection, concrete, individual attempts to seek the protection of the state are - as evidence - perhaps usually necessary (depending on the circumstances and other evidence) to rebut that presumption. In that sense only, seeking the protection of the state might amount to a *de facto* requirement in many cases.
>
> [Emphasis in original and emphasis added]

[44] In the present case, based on the record, persecution against the Roma people in Hungary is widespread and in most cases indiscriminate. In particular, the Board summarized in its decision the progress of 22 cases in Hungary in which Roma were victims of violent attacks between 2008 and 2009 and only the four suspects were arrested and charged. In light of all the other evidence, one can only conclude probably very little to nothing would be done even if the applicants sought police protection. Therefore, I am of the view that the Board erred in placing the emphasis of its assessment that the applicants did not seek police protection, making its decision unreasonable.

[45] Insofar as the overall assessment of evidence is concerned, I agree with the applicants that the officer made a reviewable error.

[46] The legal requirement in section 96 of the Act is that a claimant be "unable or, by reason of [their] fear, unwilling to avail themself of the protection of [their country of nationality]". Mr. Justice Richard Mosley indicated in *Varela* at paragraph 16 regarding the legal requirement: "[a]ny efforts must have "actually translated into adequate state protection" at the operational

level." (citing *Beharry* at paragraph 9). Mr. Justice Zinn further explained in *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 at paragraph 11, [2012] FCJ No 1545: "[a]ctions, not good intentions, prove that protection from persecution is available." To prove a state is unable to provide adequate protection, assessed at the operational level, one can use whatever evidence is sufficiently convincing, including documentary evidence (*Majoros* at paragraph 12).

[47] Here, although I agree with the respondent's statement of the law that state protection need not rise to the level of perfection pursuant to *Villafranca* or not always be effective pursuant to *Kaleja*, the Board's analysis of the contrary evidence is problematic. In the present case, the Board simply acknowledged the mixed results from the government's efforts and paid only lip-service to the notion of operative effectiveness. In my view, it placed overwhelming reliance on the government's efforts and good intention in arriving at its conclusion that state protection was adequate. Therefore, for that reason too, the Board's decision is unreasonable.

[48] For the reasons above, I would therefore allow this application for judicial review and remit the matter back to a different Board for redetermination.

[49] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the applicants' application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2129-13
STYLE OF CAUSE:	GABOR MOLNAR, VIKTORIA BEATA MOLNAR AND CSILLA MOLNAR v CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	SEPTEMBER 25, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
DATED:	MARCH 4, 2015

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