



Date: 20130207

Docket: IMM-7805-11

Citation: 2013 FC 126

Ottawa, Ontario, February 7, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**JOZSEF MOLNAR,
JOZSEFNE MOLNAR
(a.k.a. JOZSEFNE MARIA MOLNAR),
KATALIN MOLNAR, GEZA MOLNAR,
JOZSEF MOLNAR (a.k.a. JOZSEF MOLNAR)
RAMONA MOLNAR,
ILONA BERKI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The seven applicants are a family of Roma ethnicity from Hungary. They seek judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Protection Board that they are neither Convention refugees nor protected persons. This application is brought under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As a result of the applicants' initial pleadings in this matter their former counsel sought and was granted intervenor status. Prior to the hearing of the application the applicants advised the court

that they would not proceed with any allegations related to the conduct of the former counsel. As a result, the former counsel took no further part in these proceedings.

BACKGROUND:

[3] The principal applicant Mr. Jozsef Molnar was born in Sajószentpéter, Hungary in 1966. His updated Personal Information Form (PIF) lists five brothers and a sister; two brothers are in Toronto, one is deceased, and the rest remain in Sajószentpéter. In 1983, he married Jozsefne Maria Molnar, also a Roma from Sajószentpéter, the daughter of Geza Molnar. They have three children. Two of them are Jozsef Molnar Jr (born in March 1988), and Katalin Molnar (born in February 1996). The third, Maria Molnar (born in March 1984) was, as of the date of the hearing on September 15, 2011, also living in Canada but is not included in this application.

[4] Jozsef Molnar Jr's common law spouse is Ilona Berki (born 1987) in March 2007. Ms Berki's updated PIF lists five brothers and two sisters, all living in Sajószentpéter. The couple have a daughter, Ramona Molnar (born in December 2009), and a handwritten addition to Jozsef's original PIF indicates that a son, Jozsef Roberto Molnar, was born in Toronto in 2011.

[5] Mr. Molnar testified that Roma are segregated into a ghetto in the town of Sajószentpéter and that his family experienced harassment and discrimination, especially from the Magyar Gárda movement, extremist Hungarian nationalists. He says that the Molnars were constantly checked for identification by the police and that they suffered several severe incidents of persecution by members of the Magyar Gárda. Efforts to seek police protection were unsuccessful.

The police told them that they would not pursue his complaint if they didn't know the names of their attackers. Their horses were stolen, their home was fire-bombed and their dog was killed. The parents and daughters came to Canada to seek protection in April 2009. After their departure, Geza Molnar says he was assaulted by the Magyar Gárda who demanded to know where the family had gone. He fled to Budapest where he stayed with family while making arrangements to come to Canada which he did in October 2009. Josef Molnar Jnr, his wife and daughter first sought refuge in the town of Miskolc with the wife's family and then came to Canada in February 2010 after a further assault by the Magyar Gárda.

[6] At the first RPD hearing date, the Board was advised of concerns with the applicants' PIFs due to the manner in which they had been prepared with the assistance of an immigration consultant and translator. As a result, the applicants were unable to swear that the PIFs were complete, true and correct. The hearing was adjourned and the applicants were given an opportunity to prepare revised PIFs and to submit a complaint against the consultant, neither of which they did in the interim. At the second hearing date the applicants elected to proceed with their oral testimony. Following the issuance of the Board's decision they filed a complaint against the legal counsel who assisted them at the RPD hearings. As the allegations against that counsel in this Court have been withdrawn, I see no reason to comment on them in these reasons.

DECISION UNDER REVIEW:

[7] The Board Member noted that the determinative issue was whether the claimants' fears of persecution were objectively reasonable. He found that the claimants had not provided a reasonable

explanation for not updating their PIF narratives and this undermined their credibility. He then analyzed state protection in Hungary. The Member commented on the discriminatory and prejudicial situation faced by Roma in that country.

[8] The Board Member wrote that he could not conclude that there was a failure of state protection for several reasons. The Hungarian police could not have pursued an investigation of an attack described by Mr. Molnar as he told them that he did not know whether he recognized his assailants. When his horses were stolen in 2009, the claimant fled from the country before the police could complete an investigation. The Member noted that the claimant gave what appeared to be two different versions of a story of sexual harassment of his daughter Maria: one version was that he did not report the incident because the police would do nothing, the other was that his daughter reported the incident but the police sent her away again. The Member drew a negative credibility inference. The Member then commented that each of the adult claimants had described other particular incidents which they experienced themselves, but that in relation to the principal claimant, the presumption of adequate state protection in Hungary was not rebutted.

[9] The Board Member preferred the documentary evidence to the claimants' testimony. Counsel submitted material criticizing government efforts to improve the status of Roma, which the Board Member considered warranted, but he did not find that the material demonstrated that state protection was so inadequate that it would have been unreasonable for the claimants' to seek it out. He indicated his concern over the rise of far-right parties in Hungary but balanced this with persuasive evidence that Hungary was making serious efforts to rectify the treatment of minorities and combat police abuses. He cited avenues of recourse such as the Equal Treatment Authority, the

Parliamentary Commissioners, and the Roma Police Officers' Association. He also noted that as a member of the European Union, Hungary was taking steps to implement European standards.

Overall, he was not persuaded that state protection would not have been forthcoming if the claimant had sought it out.

ISSUES:

[10] As a preliminary matter, the respondent asked that the application be dismissed on the grounds that the applicants did not come before the Court with clean hands, had failed to file their application for leave within the time limit and had brought no request for an extension. While it appears clear that the applicants did not exercise due attention to their claims, I am unable to conclude on the record before me that they have deliberately attempted to mislead the Court. Accordingly, I will not dismiss the application on this ground.

[11] There is a credible explanation for the delay (an address error by the Board) an arguable case for leave, evidence of intent to pursue the application and no evidence of prejudice to the respondent. In the circumstances, I grant an extension retrospectively.

[12] As the applicants have advised the Court that they are not proceeding with any allegations related to the conduct of their former counsel, the issues are:

1. Did the Member err by failing to consider the oral testimony of the applicants other than the principal applicant?
2. Did the Member err by making unreasonable findings unsupported by the evidence?
3. Did the Member err by ignoring relevant evidence?

4. Did the Member commit an error of law in applying the wrong test for state protection?

[13] The standard of review for each of these issues has been satisfactorily determined by the previous jurisprudence. For the first three it is reasonableness: *Nour v Canada (MCI)*, 2012 FC 805 at paras 13, 43; *Kazondunge v Canada (MCI)*, 2012 FC 1310 at paras 11-12. For the fourth issue the standard is correctness: *CRPP v Canada (MCI)*, 2012 FC 181 at paras 24-29.

ANALYSIS:

1. Did the Member err by failing to consider the oral testimony of the applicants other than the principal applicant?

[14] The applicants contend that while the Member noted at paragraph 13 of the decision that each adult claimant had described incidents of persecution he did not discuss this testimony. Even if only assessed as a set of dependent claims, the testimony of the other applicants was relevant to the issue of state protection and could not be dismissed without any explanation, they argue.

[15] The respondent notes that the evidence of the three other applicants who testified at the hearing did not fill more than one page each in the transcript and added nothing that required additional analysis.

[16] The test is whether the dependent claims raised different issues from the main claim, not different factual details going to the same issues (*Ramnauth v Canada (MCI)*, 2004 FC 233 at para

9). I do not see the incidents narrated by the three secondary claimants as relating to a distinct issue from that of persecution of Roma. They merely add details to the main issue. These incidents were considered, but taken separately, without Mr. Molnar's main narrative, they did not amount to successful claims. The Board Member did provide express reference to the other applicants' testimony, even if the reference was rather terse.

[17] I believe that the Board Member's use of this testimony was reasonable.

2. Did the Member err by making unreasonable findings unsupported by the evidence?

[18] The applicants argue that it was unreasonable for the Member to find that Mr. Molnar's credibility was undermined over whether the sexual harassment of his daughter Maria was reported or not. He had a longer experience with the authorities and saw no point in reporting the incident; this was not inconsistent with the fact that his daughter did report it.

[19] The respondent argues that a Board is entitled to make such a negative credibility finding and that even if this particular finding was unreasonable, it was not material to the outcome.

(*Aguebor v Canada (MEI)*, [1993] FCJ No 732 at para 4; *Do v Canada (MCI)*, 2002 FCT 464 at para 4).

[20] The Board Member had already accepted that Roma faced discrimination in Hungary, that Mr. Molnar had been attacked in a restaurant in 2009, and that his horse(s) had been stolen in 2009,

and went on to accept the three incidents narrated by Jozsefne, Geza, and Jozsef Jr. While I might not have reached the same conclusion on this point, I agree that it was immaterial to the outcome.

3. Did the Member err by ignoring relevant evidence?

[21] The applicants argue that the Member should have more clearly demonstrated that he had considered their documentary evidence. He relied heavily on the National Documentation Package from the Refugee Protection Division and ignored evidence which corroborated the applicants' testimony, such as the documentation of the injuries to Katalin Molnar and Jozsef Molnar. He failed to explain why he preferred other evidence over their country evidence which ran contrary to his conclusion that Hungary was providing adequate protection to Roma. He noted the evidence contradicting his findings only in a summary way, without specifying exactly what the contradictions were.

[22] The respondent argues that with respect to the documentary evidence of injuries to Jozsef Molnar and Katalin Molnar, the Member had not questioned that these incidents occurred. Regarding the documentation related to state protection, the Magyar Gárda, and the treatment of Hungarian Roma, the Member acknowledged that there were ongoing problems, but it was within his discretion to weigh this evidence. It is trite law that the RPD is presumed to have considered all the evidence unless the contrary is shown. Furthermore, the respondent argues that this finding was also immaterial to the outcome.

[23] An explicit finding on every element of evidence is not required (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 at para 16). It was within the Board's discretion to weigh the factual evidence (*Canada (MCI) v Khosa*, 2009 SCC 12 at para 64). From my reading of the record as a whole, I do not believe that the Member unreasonably ignored any relevant information.

4. *Did the Member commit an error of law in applying the wrong test for state protection?*

[24] It is well established in the jurisprudence that a claimant is not required to seek state protection if it would not reasonably be available: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [Ward] at paras 48-50. The test for determining the adequacy of state protection is given in *Zhuravlev v Canada (MCI)*, [2000] FCJ No 507 at para 31: "the lack of state protection has to be assessed as a matter of state capacity to provide protection rather than from the perspective of whether the local apparatus provided protection in a given circumstance."

[25] The applicants argue that where victims do not have an opportunity to obtain protection from the police, that fact gives sufficient grounds to consider the incapability of state protection (*Myle v Canada (MCI)*, 2006 FC 871 at para 32). The Court has drawn a line between the willingness of a government to respond to violence and actual results (*TMC v Canada (MCI)*, 2004 FC 1670 at para 8). The Panel's view that the applicants did not rebut the presumption of state protection because they failed to approach the authorities was a misunderstanding of the test and a reviewable error.

[26] The respondent argues that the jurisprudence also demonstrates that states are presumed to be able to protect their nationals, bar clear and convincing evidence, and particularly so when they are democratic. A claimant has to prove that he has exhausted all open courses of action (*Flores Carrillo v Canada (MCI)*, 2008 FCA 94 at para 38; *Park v Canada (MCI)*, 2010 FC 1269 at para 51; *Canada (MEI) v Villafranca*, [1992] FCJ No 1189 (QL) at para 7). As well, the Refugee Division may draw conclusions about the availability of state protection from organizations other than the police (*Hinzman v Canada (MCI)*, 2007 FCA 171 at para 57). The test for state protection is not effectiveness but adequacy and the Panel reasonably found that this had not been rebutted (*Samuel v Canada (MCI)*, 2008 FC 762 at para 13; *Cosgun v Canada (MCI)*, 2010 FC 400 at paras 42-43).

[27] In my view, the Board Member both applied the correct test and made a reasonable finding. He addressed the problems of discrimination in Hungary and discussed whether the state was nonetheless willing and able to protect its citizens. He addressed and weighed the Amnesty International evidence to the contrary as well as other contrary evidence. He noted, however, that although the applicants had initially approached the police, they did not attempt to follow up with the police after filing their complaint about the horse theft. He concluded that they had not rebutted the presumption that the police would have furnished adequate protection if this had been sought.

[28] Overall, the Member's factual findings were transparent, intelligible and justified, and they fell within the range of acceptable outcomes. He applied the correct legal test for state protection. I find that he committed no reviewable errors.

[29] No questions were proposed for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7805-11

STYLE OF CAUSE: JOZSEF MOLNAR,
JOZSEFNE MOLNAR
(a.k.a. JOZSEFNE MARIA MOLNAR),
KATALIN MOLNAR, GEZA MOLNAR,
JOZSEF MOLNAR (a.k.a. JOZSEF MOLNAR)
RAMONA MOLNAR,
ILONA BERKI

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 29, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: February 7, 2013

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