

Federal Court



Cour fédérale

Date: 20120921

Docket: IMM-2893-12

Citation: 2012 FC 1107

Ottawa, Ontario, September 21, 2012

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

**JUDIT SEBOK, GLORIA SEBOK
(A.K.A. JUDIT GLORIA EROS),
AND MIKLOS MOLNAR**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants, all Hungarian citizens, wish to remain in Canada as refugees. Judit Sebok (the Female Applicant) is a Roma woman; Molnar Miklos (the Male Applicant) is her non-Roma spouse; and, Judit Gloria Sebok (the Minor Applicant) is their half-Roma daughter.

The basis of the Applicants' claim is their fear of persecution at the hands of the Female Applicant's former common-law spouse (referred to as E) as well as E's relatives and friends.

[2] The Minor Applicant is the biological daughter of the Male Applicant, born while the Female Applicant and E were in a common-law relationship. The Applicants allege that E's discovery of the affair led to beatings of the Female Applicant and threats to the Applicants. The Applicants moved twice to evade E and finally came to Canada in December 2009.

[3] In a decision dated March 2, 2012, a panel of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) concluded that the Applicants were not Convention refugees or persons in need of protection. The Board found that, while the Female Applicant and the Minor Applicant had a nexus to a Convention ground, the Male Applicant did not. Although the Board expressed some concerns about the credibility of the Applicants, state protection was "the determinative issue". Specifically, the Board found that the Applicants had not provided clear and convincing evidence of the state's inability to protect.

[4] In this Application for Judicial Review, the Applicants seek to overturn this decision. For the reasons that follow, I will allow the application.

II. Issues and Standard of Review

[5] The issues raised by this application are as follows:

1. Is the Board's finding that the Male Applicant lacks a nexus to a Convention ground unreasonable?
2. Are the Board's credibility findings unreasonable?
3. Is the Board's state protection finding unreasonable?

[6] The Board's decision is reviewable on a standard of reasonableness. The role of the court on review of a decision on a reasonableness standard is to determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). Further, a reasonable decision will display "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, above at para 47).

III. Nexus

[7] The Board accepts that the Female Applicant and Minor Applicant are Roma and "therefore there is an apparent nexus due to ethnicity". The Board also concludes that there is a nexus due to membership in a particular social group: "women fearing violence at the hands of

their spouse”. However, the Board concludes that the Male Applicant does not have a nexus to a Convention ground, its reasons being as follows:

The male claimant is an ethnic Hungarian citizen fearing an angry Roma husband who according to him wants to exact revenge upon him. Firstly, this does not provide grounds within section 96 for the male claimant. While the male claimant’s affair may provide reasons for the Roma husband to become aggressive with the male claimant . . . the question then is what sort of risk would that place the male claimant. Therefore, his claim is assessed under section 97.

[8] The Applicants point to three ways that the Male Applicant’s claim has a nexus to a Convention ground:

1. He is a spouse or member of a nuclear family, which demonstrates that he is a “member of a social group”.
2. He is the spouse of a victim of domestic abuse, where victims of domestic abuse are members of a social group.
3. He is a member of a social group of non-Roma married to a Roma and is subject to persecution because of his relationship with the Female Applicant.

[9] Under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, one of the requirements is nexus to one of the five Convention grounds: namely race, religion, nationality, political opinion and membership in a particular social group. Although it is a question of mixed fact and law, the determination of nexus is within the Board’s expertise and may be largely fact

driven (*Leon v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1253 at para 13).

[10] It is well established that the family can constitute a social group under s. 96 (*Escorcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 644 at para 39, [2007] FCJ No 891 [*Escorcia*]). In determining whether or not membership in the social group of the family can constitute nexus, the relevant question is whether or not the claimants experience persecution because of their status as a members of the family (*Escorcia*, above at para 39). Although decided many years earlier, *Re Araya*, 1977 CarswellNat 556 (WL Can) (Immigration Appeal Board, Canada) IAD No 76-1126, January 6, 1977 [*Araya*], cited by the Applicant, applies the same test; Ms. Araya experienced persecution in connection with her husband's political activities because of her relationship with her husband (*Araya*, above at paras 16-17). In simple terms, a claimant does not establish nexus merely because he or she is the partner of a person who can establish nexus or a member of the "nuclear family"; there must be more.

[11] In this case, the Male Applicant claims to have suffered harm at the hands of E because of his relationship with the Female Applicant and the Minor Applicant. Although the reasons are not entirely clear, it appears that the Board accepted that E became "aggressive" with the Male Applicant because of his relationship with the Female Applicant. Although this factual finding supports the Male Applicant's nexus, the Board arrived at the opposite conclusion without explanation. In my view, this was an error.

[12] This error would be immaterial if the Board's state protection findings are supportable. However, as discussed below, I conclude that the state protection findings are fatally flawed.

IV. Credibility

[13] As noted above, the Board states clearly and explicitly that the determinative issue is state protection. The Board never clearly makes a finding that it does not believe the story put forward by the Applicants. However, the decision contains credibility findings with respect to specific aspects of the claims, some of which are not sustainable.

[14] The Applicants assert that the Board inappropriately analyzed the credibility of the Female Applicant's allegations of domestic abuse. This argument raises issues addressed by the *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (the Gender Guidelines), as updated and continued. Although these Guidelines are not binding, the Board has the obligation to consider them in appropriate cases.

[15] The Gender Guidelines recognize domestic violence as a circumstance that may lead to a fear of persecution in the refugee context. The Guidelines cite *R v Lavallee*, [1990] 1 SCR 852 at 873, [1990] SCJ No 36 [*Lavallee*] for its discussion of popular mythology and stereotypes about domestic violence that may be erroneously used to evaluate the actions of victims: "Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it." Justice

Wilson stated, as adopted by the Gender Guidelines, that women who experience domestic abuse demonstrate a “reluctance to disclose to others the fact or extent of the beatings” as part of their victimization (*Lavallee*, above at 885). The Gender Guidelines state that the context of social, cultural, traditional and religious norms should be considered. Lastly, there may not always be supporting documentary evidence and claims should be assessed based on the circumstances of the claimant and similarly situated individuals.

[16] With these general principles in mind, I turn to the facts that the Board considered. In its discussion of credibility issues, the Board took into account the lack of supporting medical documentation and that the situation did not reach the point where the Female Applicant required medical attention. In the context of the state protection analysis, the Board stated:

I was not persuaded by the claimant’s evidence that she suffered domestic abuse at the hands of her Roma husband given her testimony when specifically asked if she experienced any physical injuries by her Roma husband which required the police to become involved. She testified that she never allowed that to happen because she did not want her kids to see him beat her.

[17] The Board’s consideration of multiple facts resembling stereotypes of domestic violence without any further scrutiny raises significant concerns. Similarly, the Board’s lack of regard for the recommendations in the Gender Guidelines about documentary evidence and assessment of claims in the context of social and cultural norms is also troubling. Although the Board purports to consider all the evidence in the context of the Gender Guidelines, the Guidelines were not, in my view, applied in any meaningful way (see, for example, *Evans v Canada (Minister of Citizenship and Immigration)*, 2011 FC 444 at para 15, 388 FTR 122).

[18] It may have been open to the Board to disbelieve the Female Applicant's story of abuse; however, it was not reasonable for the Board to say, in essence, that the Female Applicant was never hit hard enough to be a victim of domestic abuse.

[19] The Applicants point to other alleged errors. Given the seriousness of the failure to adequately consider the Gender Guidelines, I need not consider the other possible errors. I conclude that, if the Board has made an overall credibility finding, it is not defensible in respect of the facts and the law.

V. State Protection

[20] Even in the face of flawed credibility findings, a reasonable finding on state protection could result in a decision that, as a whole, is reasonable. In this case, the flawed conclusions on nexus and credibility may not be determinative of this application for judicial review.

Accordingly, I turn to the Board's analysis of state protection.

[21] The decision contains a lengthy discussion of state protection. However, for the most part, the Board's analysis focuses on protection for Hungarian Roma fearing persecution as Roma. This analysis appears to miss the crux of the Applicants' claim for protection as victims of domestic violence in Hungary. To sustain the Board's decision, I must be satisfied of the reasonableness of the Board's conclusion that there is adequate state protection for victims of domestic abuse and not just for Roma.

[22] In discussing the adequacy of state protection for victims of domestic violence, the Board relies heavily on the availability of restraining orders pursuant to a Hungarian law passed in 2009. However, according to documentary evidence cited by the Board itself, the adequacy of this initiative is questionable. The Board acknowledges that NGOs believe that these new provisions do not effectively protect victims or promote accountability of perpetrators. The Board also notes that there are no special training or law enforcement units that can facilitate effective implementation of the legislation. As reflected in the documentary evidence, restraining orders were issued in only 12% of reported domestic violence cases in 2010 and there was no data concerning breaches of these orders. In view of this evidence, the Board's conclusion that the Female Applicant and even the Male Applicant could have obtained meaningful state protection through this new legislation is not well founded.

[23] The Board and, before me, the Respondent rely heavily on the fact that the Applicants did not seek police or state protection. The jurisprudence is clear that claimants are obliged to seek state protection unless the state is "unwilling or unable" to protect them (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 723-724, [1993] SCJ No 74). This is the key legal concept applicable to the case at bar; I need not canvas the "avalanche" of cases that further define and refine the obligation to seek protection.

[24] In this case, the evidence is that the Female Applicant is a Roma woman who was living in a state where police corruption and abuse against Roma occurs, where Roma women experience a high incidence of domestic violence and where government initiatives to improve the situation are not shown, at least on this record and the Board's own reasoning, to be

meaningfully adequate. A Response to Information Request cited by the Board explained a study demonstrating the high incidence of violence against Romani women in Hungary. This study concluded that Roma women reported these incidents to the police less often than non-Roma. Roma women lacked trust in law enforcement officials because of police antagonism toward Roma and failure to provide adequate protection in the past. The Gender Guidelines also indicate that in situations of gender-based persecution, the circumstances of similarly-situated individuals may be relevant in the absence of other evidence, lending further significance to the documentary record.

[25] The Board's conclusion that the Applicants should have sought protection cannot be reasonable, in this particular case, when the totality of the evidence demonstrates that state protection would not have been reasonably forthcoming.

VI. Conclusion

[26] For these reasons, I would allow the application for judicial review. The matter will be referred back for reconsideration by a different panel of the Board.

[27] This case presents many issues of credibility that were not referred to by the Board in its decision. I wish to make it clear that, in this decision, I make no findings with respect to the credibility of the Applicants; that is a task for the new panel of the Board.

[28] In their Notice of Application, in addition to the usual relief, the Applicants ask that the Court declare the Applicants to be Convention refugees or protected persons and that they be granted costs of the application. These remedies were not pursued in the Applicants' written or oral submissions and have not been considered.

[29] Neither party proposed a question for certification. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the matter referred back to the Board for reconsideration by a different panel of the Board; and
2. No question of general importance is certified.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2983-12

STYLE OF CAUSE: JUDIT SEBOK, GLORIA SEBOK (A.K.A. JUDIT GLORIA EROS), AND MIKLOS MOLNAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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