

**Federal Court Reports**

**Molnar v. Canada (Minister of Citizenship and Immigration) (T.D.) [2003] 2 F.C. 339**

Date: 20021016

Docket: IMM-285-02

Neutral citation: 2002 FCT 1081

Ottawa, Ontario, October 16, 2002

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ELEK **MOLNAR**, MARIA SZUCS,

ERIC **MOLNAR**, ELEK **MOLNAR**

Applicants

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

**REASONS FOR ORDER AND ORDER**

[1] This is an application for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the "Board") dated December 21, 2001, wherein the Board determined that the applicants were not Convention refugees.

[2] The applicants, Elek **Molnar** (senior), Elek **Molnar** (junior) and Maria Szucs, are Hungarian citizens of Roma ethnicity. They claim to have a well-founded fear of persecution by reason of this ethnicity.

[3] The applicants applied for refugee status in Canada and were refused by a decision of the Board dated May 27, 1998.

[4] In 1998, the applicants returned to Berekboszovmeny, Hungary, where they had previously lived. Their house was no longer there and the applicants stayed temporarily with friends. They later rented a one-room apartment in a secluded part of town.

[5] After their return, the applicants were subjected to beatings, mistreatment and humiliations at the hands of neo-nazis, nationalists as well as by the police. More specifically, on August 20, 1998 during the celebration of a holiday, policemen beat the principal applicant and his wife. The principal applicant was arrested and detained for thirteen days.

[6] On August 12, 2000, the police raided the applicants' home and attacked them with billy clubs. This incident caused the female applicant to go into labour. The following day with the help of a midwife, she gave birth to their second son.

[7] In November 2000, while the principal applicant was looking for a new home for his family, two motorcyclists followed him non-stop for approximately six hours to the Slovenian border. The following day, the principal applicant returned and these motorcyclists reappeared and beat him.

[8] In December 2000, a census was being conducted in the village in order to determine the total population of the village and its ethnic composition. The applicants refrained from registering at the mayor's office for fear of the possible consequences of such a census.

[9] When the applicants failed to register with the authorities, the police forcibly took them to the station. The principal applicant was detained for six days and beaten.

[10] The applicants left Hungary on December 30, 2000. However, once in Canada, they were sent back because they lacked documentation.

[11] When they returned to Hungary, the applicants hid in pastures and stables for three months.

[12] On April 14, 2001, the applicants succeeded in travelling to Canada where they claimed refugee status.

[13] At the hearing, the principal applicant was asked whether he had ever sought redress and protection from the police. He responded that after the border incident, he made a verbal complaint to the police, but that they refused to get involved. According to him, the police laughed and said that if he was murdered, then his family could come and complain.

[14] The principal applicant was also asked why he did not consult a lawyer or seek the assistance of Roma organizations. He replied that such options would have been useless since the police in Hungary are the authority.

[15] Based on the applicants' testimony, the Board concluded that even if it accepted their allegations of persecution by the local police and nationalists, it did not believe that they had adequately sought redress and protection by the police.

[16] The Board also held that the applicants had not sought redress from human rights organizations. It pointed out that documentary evidence indicated that substantial progress had been made since the late 1980's in education, employment, protection, human rights by the government of Hungary as well as by non government organizations with respect to the Roma.

[17] As a result, the Board found that the applicants were not Convention refugees because they had not adequately sought redress and protection by the police, and because they had failed to seek assistance from Roma self-governments, legal aid offices and many other organizations.

#### ANALYSIS

[18] The respondent submits that the Federal Court of Appeal in *Kadenko v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 1876, has imposed a heavy burden on the applicant to demonstrate that all courses of action have been exhausted before claiming the protection of another state. In that case, the court held at para. 3 that the refusal of certain police officers to provide protection, does not indicate that the state is incapable of protecting its citizens:

Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so.

[19] In my opinion, the present case can be distinguished from *Kadenko, supra*. In *Kadenko, supra*, the applicants complained to the police twice but were unable to receive assistance. However, in the case at bar, the police not only refused to protect the applicants, but were also the perpetrators of the acts of violence. According to the testimony of the principal applicant, the police beat the applicants on three separate occasions. On the first occasion, the police beat the principal applicant and his wife, and then arrested and detained him for thirteen days. On the second occasion, the police raided the applicants' home and attacked them with billy clubs, causing the pregnant wife to haemorrhage, and almost lose her child. On the third occasion, the police detained the principal applicant at the police station for six days and beat him.

[20] It is clearly unreasonable to have expected the applicant to seek additional protection from the police when it is the police that was responsible for the acts of violence.

[21] Considering that the police could not provide assistance to the applicant, should the applicants have sought redress through other sources?

[22] In its decision, the Board identified numerous agencies and organizations that were enacted by the government of Hungary in order for the Roma to vindicate their rights. It highlighted the fact that legal aid had been successful in many cases of discrimination against Roma. As such, there were several avenues of redress and assistance available to the applicants, and it was incumbent upon them to seek assistance from these organizations.

[23] In my opinion, the Board erred in imposing on the applicants the burden of seeking redress from agencies other than the police.

[24] The purpose of the police is to protect the citizens. If they refuse or are unwilling to act, this Court has indicated that there is no obligation on an individual to seek counselling, legal advice, or assistance from human rights agencies.

[25] In *Cuffy v. M.C.I.*, [1996] F.C.J. no. 1316, McKewown J. stated at para. 11:

The applicant in the case before me had gone to the police on several occasions as stated by the Board and they had not provided assistance to her. She has no obligation to use her own resources nor is an offer of counselling what state protection requires.

[26] Similarly, in *Risak v. M.E.I.*, [1994] F.C.J. no. 1581, Dubé J. held at para. 11 :

Thus, in the case at bar, the question is whether or not it was objectively reasonable to expect the applicant to have further sought the protection from the army and the police in Israel after having been so brutally rebuffed by the very authorities from whom citizens expect protection. There is nothing in our jurisprudence to the effect that in such situations the applicant has the further burden of seeking assistance from human rights organizations or ultimately, to launch an action in court against the government.

[27] Therefore, as held by Lemieux J., "Canadian jurisprudence has repeatedly stated that there is no further burden on an applicant to seek redress from human rights organizations." (*Balough v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1080, at para. 44).

[28] Furthermore, in my view, it is important to draw a distinction between acts of discrimination and acts that are criminal in nature. The organizations highlighted by the Board have been successful in reducing discrimination against the Roma. However, the purpose of these organizations is not to provide protection from crime. This is the role of the police. In *N.K. v. Canada (Solicitor General)*, [1995] F.C.J. no. 889, I stated at para. 44 and 45:

Counsel for the respondent argued that in situations where the police refused to do their duty the individual should go to a higher tribunal or approach a different organization, such as the Human Rights Commission.

I cannot accept such a suggestion. The issue here is not merely discriminatory acts, which could be the subject of a complaint to a Human Rights Commission. Some of the acts alleged are criminal in nature (sexual and other forms of assault) and so are not within the jurisdiction of a Human Rights Commission.

[29] In the case at bar, the acts committed against the applicants were not merely discriminatory, but also criminal. They were threatened, detained, and beaten. Most of these acts were committed by the police, the authority that is supposed to provide protection. The Board, by concentrating on the existence of human rights agencies and legal aid, failed to address the real issue of protection from criminal acts.

[30] In these circumstances, where protection from crime is at issue, it is questionable whether redress could have been obtained by seeking assistance from human rights organizations. The only authority that could have provided assistance is the police. In my view, once the applicants sought assistance from the police and they refused, there was no obligation on them to seek redress through other sources.

[31] The question of whether the applicants have satisfied their burden relates to the broader issue of whether the state of Hungary is capable of protecting its citizens, and more particularly, the Roma. The principle concerning state protection was established by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. In that case, the Court held that the capability of a state to protect its citizens is simply an assumption which can be defeated where the claimants provide clear and convincing evidence that the state cannot protect them. LaForest J. indicated how this evidence might be advanced. He stated at para. 50:

[...] For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. [...] [My emphasis].

[32] This is exactly what the applicants did in the present case. Based on the *Ward, supra*, decision, I can only conclude that the applicants have provided sufficient evidence to demonstrate that state protection was not available.

[33] As to the willingness of the state to address the situation of the Roma in Hungary, I recognize that there was substantive evidence before the Board to show that the Hungarian government had taken measures to address this issue. However, this cannot equate with adequate state protection (*Balough, supra*). As stated by Gibson J.:

Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework. [Emphasis mine].

*Elcock v. Canada (Minister of Citizenship and Immigration)*, (1999) 175 F.T.R. 116 at 121.

[34] In the present case, the documentary evidence found in the regional binder index of documents deposited by the Refugee Hearing Officer clearly indicates that despite efforts by the state, police protection of the Roma is inadequate. This evidence demonstrates that Roma live in fear of both the police and the judicial process in Hungary, as they are the victims of police violence and a judicial process that supports and even encourages violence against them.

[35] According to a document entitled "Racism, racial discrimination, xenophobia and all forms of racial discrimination," hostility towards the Roma is virtually systemic in the Hungarian police force. The Roma believe that they are systemically targeted by the police, as exhibited by the high number of cases of off-duty police officers harassing them. Furthermore, Roma victims are rarely able to obtain adequate remedies for such abuses. The 1997 statistics concerning "official crimes" (i.e. crimes committed by public officials) indicate that approximately three percent of cases brought against police actually led to convictions. In the few cases where police officers were convicted, the penalties were usually fines, probation or suspended sentences, and the police officers generally remained on the force.

[36] The regional index binder also contains the U.S. Department of State Country Report on Human Rights Practices for 2000, which addresses the ineffective legal protection of the Roma in Hungary. According to this document, the Roma are the most common victims of police abuse. The Roma also receive less than equal treatment in the judicial process, where they are kept in pre-trial detention more often and for longer periods of time than non-Roma. This document highlights the fact that the Council of Europe's Commission against Racism and Intolerance Report for 2000 found that the legal protection of Roma is ineffective and that regulations banning discrimination are insufficiently implemented. The Amnesty International Report 2001 also indicates that this same commission held that severe problems of racism and intolerance exist in Hungary, and that the incidence of discrimination towards the Roma continue in all fields of life, especially with the police.

[37] The plight of the Roma in Hungary has led my colleague Muldoon J. to conclude that "When it comes to protecting Roma from the serious assaults and persecution shown here, Hungary appears to have suffered a break-down of State civilization". (*Elemer v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 648, at para. 3). This is equally true in the present case.

[38] For these reasons, this application for judicial review is allowed. The Board's decision is set aside and the matter is sent back for redetermination in accordance with these reasons.

### **ORDER**

**THIS COURT ORDERS THAT** the application for judicial review is allowed. The Board's decision is set aside and the matter is sent back for redetermination in accordance with these reasons.

"Danièle Tremblay-Lamer"

J.F.C.C.

**FEDERAL COURT OF CANADA**

**TRIAL DIVISION**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-285-02

**STYLE OF CAUSE:** Elek Molnar

Maria Szucs

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Elek Molnar

Applicant(s)

and

The Minister of Citizenship and Immigration

Respondent

**PLACE OF HEARING:** Montreal

**DATE OF HEARING:** October 2, 2002

**REASONS FOR ORDER AND ORDER:**

THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

**DATED:** October 16, 2002

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