

Federal Court



Cour fédérale

Date: 20141201

Docket: IMM-3972-13

Citation: 2014 FC 1155

Ottawa, Ontario, December 1, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

JOZSEF SZTOJKA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) of the May 24, 2013 decision (the Decision) of J.M. McCabe, a Member (the Member) of the Immigration Division of the Immigration and Refugee Board, wherein the Member determined that Jozsef Sztojka (the Applicant) is inadmissible on grounds of serious criminality pursuant to paragraph 36(1)(c) of the *IRPA*.

[2] The allegation against the Applicant that underlies the Decision is that he sexually assaulted a minor. Though the Applicant raised a number of issues in his Memorandum of Fact and Law, his counsel advised at the hearing of this application that he was pursuing only one: that the Member erred in rejecting the Applicant's assertion that the sexual assault allegation against him was fabricated. This argument is based mainly on three allegations: (i) the psychological problems of the alleged victim; (ii) antagonism against the Applicant by the mother of the alleged victim; and (iii) antagonism against the Applicant by the police.

[3] For the reasons provided below, I do not accept the Applicant's arguments and I dismiss the present Application.

II. Facts

[4] The Applicant is a 72-year-old citizen of Hungary of Roma ethnicity. He came to Canada with his common-law spouse in December 2011, and sought refugee protection on the basis of alleged persecution due to his Roma ethnicity.

[5] In 2009, the home of a Roma family, neighbours of the Applicant in Dabas, Hungary, was set on fire by a Molotov cocktail. The father and his five-year-old son were shot multiple times and killed when they fled the burning house. The Applicant alleges that, despite abundant evidence of murder, the Dabas police concluded that the father and his son had died of smoke inhalation.

[6] The alleged antagonism against the Applicant by the Dabas police arose when his spouse, Lidia Horvath, began publicly demanding that the matter be properly investigated and the assailants brought to justice.

[7] The Applicant alleges that there was a subsequent plot to kidnap and kill Ms. Horvath and another plot to set fire to the Applicant's house. Shortly thereafter, the Applicant's house was indeed destroyed by fire. The Applicant alleges that firefighters did not intervene. The Applicant and his wife were later accused of setting the fire themselves, and charged with fraud and arson. The trial on those charges was ongoing when the Applicant and Ms. Horvath fled Hungary, citing concerns that they would not receive a fair trial as well as increasing threats and mistreatment from the Dabas police.

[8] The allegation of sexual assault against the Applicant is based on a complaint filed in October 2011, by Tamaya Chekosh who is the mother of the alleged victim, Tamaya Lazar, who was then nine years old. The complaint detailed allegations by the daughter that the Applicant touched her sexually. A warrant for the Applicant's arrest was later issued by the Dabas police.

[9] Based on the oral representations of the Applicant's counsel, it is not disputed that the alleged offence can be a basis for a finding of inadmissibility on grounds of serious criminality per paragraph 36(1)(c) of the *IRPA*.

III. Decision

[10] The Member concluded that the Applicant is inadmissible on grounds of serious criminality. In so concluding, the Member considered: (i) the complaint filed with the Dabas police; (ii) the testimony of Ms. Horvath and her nephew Robert Horvath concerning the alleged victim's psychological problems; (iii) the psychologist's report of the alleged victim; (iv) a letter written by the mother of the alleged victim withdrawing her complaint; and (v) the warrant for the Applicant's arrest.

[11] In his oral reasons, the Member mentioned among other things that the "state of relations between the police and judiciary in Dabas and [the Applicant]" were not directly relevant to the matter to be decided (Decision, at p. 7). The Member dismissed the Applicant's submission that the Member should not give weight to the information from the Dabas police because counsel had not offered a "compelling basis for this proposal" (Decision, at p. 7).

[12] The Member noted that the complaint was signed by the alleged victim's mother and filed with the Dabas police. The Member also noted that the complaint form contained a caution as to the consequences of making false accusations.

[13] With regard to the alleged antagonism against the Applicant (and Ms. Horvath) by the alleged victim's mother, the Member noted that the only evidence was unsubstantiated speculation.

[14] Regarding the letter allegedly written by the mother of the alleged victim withdrawing the complaint, the Member stated that he did not “give full weight” to the document as it “is not notarized and [it] is virtually impossible to verify the author”. The Member decided that greater weight should be given to the initial complaint because it mentions specific events related to the alleged sexual assault. The Member also noted that the withdrawal letter did not indicate that the alleged assault did not occur.

[15] The Member considered the psychologist’s report on the alleged victim and concluded that the psychologist expressed no opinion that the alleged victim should not be believed or that there is any psychological problem that would cause one to question her statements.

[16] The Member also gave full weight to the police warrant “for the purpose of establishing that certain acts are an offence where they are committed”.

IV. Issue

[17] The only issue is whether the Member erred in finding that the evidence supports a conclusion that there are reasonable grounds to believe that the Applicant sexually assaulted Tamaya Lazar.

V. Analysis

A. *Standard of review*

[18] Whether the Member erred in assessing the evidence is a question of fact and mixed fact and law to be reviewed on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 53 [*Dunsmuir*]). As mentioned in *Dunsmuir*, at paragraph 47:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

B. *Did the Member err in assessing the evidence*

[19] In deciding whether a foreign national is inadmissible on grounds of serious criminality, the Member must determine whether there are “reasonable grounds to believe” that an act was committed that falls within the scope of section 36 of the *IRPA*. In *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*], at para 114, the Supreme Court of Canada held that “reasonable grounds to believe will exist where there is an objective basis for the belief which is based on compelling and credible information”. The standard of “reasonable grounds to believe” requires more than a mere suspicion, but not as much as a balance of probabilities (*Mugesera*, at para 114).

[20] Oral argument by the Applicant's counsel focussed on the allegation of sexual assault itself, including the following issues:

- i. The psychologist's report concerning the alleged victim;
- ii. Testimony as to possible motivations for fabricating the allegations, including alleged psychological problems of the victim and the alleged antagonism of the victim's mother, and;
- iii. The letter in the name of the victim's mother withdrawing the allegation of the sexual assault.

[21] In my view, the Applicant was well advised not to pursue his argument based on antagonism of the police in Dabas against the Applicant. The Member considered the issue to be peripheral (he said "not directly relevant") and I find this conclusion reasonable. The starting point of the sexual assault allegation is a complaint made to the police, not by the police. There is no evidence that the police coerced the filing of the complaint and any argument to that effect would be no more than speculation. In any case, this matter turns on the credibility of the sexual assault allegation, not the credibility of the police. I am satisfied that the Member was aware of this fact and gave it reasonable consideration.

[22] Having reviewed the psychologist's report, I conclude that it was reasonable for the Member to conclude that it does not support the theory that the alleged victim fabricated her story, or that she has psychological problems that could have led her to do so.

[23] The Member considered but was not satisfied by the testimony from witnesses who know the alleged victim concerning her alleged psychological problems. In my view, it was reasonable for the Member to conclude that "[n]one of these character traits are borne out in the [psychologist's] report".

[24] It was also reasonable for the Member to conclude that there was no evidence, other than speculation, to support the allegation that the victim's mother fabricated the sexual assault allegation out of antagonism against the Applicant and Ms. Horvath.

[25] Further, it was reasonable for the Member to doubt the authenticity of the letter from the victim's mother withdrawing her complaint, and also to note that it did not indicate that the alleged sexual assault had not happened. I am also of the view that it was reasonable for the Member to consider the relevance of the caution on the complaint form against making false allegations.

[26] In a recent decision, my colleague Justice Henry Brown set aside another decision of the Immigration Division which concerned the Applicant's spouse, Ms. Horvath, and which had ruled her likewise inadmissible (*Horvath v Canada (Citizenship and Immigration)*, IMM-6254-13, October 21, 2014). In my view, there are reasons to distinguish that case from the present

case and not to follow its result. Firstly, the asserted inadmissibility in Ms. Horvath's case concerned charges alleging fraud and arson for which her trial in Hungary is ongoing. The allegation against the Applicant in the present case is distinct from these charges. The impugned decision concerning Ms. Horvath refused to consider the background of antagonism by the Dabas police, even though the inadmissibility asserted against her was based on allegations that relied on evidence gathered by the Dabas police. In her case, the impugned decision opined that the evidence submitted in her defence should have been objected to.

[27] By contrast, the basis of the inadmissibility of the Applicant in the present case is a complaint made by a third party. Moreover, even though the Member indicated that the state of relations between the Applicant and the authorities was not "directly" relevant, he did comment on those allegations, stating that "[t]he nature of the relationship between the Dabas police and the Dabas authorities and you are such that it should raise serious doubts as to the reliability of any allegation made by them". In my view, it was reasonable for the Member to focus on the specific allegations before him.

VI. Conclusion

[28] In my opinion, the application for judicial review should be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is dismissed.
2. There is no serious question of general importance to be certified.

"George R. Locke"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3972-13

STYLE OF CAUSE: JOZSEF SZTOJKA v THE MINISTER OF CITIZENSHIP
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