Federal Court  Cour fédérale

Date: 20160115

Docket: IMM-547-15

Citation: 2016 FC 49

Ottawa, Ontario, January 15, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

MARINKO MRDA
DRAGANA TINTOR

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Mr. Marinko Mrda and Ms. Dragana Tintor, have brought an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision dated January 6, 2015, by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, which determined that they were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the IRPA.

[2] For the reasons that follow, the application is allowed.

I. Background

[3] Mr. Mrda and Ms. Tintor are both citizens of Croatia and Serbia and ethnic Serbs of the Christian Orthodox faith. Mr. Mrda was born in Croatia and became a citizen of Serbia on August 14, 2003. Ms. Tintor was born in Croatia and became a Serbian citizen on May 6, 2004. The Applicants met in August 2008 and were married October 19, 2012. They arrived in Canada on October 30, 2012 and claimed refugee status on November 1, 2012. The Applicants made the following allegations in support of their refugee claims.

A. *Principal Claimant*

[4] The principal claimant, Mr. Mrda, spent his early childhood years in Croatia. In school, he was the subject of constant insults, harassment and physical attacks by Croatian students and teachers because of his Serb ethnicity and Orthodox religion. He was told that Serbs should be banished from Croatia. His teachers expressed hatred towards him and tried their best to make him leave or to have him expelled. When he complained to the school principal, he was accused of lying and would receive detention. When his parents approached the school principal, they were kicked out of the office.

[5] In 1998, Mr. Mrda left Croatia to finish high school in Serbia. However, he continued to be harassed in school due to his distinct Croatian accent and nationality. The teachers asked him questions and then would say that they didn't understand a word he was saying. They

would also tell him to sit down or he would receive a failing grade, and they would kick him out of class for no reason. When he complained to the principal, he was told that he would be expelled from the school and the dormitory where he was living. His parents wrote to the school and the response was: "If you don't like it, take your kid out of the school and go back to Croatia".

[6] Upon finishing high school, Mr. Mrda moved to a larger city in Serbia to attend university, hoping that his situation would improve. There, he faced the same kind of humiliation and harassment at the hands of fellow students and teachers because he came from Croatia. They would tell him he should go back to where he came from, that they didn't need Croatians in Serbia, that they should all be killed and that they were all "Ustashas", a derogatory term. One of his professors, who was also Vice-Dean, vowed that he would not let Mr. Mrda finish university anywhere so long as he lived. When Mr. Mrda complained to the Dean of his faculty, the Dean dismissed his complaint. After three (3) years of attempting to pass his first year curriculum, he finally dropped out and returned to Croatia.

[7] In Croatia, Mr. Mrda attempted to secure a job but was constantly turned away or fired due to his Serb ethnicity. After about a year of trying to find a job he decided to work on his family farm, but he continued to face discrimination. In 2009, Mr. Mrda and his father were selling produce in the marketplace when a man insulted their ethnicity and kicked over their stall and produce. Mr. Mrda and his father called the police, but when the officer arrived he refused to assist them because of their Serb ethnicity. Mr. Mrda and his father went to the regional police station to file a complaint. They were told by the police that if they did not go

away, a report would be written to the effect that they assaulted a police officer, and they would end up in jail.

[8] Mr. Mrda also faced harassment from his neighbour, who insulted his family, threatened to attack them and even tried to forcefully enter their home. When Mr. Mrda's father called the police, they accused him of provoking the neighbour. When he asked how he had provoked the neighbour, the police responded that it was his Serbian presence in Croatia that was insulting. According to Mr. Mrda, this same neighbour fatally hit his brother with a car in 1993. When it was reported, they were told that the file would not show that the motive was based on nationalistic grounds. After Mr. Mrda's brother died, this same neighbour continued to insult and harass his family and went as far as telling Mr. Mrda and his wife that when their child was born, "he will end up the same way like his uncle because he will not allow Serbs to breed in Croatia".

[9] In January 2012, while Mr. Mrda and Ms. Tintor were celebrating the Orthodox Christmas with Mr. Mrda's family in Croatia, their house was attacked by a group of Croatians. The group banged on their door, yelled insults and threatened to set fire to their house to kill them. The family did not call the police in light of their prior experiences of police inaction and their belief that it would only impassion their attackers.

[10] Mr. Mrda was also harassed whenever he went to Serbia to visit Ms. Tintor. When he crossed the border, he would be asked what an "Ustasha" was doing in Serbia. He would be detained for several hours and be provoked on the basis of his ethnicity. As his car had Croatian

license plates, it was vandalized in Serbia. When the couple contacted the police to lodge a complaint, they were accused of provoking the vandals by driving in Serbia with Croatian license plates. The police did not write a report. Upon returning to Croatia, he would also be harassed at the border crossing by Croatians who asked why he was coming back as they were doing their best to kill and expel people like him.

B. *Secondary Claimant*

[11] The secondary claimant, Ms. Tintor, was born in Croatia but moved to Serbia when she was eleven (11) years old due to the war. In Serbia, Ms. Tintor was humiliated and discriminated against in school due to her Croatian nationality. Her family was told that they did not belong with Serbs and that they should go back to where they came from. Ms. Tintor and her sister were harassed in school by teachers and students because they spoke Croatian. People would call them "Ustashas" and they would swear at them and humiliate them. At the age of sixteen (16), Ms. Tintor developed a serious illness as a result of all the stress. Ms. Tintor and her family returned to Croatia in 2003, but they were subjected to humiliation, insults and threats by their Croatian neighbours and their home was vandalized.

[12] In 2006, in an attempt to escape the problems she was having in Croatia, Ms. Tintor returned to Serbia where she found employment. However, she continued to face discrimination in her workplace. She was exposed to insults and humiliation because of the way she spoke. She was told that "Tudjman should have killed [them] all, that [they] didn't belong to Serbia and to go where [they] came from." In 2009, she began to suffer anxiety attacks which she attributed to living in such a stressful situation.

[13] In 2010, Ms. Tintor began her university studies in Serbia but quickly fell victim to harassment by students and professors alike. One of her professors publicly insulted her in class saying that she belonged in Croatia and accused her of making "Serbia dirty". Her professors refused to let her take her exams or to mark them, ensuring that she was unable to pass her courses. The professors would tell her that she must learn how to speak first and then come back and take her exams. When she complained to the Dean of her university, he warned her that if she filed a complaint and it became public, then he would make sure that she would be unable to enroll in any university in Serbia.

[14] Ms. Tintor also faced harassment whenever she returned to Croatia, including the evening of January 2012, when she was celebrating the Orthodox Christmas with Mr. Mrda's family and their home was attacked.

II. Decision under review

[15] The RPD found the Applicants' testimony to be clear, straightforward and devoid of any major inconsistencies, contradictions, exaggerations or embellishments. It found both Applicants to be credible.

[16] The RPD noted that the Applicants were claiming refugee protection against both Serbia and Croatia and proceeded to first analyse the claims against Serbia. In regards to Mr. Mrda, the RPD found that he was subjected to discriminatory treatment in Serbia but determined that the discrimination he experienced did not amount to persecution. The RPD noted that while the mistreatment started when he went to Serbia to pursue his studies and it eventually led him to

return to Croatia in 2002, Mr. Mrda nonetheless became a citizen of Serbia in August 2003. The RPD noted Mr. Mrda's explanation that he chose to perform his military service in Serbia, rather than Croatia, because he was afraid to serve under the same Croat officers who had murdered Serbs during the war. The RPD also noted that after completing his military service, Mr. Mrda returned to Croatia but started commuting between Croatia and Serbia, where Ms. Tintor lived. Although his frequent return trips were not without incidents of humiliation and insults, and that the response from the police authorities when trying to denounce some of the incidents was non-existent, Mr. Mrda continued to commute between the two (2) countries.

[17] The RPD applied two tests: first, it examined whether "taken individually, are the incidents of such a serious character that it could lead the panel to conclude that they are persecutory in nature"; and second, it inquired whether, "taken individually, do these incidents nevertheless produce "in the mind of [Mr. Mrda] a feeling of apprehension and insecurity as regards his future existence"". The RPD responded in the negative to both questions.

[18] Regarding Ms. Tintor, the RPD concluded that she was subjected to discriminatory treatment while in Serbia and that some of the incidents led to serious restrictions on her access to normally available educational facilities, which amounted to persecution. In its decision, the RPD noted that the incidents of discrimination started in school when Ms. Tintor first arrived in Serbia. The RPD also noted the following: 1) the appearance of an illness in 2000 due to the stress of the treatment she received; 2) the return of Ms. Tintor and her family to Croatia in 2003 in the hope that the discrimination and harassment would cease; 3) the harassment Ms. Tintor encountered in her workplace when she returned to Serbia in November 2006; 4) the

anxiety attacks which began in 2009 resulting from the stress caused by her situation; 5) the discrimination Ms. Tintor experienced at university when her professors refused to let her take exams and the Dean refused to follow up on her complaint; and, 6) her unpleasant experiences with the Serbian authorities when crossing the border to visit her future spouse in Croatia.

[19] The RPD concluded that taken individually, the incidents of discrimination suffered by Ms. Tintor were of such a serious character that they were persecutory in nature. Specifically, it found that the treatment suffered by Ms. Tintor while at university and more importantly, the response by the university authorities, led to serious restrictions on her access to normally available educational facilities.

[20] However, the RPD decided that while Ms. Tintor faced persecution, she had not rebutted the presumption of state protection. The RPD stated that there must be clear and convincing evidence of the state's inability or unwillingness to protect in order to rebut the presumption of state protection. After reviewing all of the mechanisms that protect ethnic minorities in Serbia, the RPD concluded that state protection was available to Ms. Tintor. Specifically, the RPD outlined the positive efforts that Serbia had undertaken to address discrimination in the country, including its legal framework to protect minorities, its constitutional prohibition on discrimination and the appeal mechanism to the Constitutional Court that is available for cases involving human rights violations. The RPD also stated that while the police in Serbia are not always effective, there are effective mechanisms to investigate police conduct and to punish police corruption and impunity. The RPD concluded that although the protection Serbia offers

is not perfect, the evidence showed that the state is willing to protect members of ethnic minorities and its protection is adequate.

[21] The RPD did not examine the Applicants' situation in Croatia given its negative finding in relation to Mr. Mrda's alleged persecution, and its finding that state protection exists in Serbia.

III. Issues

[22] This matter raises the following issues:

a) Is the application for judicial review moot?

b) Did the RPD commit a reviewable error in its determination that Mr. Mrda did not suffer persecution in Serbia?

c) Did the RPD commit a reviewable error in its determination that Ms. Tintor had failed to rebut the presumption of state protection?

IV. Relevant legislation

[23] The following provisions of the IRPA are applicable in these proceedings:

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée

religion, nationality, membership in a particular social group or political opinion,

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 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

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait 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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

V. Standard of review

[24] The applicable standard of review is reasonableness. It is well established that the question of whether discrimination amounts to persecution, and the question of whether there is adequate state protection, are questions of mixed law and fact which attract the standard of review of reasonableness *(Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796 (QL) at para 3 (FCA), (1993) 182 NR 398; *Flores Campos v Canada (Citizenship and Immigration)*, 2010 FC 842 at para 23, 193 ACWS (3d) 956).

[25] Given that the standard of review is reasonableness, the Court must determine whether the RPD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). As long as the process and outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

VI. Analysis

A. *Is the application for judicial review moot?*

[26] By letter dated September 14, 2015, the Respondent wrote to the Court to advise that after the hearing, it had been informed that the Applicants had been removed from Canada on March 16, 2015. The Respondent indicated to the Court that it was of the opinion that the application for judicial review was now moot since the Applicants were back in Serbia. The Respondent sought a direction from the Court as to whether further submissions from the parties regarding the issue of mootness, including the possible certification of a question, would be appropriate. As a result, a direction was issued by the Court on September 15, 2015, and the parties were invited to provide additional written representations on the issue of mootness. The Respondent's additional representations were filed with the Court on September 18, 2015, and the Applicants' additional representations in reply were filed on September 23, 2015.

[27] The Respondent argues that the application for judicial review meets the test for mootness as set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231. The Respondent submits that there is no longer any adversarial context given that the Applicants have returned to their country of origin and cannot meet the statutory requirements for refugee protection under section 96 of IRPA, namely they are not outside their country of origin. Moreover, they also do not meet the statutory requirements for protection under section 97 of IRPA, as they are not found in Canada. The Respondent analogizes the situation to that of a judicial review of a pre-removal risk assessment when an applicant has already been deported: in *Solis Perez v Canada (Citizenship and Immigration)*, 2009 FCA 171, [2009] FCJ No 691 (QL), the Federal Court of Appeal established that such a judicial review is moot. Moreover, the Respondent argues that the Court should not exercise its residual discretion due to Parliament's intent, as expressed in the Designated Country of Origin [DCO] regime, and the practical, statutory and operational impediments to a redetermination by the RPD. Parliament specifically removed an automatic stay of removal for DCO claimants during the judicial review of their RPD decision. Furthermore, the Respondent argues that while this Court can dismiss or allow the application for judicial review, it does not have the requisite jurisdiction to order that the matter be returned to the RPD for a new determination since the Applicants no longer meet the essential requirements of sections 96 and 97 of IRPA to claim refugee status. It also adds that there are practical impediments inherent in allowing a review of the RPD's decision where the Applicants are found outside of Canada; in particular, they would still require an Authorization to Return to Canada in order to attend their new hearing. The Respondent also requests that the Court certify its proposed question should it decide to order redetermination of the matter. Finally, in the alternative, it proposes that the Court not

pronounce itself on this application for judicial review until a decision is rendered by the Federal Court of Appeal in the appeal of *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 345, [2015] FCJ No 328 (QL) [*Molnar*].

[28] The Applicants request that the Court's decision on this judicial review be suspended until the Federal Court of Appeal renders its decision in *Molnar*, as it will address the precise question of whether an applicant's presence in their country of origin renders the judicial review of an RPD decision moot. The Applicants note that they did not leave Canada voluntarily but were returned to Croatia by Canada Border Services Agency.

[29] Upon reading the correspondence of the parties, there appears to be some confusion as to where the Applicants were sent pursuant to the removal order. For the purposes of my decision, the country to which the Applicants were removed is not important as they were citizens of both Croatia and Serbia. I do note however that Croatia is on the DCO list, but not Serbia.

[30] The Federal Court of Appeal is scheduled to hear the appeal of the *Molnar* decision on January 21, 2016. While I have considered the parties' request that I reserve judgment in this matter pending a determination by the Federal Court of Appeal in the *Molnar* matter, I have decided to issue my decision nonetheless. Although the appeal is scheduled to proceed, there is no certainty that the appeal will take place on that specific day, as the parties could discontinue the appeal or seek an adjournment should the circumstances permit. In addition, there is no definite timeframe within which the Federal Court of Appeal's decision will be rendered. There is also no guarantee that the matter will not be brought before the Supreme Court of Canada, in

which case an additional delay would result. Given that this application for judicial review has already been heard, it would not be in the interest of the parties that I delay my decision on the matter as they are entitled to finality.

[31] On the issue of mootness, for the reasons enunciated by Justice Fothergill in the *Molnar* decision, I find that the application for judicial review is not moot. Like my colleague, I am not prepared to find that the rights conferred on the Applicants by the IRPA are lost simply because the Applicants were involuntarily removed from Canada following a removal order executed by the Respondent, in accordance with its statutory obligations under the IRPA. It is important to note that the Applicants were successful in their application for leave to seek judicial review. The fact that their judicial review application could be defeated simply by reason of the enforcement of a removal order would render their rights illusory. It also opens the door to removal orders being enforced with the intent of depriving this Court of the opportunity to exercise its supervisory jurisdiction.

[32] Moreover, I do not consider the fact that the Applicants did not seek a stay of their removal order to be of significance in this case. The Applicants may have decided not to seek a stay for several reasons including the belief that they could not meet the tripartite test for obtaining a stay of removal. This should not be determinative of this Court's jurisdiction over the matter.

[33] It is also my view that this case can be distinguished from *Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026, [2015] FCJ No 1048 (QL), which found that an application

for judicial review was moot because there was no evidence that the applicant had made any attempts to continue his litigation before or after his removal. In the case at hand, the Applicants have made efforts to continue their litigation by appearing at the hearing through counsel notwithstanding their removal from Canada in March 2015.

[34] Even if the matter is moot, the arguments raised by the Respondent have not persuaded me that I should refrain from exercising my discretion to decide the matter on its merits. Leaving aside whether or not there is an adversarial context because of the wording of sections 96 and 97 of the IRPA, which is addressed in the *Molnar* decision, I find that the preservation of judicial resources supports the exercise of discretion. Both parties have made submissions and the application for judicial review has already been heard by the Court; therefore, judicial economy favours a final decision being rendered in the matter. Finally, I do not share the Respondent's view that the absence of control over the Applicants should be a deterrent to the exercise of my discretion because they are outside of this Court's jurisdiction. Litigation often involves parties who are not within the jurisdiction of the Court and it is not considered a bar to the exercise of one's rights.

B. *Did the RPD commit a reviewable error in its determination that Mr. Mrda did not suffer persecution in Serbia?*

[35] The Applicants argue that the RPD erred when it concluded that the discrimination faced by Mr. Mrda did not amount to persecution. They submit that the numerous problems experienced by Mr. Mrda while in Serbia caused his return to Croatia. In support of their argument, the Applicants refer to the following problems: 1) the humiliation experienced in

high school at the hands of students and teachers because of their Croatian citizenship and accent; 2) the discrimination and humiliation experienced while attending university, eventually causing Mr. Mrda to drop out of school; and, 3) the insults and harassment experienced when Mr. Mrda visited his spouse in Serbia and the damage caused to his car because of the Croatian plates and the lack of response from the police.

[36] The Applicants further submit that Mr. Mrda's inability to pursue his university education due to the harassment and discrimination he faced amounts to a consequence of a "substantially prejudicial nature" and in particular, a serious restriction on Mr. Mrda's access to a normally available educational facility. They rely on section 54 of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3.

[37] The Applicants argue that the RPD erred in failing to examine the totality of Mr. Mrda's experiences and in failing to consider the cumulative nature of the conduct directed against him.

[38] The Respondent argues that the RPD presented a detailed analysis in its reasons to find that the discrimination did not amount to persecution: it found that the discriminatory incidents did not lead to consequences of a prejudicial nature, serious restrictions on his right to earn his livelihood, his right to practice his religion or his access to normally available educational facilities. The Respondent also relies on the RPD's finding that the incidents did not produce a

feeling of apprehension and insecurity as regards his future existence, despite their relatively frequent occurrences and the feelings of frustration and helplessness that they may have provoked in the mind of Mr. Mrda. The Respondent submits that Mr. Mrda's narrative did not establish that he faced systemic discrimination to the point of risking being persecuted in Serbia.

[39] In its decision, the RPD found that Mr. Mrda was subjected to discriminatory treatment in Serbia, but that the said treatment did not amount to a well-founded fear of persecution. In coming to this conclusion, the RPD stated the following:

> [34] The panel is fully conscious of the fact that the line between persecution and discrimination is "difficult to establish". The first question that arises is as follows: taken individually, are the incidents of such a serious character that it could lead the panel to conclude that they are persecutory in nature? The panel does not believe so.
>
> [35] Analyzing each and every one of these incidents described, the panel does not find them to be of a particularly serious character; none of them "lead to consequences of a prejudicial nature [for the principal claimant], serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities".
>
> [36] Given the above conclusion, the subsidiary question that must be answered is as follows: taken individually, do these incidents nevertheless produce, "in the mind of [the principal claimant] a feeling of apprehension and insecurity as regards his future existence."
>
> [37] In spite of their relatively frequent occurrence and the feelings of frustration and helplessness they may provoke in the principal claimant's mind, taking into consideration all the circumstances of the claim, the panel is of the opinion that there is no evidence to indicate that the incidents have produced, in the mind of the principal claimant, a feeling of apprehension and insecurity as regards his future existence in Serbia that would give rise to a reasonable fear of persecution. [My emphasis; footnotes omitted.]

[40] The Federal Court of Appeal and this Court have made it clear that even if individual acts of discrimination taken individually do not amount to persecution, there is a requirement to consider the cumulative nature of that conduct (*Canada (Citizenship and Immigration) v Munderere*, 2008 FCA 84 at paras 41, 42, 291 DLR (4th) 68; *Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840 at paras 5, 6, [2005] FCJ No 1050 (QL)). In my view, the RPD's failure to consider the acts of harassment suffered by Mr. Mrda cumulatively constitutes a reviewable error.

[41] I note that the decision indicates that the RPD considered "all the circumstances". I also note that in its conclusion, the RPD states that Mr. Mrda has failed to establish on a balance of probabilities that the acts of discrimination, "considered individually or cumulatively" amount to persecution. In my view, however, it is insufficient to simply state that the acts of discrimination have been considered cumulatively. An analysis of the cumulative effect is necessary and in this particular case, no such analysis was done.

[42] I am also of the view that the RPD improperly ignored evidence in reaching its conclusion that the acts of discrimination suffered by Mr. Mrda did not amount to persecution. If the RPD did consider this evidence, its conclusion is inconsistent with that reached in relation to the Applicant, Ms. Tintor.

[43] The RPD found that the incidents in relation to Ms. Tintor were of such a serious character to conclude that they were persecutory in nature. In particular, the RPD found that the

events in relation to her university studies led to serious restrictions on her access to normally available educational facilities. The RPD stated the following in support of its decision:

> [44] As stated above, during her first year of her university studies […] in September 2010, in addition to being subjected as before to discrimination, the claimant became the target of public humiliation at the hands, not of her fellow students, but of an individual in a position of authority namely her professor. Her attempts at seeking redress with higher university authorities proved useless. In fact, they actually led to the utterance of threats by the dean of her faculty that would have actually resulted in seriously restricting her ability to pursue her university education had they been carried out.
>
> [45] The second year, her ability to pursue her studies was indeed seriously restricted once her professors stopped looking altogether at her exam papers. These actions would result in preventing the claimant from passing courses and actually obtaining her university degree.

[44] Despite determining that this set of facts amounted to a denial of access to normally available educational facilities for Ms. Tintor, the RPD found exactly the opposite in the case of Mr. Mrda, even though the evidence demonstrates that he experienced the same type of problems in all of his educational institutions, including university and that he was also refused assistance and threatened by educational authorities.

[45] Specifically, Mr. Mrda testified :

> BY PRESIDING MEMBER (to person concerned)
>
> Q. And also … where you also faced difficulties with the … the university of … authorities … I mean, the professors?
>
> A. Yes.

Q. Now, with the … the professors, did you ever think of going to the … to the university authorities? I mean, either the … the dean or the directorate to … to … to complain and to try to rectify … to get the situation rectified?

A. Yes, I did.

[…]

Q. Okay. Now, so what … who did you go to at the university in the … in your complaint?

A. Regarding professors, I went to see the dean.

[…]

Q. Okay. So you go to the dean. Was there … what … what happens? Excuse me. What happens with the dean?

A. They wouldn't believe that the professor is, you know, humiliating me and trying to fail me at the exam.

Q. Okay.

A. 'Cause these are their colleagues that they work with together. […] professors have a total autonomy. If they say the students fail, the dean is not going to ask them, "Why did the students fail?" Their decision is final and no one is questioning them why or for what reason.

Q. Okay.

A. So that was my words against their words.

Q. Okay.

A. I was not believed.

Q. One second. Was there a formal complaint mechanism or you just yourself went and spoke and had a … had a conversation with the dean about the situation?

A. You could file a formal complaint, but first step would be that you have to go and speak to the dean because through him you are filing this. And if he deems that there is no reason, that it is not necessary to do so, you cannot do it.

Q. So if I understand correctly, just to make sure that I … that it … that it's … that's the case, you had … the process was you go

> to the dean first, you make a verbal complaint, you state the situation. If the dean is of the opinion that there is some … that it … that it's … there's some foundation to this complaint, then you can make a written complaint which is processed through him. Correct?
>
> […]
>
> "That's correct."
>
> […]
>
> Q. Good. Okay. So after how many months do you decide to drop out?
>
> A. After three years. It was the year 2002. I could not finish that academic year so I dropped out the university. Then I went back to Croatia.
>
> […]
>
> A. And if I can add to this what I've said, sir, I was attending for all those three years the first year of studies because I couldn't pass the exam, sir. And Professor […] himself told me, "As long as I am alive, you would never, ever finish university anywhere."
>
> […]
>
> A. […] he was also the vice dean for the curricular and education there.
>
> (Certified Tribunal Record [CTR] at 349-351)

[46] Although the RPD indicates that it considered Mr. Mrda's testimonial evidence, the substance of the RPD's decision is almost entirely based on the narrative that Mr. Mrda presented in his Personal Information Form [PIF], and neglects to include the extensive details or new evidence that was provided at the hearing.

[47] Given that the RPD found Mr. Mrda to be credible, I find that the RPD ignored important and relevant evidence. In the absence of any analysis addressing the evidence in question and

explaining the differential in the claimants' treatment, I find the RPD's decision to be unreasonable and not within the range of possible acceptable outcomes which are defensible in respect of the facts and the law as enunciated by the Supreme Court of Canada in *Dunsmuir* at para 47.

C. *Did the RPD commit a reviewable error in its determination that Ms. Tintor had failed to rebut the presumption of state protection?*

[48] The RPD found that while Ms. Tintor faced persecution, she had not rebutted the presumption of state protection. The RPD grounded its decision on the positive efforts undertaken by the government of Serbia to address discrimination and its finding that no evidence had been adduced to establish that Serbia is unable or unwilling to protect its citizens.

[49] The RPD correctly stated that there is a presumption that a state is capable of protecting its citizens and that the presumption can only be rebutted by clear and convincing evidence that state protection is inadequate or non-existent (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724, 726, 103 DLR (4th) 1; *The Minister of Citizenship and Immigration v Flores Carillo,* 2008 FCA 94 at para 30, [2008] 4 FCR 636; *Ferko v Canada (Citizenship and Immigration)*, 2012 FC 1284 at para 43, [2014] 2 FCR 22).

[50] I find however, upon review of the RPD's analysis on the issue of state protection, that the RPD committed a reviewable error in its application of the test of state protection by failing to relate the general country conditions to the particular context of Ms. Tintor.

[51] The RPD's analysis focuses entirely on the evidence of general country conditions in Serbia derived from a variety of country profile reports. In the course of its review, the RPD acknowledges a number of findings which are difficult to reconcile with its conclusion that the state protection in Serbia is adequate. For example, the RPD acknowledges that "the relationship between Serbia and the Serb minority in Croatia remains problematic" (para 50), that "[h]ostilities against minorities is pervasive and discrimination against members of these minorities, which include Serb minorities coming from Croatia, is considered to be one of the most serious human rights problems facing Serbia today" (para 51) and that "it is undeniable that a climate of hostility toward members of national and ethnic minorities remain in existence" (para 52). The RPD nevertheless discounts these observations on the basis that the Serbian government has taken steps to rectify these problems through the adoption of a legal and constitutional framework to protect its citizens from discrimination. Such steps, according to the RPD, include an appeal mechanism to the Constitutional Court for cases involving human rights violations and the mandate given to a number of institutions, such as the Office of the National Ombudsman and the Commissioner for Equality to protect and promote human rights and prevent and denounce abuses.

[52] With respect to the judiciary, the RPD notes that its decisions are "generally respected by the government". While this may be so, the RPD's finding does not address, in my view, those situations where the discrimination originates from individuals who are not part of the government apparatus.

[53] Furthermore, the RPD's reliance on the Office of the National Ombudsman and the Commissioner for Equality does not take into consideration the distinction between the adoption of a legal framework, its implementation and its enforcement. In its *Serbia Country Report on Human Rights Practices for 2013* [USDSCR], the US Department of State states that the Ombudsman considers that the "government often lacked the will to implement relevant laws" and that the "lack of an organized, nonpoliticized, and noncorrupt public administration created significant problems for citizens" (CTR at 24). The same USDSCR also states that while the Constitution prohibits discrimination and the government has made efforts to enforce these prohibitions effectively, discrimination continued against ethnic minorities (CTR at 24). It further indicates that numerous observers noted the existence of a climate of hostility toward members of national and ethnic minorities, including Croats, and that the Commissioner for Equality had reported that citizens had extremely strong negative opinions of Croats, among other minorities (CTR at 28).

[54] Recognizing that the police in Serbia are not always effective and that corruption and impunity are issues of concern, the RPD nonetheless finds that there are effective mechanisms to investigate police conduct and to punish police corruption and impunity. With the exception of stating that minorities are represented within the national force and less so at the local levels, the RPD does not elaborate on those mechanisms.

[55] The RPD's decision also fails to consider the evidence of the Applicants on the issue of state protection. Mr. Mrda testified on the problems he experienced when crossing the Croatian-Serbian border:

> [t]he Croatians would tell me, "Oh you go now to Serbia, so you better never come back." And when I would come back, on Croatian side they would tell me, "Oh, why are you now coming back? We were doing our best to kill you and to expel you from Croatia and now you are coming back here."
>
> And on the Serbian side of the border, they would tell me, "Why are you going? What are you going to look for in Serbia? You are a Croatian." And although I am Orthodox by the way how I speak, they would view us as Catholics. They would tell us, "You are Ustaša." (CTR at 361)

[56] In her PIF narrative, Ms. Tintor also stated having experienced unpleasant situations at the Serbian border because Mr. Mrda was from Croatia.

[57] In addition, Mr. Mrda provided evidence that while in Serbia visiting his wife, during the 2008-2009 New Year's celebrations, his vehicle was scratched and its tires were punctured. Mr. Mrda testified that the police were called and their response was:

> "Oh, what did you expect? You came with a Croatian licence … those Croatian plates here to Serbia, so … so what were you expecting?" They even didn't write a report or anything. And that was the last time that I would come there by car. From there on, I was coming by bus. (CTR at 362)

Ms. Tintor also referred to that incident in her PIF narrative.

[58] When questioned by the RPD about existing organizations in Serbia to help minimize discrimination, such as the Office of the National Ombudsman and the Commissioner for Equality, Mr. Mrda testified that:

> Even then there were organizations in Serbia. They did exist. They were either very slow in their actions or simply they didn't do anything. Now, regarding the future, they would do their best that

> the rights of the citizens are implemented, appreciated. But for how long in the future?
>
> […]
>
> And now if I have to go back to Serbia now, I will have to wait, let's say, four or five years for these issues to be resolved. And I'm saying how would I be able to live there in that period of time under the same pressure? (CTR at 367)

[59] He added:

> There always have been promises and there are promises. And never have they been fulfilled. My opinion is they are scams saying promises that something will be achieved." (CTR at 369)

[60] The RPD also asked Ms. Tintor for her thoughts on this situation. She responded:

> The situation in Serbia is that these are only words. These are only promises. This is only talk. And as my husband was saying, they're words. They are just political games. […] the reality is different. The situation is different than what …what those words are.
>
> […]
>
> … it was something that I was experience, whenever you would go somewhere and try to, you know, complain or say something, they would always ask the same question. "Okay, so why are you get here? What … what … why are you here? Why are you here?"
>
> […]
>
> "Croatia is your country. Why don't you go back there?" And after all, there was always the response, "We are not forcing you to stay here, right?" (CTR at 370-371)

[61] While I acknowledge the fact that the RPD did not need to refer to all the evidence (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708), the assessment of state protection should have been done not only in the context of the country conditions in general but also with respect to

the steps taken by Ms. Tintor to seek the protection of the state and her interaction with the authorities in the circumstances of this case (*Garcia Aldana v Canada (Citizenship and Immigration)*, 2007 FC 423 at para 12, [2007] FCJ No 573 (QL)). The RPD's failure to consider all the relevant factors, in my view, constitutes a reviewable error which requires that the decision of the RPD be set aside.

VII. Certified question

[62] In its submissions to the Court on September 18, 2015, the Respondent proposed that in the event this Court order that this matter be returned to the RPD for a redetermination, the following question should be certified:

> Pursuant to ss. 18.1(3) of the Federal Courts Act and ss. 96 and 97 of the Immigration and Refugee Protection Act, does the Federal Court have jurisdiction to order a Refugee Protection Division claim be redetermined where the applicant has been removed from Canada and is not outside their country of nationality?

[63] The Applicants did not take a position on the certified question proposed by the Respondent.

[64] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9, [2014] 4 FCR 290, the Federal Court of Appeal confirmed the test for certifying questions:

> It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v.*

> *Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (F.C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145. [2010] 1 F.C.R. 129 at paragraphs 28, 29, and 32).

[65] My decision to allow the application for judicial review and to have the matter be returned to the RPD for redetermination by a different member is based on my conclusion that the application is not moot despite the Applicants' involuntary removal to their country of origin. In my view, the pending appeal in *Molnar* involves a question that, if resolved by the Federal Court of Appeal, will have a direct effect on this case. Given that one of the issues in this application for judicial review is the subject of a pending appeal, I will certify the same question as was certified in *Molnar*:

> Is an application for judicial review of a decision of the Refugee Protection Division moot where the individual who is the subject of the decision has involuntarily returned to his or her country of nationality, and, if yes, should the Court normally refuse to exercise its discretion to hear it?

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The decision is set aside and the matter is remitted for redetermination by a different panel member of the Refugee Protection Division of the Immigration and Refugee Board;

2. The following question is certified:

> Is an application for judicial review of a decision of the Refugee Protection Division moot where the individual who is the subject of the decision has involuntarily returned to his or her country of nationality, and, if yes, should the Court normally refuse to exercise its discretion to hear it?

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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