Date: 20080415

Docket: IMM-3840-07

Citation: 2008 FC 484

Montréal, Quebec, April 15, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

Zoltan DARABOS
Anita ZDENKO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 7, 2007, wherein the Board determines that the applicants are not Convention refugees according to section 96 of the Act, nor "persons in need of protection" according to section 97 of the Act.

Facts

[2] Common-law spouses and citizens of Hungary, the applicants claim protection as "Convention refugees". They both allege facing a risk to life and a risk of cruel and unusual treatment or punishment or danger of torture for reasons of membership in a particular social group.

[3] The female applicant alleges to be a member of the Roma ethnic group unable as such to find steady employment. As a result of his relationship with the female applicant, at the beginning of 1998, the male applicant had trouble obtaining employment and was forced to travel abroad in search of work.

[4] When he returned to Hungary on March 11, 2000, the male applicant was arrested and detained for an alleged rape that occurred while he was out the country. This allegation was published in a newspaper article. While in detention, the authorities allegedly came to the applicants' home and seized their property. The female applicant was also arrested later. The male applicant was released in June 2000, and the charges were ultimately dropped.

[5] The applicants left Hungary on June 15, 2001 and filed their refugee application the same day, upon arrival in Canada.

The Board's decision

[6] In its decision of August 7, 2007, the Board concluded that the applicants have not provided credible or trustworthy evidence that they were "Convention refugees" or "persons in need of protection".

[7] The Board indicates not being convinced that the female claimant is actually a member of the Roma ethnic group. The male applicant's Personal Information Form (PIF) indicates that his spouse maintained close ties to Roma people, but there is no indication that she is a member of that group. Further, at a previous hearing before the Board, the female applicant states that she and the members of her family are not a Roma, and that any prior allusions to her being Roma were encouraged by an interpreter. Finally, the Minister's exhibits include a declaration from the female's parents to a visa officer at the Embassy in Budapest indicating that neither they nor she are members of a minority group. Faced with inconsistencies and vague explanations given by the female applicant to indicate that she is a Roma, the Board concludes that there is no basis for a credible fear should she return to Hungary.

[8] With respect to the male applicant's allegation of fear to be arrested and detained, the Board indicates that Hungary is a democracy with a functioning judiciary. And while the applicant may have been arrested and detained on charges of rape, still he was eventually released and the charges dropped. The applicant indicates being told at the time of his release to be careful due to his spouse being a Roma, a fact the Board does not accept. Further, the applicant waited one year before leaving Hungary with his own passport, and by his own admission had no problems with

authorities. There is also no evidence of any arrest warrant or charges pending against the male applicant

ISSUES

[9] This application raises the following issues:

i) Did the Board's use of transcripts from a previous hearing raise an apprehension of bias?

ii) Did the Board err by failing to consider the applicant's personal experiences involving his unjustified detention?

STANDARD OF REVIEW

[10] The first issue raised by this application relates to a fairness issue imputing partiality on the part of the Board. Questions of procedural fairness do not undergo a standard of review analysis and thus are not subject to the standard of review. "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions" (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28 (QL), at para. 100).

[11] The second issue raised by the applicants suggests that the Board did not take into consideration the male applicant's detention in Hungary or how the administration of justice was carried out. In essence, this issue is factual and involves the Board's appreciation of the applicant's evidence.

[12] In light of the recent decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and prior jurisprudence, the Court finds the applicable standard of review to be that of reasonableness for the second issue. According to this standard, the analysis of the Board's decision will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] […] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

ANALYSIS

[13] With respect to the argument regarding partiality and the use of prior transcripts, the Court finds at the outset that transcripts of previous hearings are generally admissible before a newly constituted Board (*Badal v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 311, [2003] F.C.J. No. 440 (QL), at para. 16; *Diamanama v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 121 (QL), at para. 10).

[14] Further, the Court has read the transcripts and it notes that while the applicants were represented by counsel at the hearing, the issue of bias stemming from the use of prior hearing transcripts was not raised. In fact, the applicants' counsel accepted the introduction of these transcripts into evidence at the hearing. As held in *Chamo v. Canada (Mininster of Citizenship and Immigration)*, 2005 FC 1219, [2005] F.C.J. No. 1482 (QL), at para. 9: "[t]he failure to raise a reasonable apprehension of bias at the earliest possibility forecloses the possibility of raising such an argument subsequently before this Court" (*see Singh v. Canada (Minister of Citizenship and*

Immigration), 2005 FC 35, [2005] F.C.J. No. 59 (QL), at para. 18; *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1367, [2003] F.C.J. No. 1741 (QL), at para. 15).

[15] The male applicant asserts in his affidavit that his previous counsel opposed the inclusion of the transcripts of the prior hearing in the present proceedings and in support of this contention cites correspondence from counsel in the tribunal record. The Court having read these letters finds however that counsel appears to have challenged the merits of a *de novo* hearing, rather than the inclusion of prior transcripts as such.

[16] However, even if the applicants were permitted to now raise the allegation of bias, their arguments would still fail since they did not meet the test as described in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, that is to ask "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?" The burden was therefore for them to establish how the hostile relationship that existed between the previous Board member and the applicants' prior counsel, as allegedly demonstrated in the transcript of the prior hearing, raises a reasonable apprehension of bias on the part of the second Board. They unfortunately failed their burden to meet the test on this issue.

[17] Further, the use of transcripts of prior hearings to make adverse credibility findings does not violate principles of fairness where the claimants are provided, as they were here, with an

opportunity to be heard and make representations (*Badal, supra*, at paras. 17-19). Indeed in *Khalof v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 444 (QL), at para. 15.

[18] In the present case, the applicants were given an opportunity to make representations and to provide explanations regarding prior testimony. Thus, the Court cannot find a breach of procedural fairness.

[19] The Court disagrees with the male applicant's contention that the Board did not give sufficient attention to his unjustified detention and misunderstood the administration of justice in Hungary. On the contrary, the Board's decision reveals that it did indeed consider the male applicant's detention, but retained that he was subsequently released free with no outstanding charges against him.

[20] Further, the male applicant admitted that he did not experience any problems with the Hungarian authorities in the year before he left Hungary. When assessing s. 96 and s. 97 claims, the focus of an analysis is forward looking, dealing with the present or prospective risk to the claimant (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99, [2007] F.C.J. No. 336 (QL), at para. 15; *Kathirgamu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1222, [2007] F.C.J. No. 1614 (QL), at para.16; *Natynczyk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 914, [2004] F.C.J. No. 1118 (QL), at para 71). Here the male applicant did not provide convincing evidence that he would be targeted in the future.

[21] Moreover, while the male applicant indicated that he was told upon his release to be careful, this comment was based on his common-law spouse's allegation that she was Roma, which the Board did not find credible.

[22] In the present case, the Court finds there is nothing unreasonable in the Board's decision. On the contrary, it took into consideration the detention and subsequent release of the male applicant and concluded that there is no sufficient ground to grant a refugee status or to find the male applicant to be a person in need of protection. The decision took into account the proof but, unfortunately for the applicants, the result is not the one they expected. It is not for this Court to substitute its opinion for the Board's findings and conclusions. The Board is a specialized tribunal with the advantage of having heard and seen the applicants when assessing their credibility.

[23] The Board's decision deserves respect and should stand since the claimants failed with their burden to demonstrate that it is unreasonable. Therefore, the application will be dismissed.

JUDGMENT

FOR THE FOREGOING REASONS THE COURT dismisses the application for judicial review.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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