

Date: 20080507

Docket: IMM-603-07

Citation: 2008 FC 581

Halifax, Nova Scotia, May 7, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

OSZKAR HOLMIK

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Oszkar Holmik, applies for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated December 21, 2006, which determined that the Applicant was not a convention refugee nor a person in need of protection.

[2] The Applicant is a citizen of Hungary. He alleged that members of an organized crime element would make unauthorized deposits into his bank account and compel him to withdraw money in a laundering and extortion scheme. He further alleged he was threatened to ensure compliance with the illegal scheme.

[3] This is the second occasion where the Board heard the Applicant. The first board decision was set aside and is cited as *Holmik v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1745 (*Holmik 2004*). Justice Mactavish found the credibility findings by the board were patently unreasonable since the board failed to consider both the Applicant's explanation of events and the documentary evidence which supported his claim. In addition, Justice Mactavish found that that the board did not consider country condition evidence that was contrary to its finding that adequate state protection was available to victims of organized crime in Hungary.

[4] In the case at bar, the Board concluded that some of the Applicant's evidence was not credible and that the Applicant did not rebut the presumption of state protection.

ISSUES

[5] The issues arising in this application are:

1. Was the Board's December 21, 2006 decision contrary to the decision in *Holmik 2004*?
2. Did the Board err in making its credibility determinations and findings of fact?
3. Did the Board misapply the test for state protection?

4. Was the Applicant denied natural justice by the Board's failing to confront him with alleged contradictions at the hearing?

STANDARD OF REVIEW

[6] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, held that there are only two standards of review: correctness and reasonableness (*Dunsmuir* at para. 34). The Court stated that questions of fact, discretion and policy as well as questions where legal issues cannot be easily separated from factual issues will attract the standard of reasonableness. Legal issues will attract a standard of correctness although some legal issues may attract the more deferential standard of reasonableness.

[7] The Supreme Court of Canada also said determination of the standard of review involves two steps (*Dunsmuir* at para 62). First, courts must ascertain whether the jurisprudence has already determined in a satisfactory manner the deference to be accorded to a particular category of question. If the degree of deference has not been determined by prior jurisprudence, then the reviewing Court must proceed to analyze the relevant factors to identify the proper standard of review.

[8] Questions of fact or credibility within the expertise of the Board have been previously determined to be reviewed on a deferential standard (*Aguebor v. Canada (Minister of Citizenship and Immigration)* (1993), 160 N.R. 315 (F.C.A.)). Recently, Justice de Montigny in *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para. 15, in applying *Dunsmuir*,

above, held that the standard of review for credibility determinations and findings of fact is reasonableness.

[9] The question of state protection involves an application of a legal test to set of facts (*Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 at para. 11). This is a question of mixed fact and law and in accordance with *Dunsmuir*, above, at para. 51, attracts the standard of review of reasonableness (*Lozada v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 397 at para. 17; *Eler v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 334 at para. 6).

[10] Finally, the duty to comply with the rules of natural justice and procedural fairness applies to all administrative bodies acting under statutory authority. A breach of the rules of natural justice or procedural fairness will result in the decision being set aside (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at paras 34, 74, 75).

ANALYSIS

Was the Board's December 21, 2006 decision contrary to the decision in Holmik 2004?

[11] In the preceding judicial review, Justice Mactavish stated (*Holmik 2004*, above, at para. 26):

It was open to the Board not to accept Mr. Holmik's testimony regarding what the Board itself identified as a central issue in the case. However, before coming to the conclusion that his story was implausible, the Board had an obligation to at least consider Mr. Holmik's explanation, and to refer to the documentary evidence that supported his claim. If the Board chose to reject this evidence, it was, in my view, incumbent upon it to explain why it did so. Having failed to do so, I find the Board's finding with respect to the implausibility of Mr. Holmik's money laundering was patently unreasonable.

[12] Justice Mactavish did not make a finding of credibility or fact. She stated it was open to the board to reject the Applicant's testimony as long as it considered his explanation and any other relevant evidence, as well as explain its reasons for rejection. Justice Mactavish also found that the board's state protection analysis was flawed because it ignored documentary evidence which contradicted its findings.

[13] In setting aside the previous board's decision, Justice Mactavish identified the flaws in the earlier board's decision and sent the matter back for re-determination. The decision of this Board will stand or fall on its treatment of relevant evidence and its analysis.

Did the Board err in its credibility determinations and findings of fact?

[14] The Board found that some of the Applicant's evidence was not credible. He had reported that his vehicle was forced off the road and later that day his vehicle was broken into by thieves. In arriving at its findings of fact, the Board considered the Applicant's explanations and the evidence which he submitted to support his claim. The Board considered:

- The Applicant's inconsistent evidence between the 2002 and 2006 hearings concerning details of being forced off the road.
- The inconsistent evidence about his activities after his claim of being forced off the road.
- The Applicant's failure to give a straightforward description of how the thieves fled the scene.
- The fact that the police report signed by the Applicant made no mention of his being forced off the road.

The Board concluded that the Applicant had not had his vehicle forced off the road nor was the Applicant present when his car was broken into.

[15] The Board also considered whether the Applicant reported his problems concerning unauthorized deposits made by organized crime to his bank account to the police. The Board had considered the Applicant's evidence and the contents of the police report, which contained no reference to unauthorized deposits or organized crime, and concluded that the Applicant had not reported his problems with organized crime to the police. The Board also considered the Applicant's reasons why he had no records to support his story. The Board reasoned that had deposits, whether authorized or unauthorized, occurred, bank records would have existed and would have been obtainable. The Board concluded that there were no unauthorized deposits made into the Applicant's account. The significance of this finding is that the Applicant was not a victim of organized crime as he had described.

[16] I am satisfied that the Board considered the Applicant's evidence and gave adequate reasons for not accepting that evidence. Its decision was not unreasonable.

Did the Board misapply the test for state protection?

[17] The Board considered the issue of state protection. The Board acknowledged the documentary evidence which reported that Hungary was vulnerable to money laundering by organized crime. The Board considered evidence about Hungary's attempt to deal with organized crime and corruption and noted the mixed success of those efforts. It concluded that Hungary still had serious problems with organized crime and corruption but it generally operated under a rule of law. Corruption within the police force was being dealt with in a systematic manner and, generally,

the police did not operate with impunity. The Board remarked that while Hungary may not provide perfect protection, it was satisfied that the government was making serious efforts to provide adequate protection.

[18] The Board did not accept the Applicant's explanation that he did not seek the assistance of Hungarian authorities because of the extent of police corruption. The Board concluded that the Applicant had not rebutted the presumption of state protection.

[19] I do not find that the Board ignored evidence of Hungary's problems with organized crime and police corruption. In my view, the Board's decision to reject the Applicant's reason for not pursuing state protection was not unreasonable.

Was the Applicant denied natural justice by the Board's failing to confront him with alleged contradictions at the hearing?

[20] At the start of the hearing the Board member stated:

All right. Now even though I didn't formally identify credibility as a concern and it wasn't a great concern in the earlier hearing, there may always be issues of credibility that come up today that (inaudible) the first panel or the first panel didn't notice them. If I hear anything of that nature I'll undertake to at least identify it for your counsel as best I can.

The Applicant submitted that the Board deprived him of natural justice by failing to identify alleged contradictions or inconsistencies at the hearing.

[21] However, the transcripts reveal that, later in the hearing, the Board member stated:

Thank you. Go ahead counsel. We're still dealing with state protection. There is some credibility concerns but I'll leave those for you to explore -- particularly around --

Counsel: About what?

Presiding member: Just the car. The questions I asked, you heard the questions I put to him.

[22] A review of the transcript shows that the Board asked questions of the Applicant and the Applicant had full opportunity to answer. Further, counsel had the opportunity, following the Board's questioning, to put questions to his client to clarify or expand his evidence.

[23] The Board had stated at the start of the proceeding that issues of credibility may arise. The Applicant was represented by counsel who would understand that the Applicant had the burden of providing evidence to prove his claim for convention refugee status or his need for protection. Counsel would also be well aware that the Board has a duty to assess credibility and make findings of fact. Counsel would also be aware that when the Board questioned the Applicant, credibility and facts may be at issue.

[24] I find that the Board highlighted the areas of concern with the Applicant's claim. Further the Applicant had the benefit of counsel. On review of the evidence, I conclude that there was no breach of natural justice.

CONCLUSION

[25] I find that the Board's findings of credibility and fact are not unreasonable. I further find that the Board did not misapply the test for state protection. Finally, I do not find that any breach of natural justice or procedural fairness occurred. The application does not succeed.

[26] The Applicant has submitted two questions for certification on the issue of state protection. The Respondent is opposed to the application. With leave of the Court, the Respondent made further submissions after the hearing to which the Applicant has responded.

[27] Given that I have found the Board's finding that the Applicant did not have any unauthorized deposits made into his bank account to be not unreasonable, the Applicant was not a victim of organized crime and would not be at risk on return to Hungary. Accordingly, the issue of state protection does not arise. In result, a certification of a question related to state protection would not be dispositive of this matter. I find that no question of general importance arises on the issue of state protection.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Application for judicial review is dismissed.
2. No question of general importance is certified.

"Leonard S. Mandamin"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-603-07

STYLE OF CAUSE: OSZKAR HOLMIK
v.
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 21, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mandamin, J.

DATED: **May 7, 2008**

APPEARANCES:

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