

Federal Court



Cour fédérale

Date: 20110622

Docket: IMM-6704-10

Citation: 2011 FC 751

Toronto, Ontario, June 22, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**LADISLAV LUKACS
ANNA JULIA LUKACS
LADISLAV LUKACS
ROBERT LUKACS
SEBASTIAN LUKACS**

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*, SC 2001, c 27 for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board dated September 21, 2010, wherein the Board determined that the applicants were not Convention refugees or persons in need of protection.

[2] Ladislav Lukacs is a citizen of the Czech Republic and is of Roma ethnicity. His wife, Anna Julia Lukacs, is a citizen of Poland and a permanent resident of the Czech Republic. His three sons are of mixed Roma ethnicity and are all citizens of the Czech Republic.

[3] Ladislav Lukacs alleges he and his family have experienced discrimination and threats due to his ethnicity. He says that they have experienced this treatment at the hands of other citizens, the police, and racist groups such as neo-Nazis and skinheads in the Czech Republic.

The applicants alleged several incidents of persecution:

- (i) In February 2005, Ladislav Lukacs, the son, was stopped by a police officer who took money from him and then issued him a ticket. This incident was reported to the police.
- (ii) In March 2007, Anna Julia Lukacs was accused of stealing at her place of employment and subsequently resigned. She did not report this incident to the police.
- (iii) In October 2005, Ladislav Lukacs, the father, was attacked and punched and kicked by four young men dressed as skinheads when leaving work. He reported this incident to the police.
- (iv) On May 11, 2008, the applicants' home was vandalized with the words "death to Hungarians," which is a reference to gypsies in the Czech Republic, and a swastika drawn on the door.

[4] The applicants' hearing was held in two sessions on two separate days. They were unrepresented during the first hearing but had legal counsel during the second hearing. The principal applicant and his brother, who attended at the hearing and assisted him, have filed

affidavits alleging that they were denied the right to counsel and intimidated by the Board Member during the first hearing.

[5] The determinative issue for the Board in rejecting the applicants' claims was state protection.

Issues

[6] Four issues were raised by the applicants in their memorandum of argument; however on the day prior to the hearing, counsel wrote to the Court advising that the applicants no longer intended to pursue issues 3 and 4 as set out in the memorandum. Counsel also informed the Court that he would seek leave to raise a new issue that had not been previously raised: the failure of the Board to make any determination with respect to Anna Julia Lukacs's country of citizenship, Poland.

[7] The Minister opposed the request for leave to raise this new issue. It was submitted that the applicants had received the Certified Tribunal Record on April 21, 2011, and offered no explanation for raising a new issue one day before the hearing. The respondent's counsel submitted that the respondent would be prejudiced if this new issue were permitted to be raised at this late stage in the proceeding.

[8] The request for leave to raise this new issue was denied. This Court has previously held that new arguments cannot be raised at the hearing if they were not raised in the written memoranda of argument: *Radha v Canada (Minister of Citizenship and Immigration)*, 2003 FC

1040 at paras. 16-18, and *Dunova v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 438, at paras. 18-20. Counsel for the applicants here was also counsel in *Dunova*.

[9] Furthermore, it was stated in the first paragraph of the Decision under attack dated September 21, 2010, that the female applicant was a citizen of Poland and a Permanent Resident of the Czech Republic. It was evident that the Board dealt only with persecution and risk in the Czech Republic. As noted by the respondent, the passages of the transcript upon which the applicants sought to rely in support of the issue they wished to raise were available to them since the filing of the certified tribunal record on April 12, 2011. A timely request for the amendment of the pleading to raise this new issue may have been positively considered; however, a last minute request of this sort will almost invariably result in a denial of leave, as in this case.

[10] As a consequence, the two issues before the Court are as follows:

1. Were the applicants denied the right to counsel at their hearing?
2. Did the Board make capricious findings of fact that the police pursued investigations stemming from the applicants' complaints?

1. Right to Counsel

[11] The applicants submit that the Board breached procedural fairness by refusing to allow the applicants to be represented by the principal applicant's brother, Tibor Lukacs, as counsel before the Board. They submit that this request was denied and that they were pressured into proceeding with the hearing despite the intention to be represented by counsel.

[12] It must be noted that the counsel retained by the applicants to represent them at the hearing, Philip U. Okpala, was not the counsel who represented them on this judicial review application. The record indicates that two days prior to the scheduled hearing, Mr. Okpala's office informed the applicants of the upcoming hearing and that Mr. Okpala would be unable to attend as he was out of the country. He had earlier requested an adjournment, but it was denied.

[13] The applicants attended the hearing with Tibor Lukacs, the brother of the principal applicant. It is asserted that the Member refused to permit Tibor Lukacs to act as the representative of the applicants. The allegations are specifically set out in affidavits from Ladislav Lukacs and Tibor Lukacs, the relevant paragraphs of which are as follows:

My brother Tibor indicated to the Member that he wished to represent us with our consent at our hearing. Tibor is my brother and of course would be representing us for no fee. Between 8:30 a.m. until 10:00 a.m. a pre-hearing conference was held on the issue of whether our hearing would proceed while my former counsel was not present and whether my brother would be allowed to represent me. I noticed that parts of this pre-hearing conference were recorded and in other parts the Member had turned off the recording equipment while continuing the conference. The Member informed my brother that he could sit and watch but was not allowed to speak or even move out of his seat let alone represent me. I felt that the Member was putting a great deal of pressure on me to agree to proceed without counsel and in the end I felt I did not have any choice but to agree because I did not want to appear as if I was trying to hide anything. I believe I was denied the right to counsel because my brother was ready, willing and quite capable of representing me at the hearing.

[From paragraph 5 of the Affidavit of Ladislav Lukacs]

As my brother's former lawyer did not appear at the hearing, I offered to represent my brother. ... I was surprised that the Member did not allow me to represent my brother and his family. Moreover, the Member treated me in a very rude and condescending manner telling me that I could sit and watch but was not allowed to speak or even move out of my seat.

[From paragraph 5 of the Affidavit of Tibor Lukacs]

[14] The affiants were not cross-examined on their affidavits and the Minister tendered no direct evidence to contradict these statements. The Minister submits that the transcript of the hearing simply does not support these assertions. I agree.

[15] I turn first to the assertion that the Member failed to record all of the proceeding. There is nothing in the transcript of the first day of hearing that supports that statement. The dialogue and statements made flow and follow each other as one would expect from a continuous recording. Further, the length of the transcript is not indicative of there being portions of the proceeding not recorded. The transcript of the first day of hearing, July 22, 2010, is 49 pages long. The record indicates that the hearing on that day began at 8:35 a.m. and ended at noon. There was a 30-minute adjournment in order that the applicants could review documents. The transcript of the second day of hearing, August 25, 2010, is 51 ½ pages long. The record indicates that the hearing on that day began at 8:35 a.m. and ended at 11:30 a.m. Given the adjournment on the first day, the transcripts reflect proceedings of approximately equal duration.

[16] I turn next to the allegation that the Member denied the applicants the right to have a representative. The transcript does not support the assertion that Tibor Lukacs offered to represent his brother's family and that the Member refused to permit him to do so. Further, having read the transcript of both hearing days, I find that it fails to disclose any conduct on the part of the Member that could reasonably be described as "rude" or "condescending" in nature, as was sworn by Tibor Lukacs.

[17] The transcript indicates that after Tibor Lukacs identified himself to the Member the Member asked: “And you’re here simply to observe the hearing, is that correct?” To which he responded “Yes.” He was then told the rules regarding the role of an observer, namely that he was to remain silent and observe the proceeding.

[18] Shortly afterwards, the Member noticed Tibor Lukacs nodding his head and said “Sir, I am going to have to ask you to stop nodding your head because – because you’re not a part of the hearing and you know, unless you’re – I mean, I’m going to ask you, are you going to represent them today?” to which he responded “Maybe.” The Member then said “Well, that’s up to you.” It was left to Tibor Lukacs to advise the Member if he wished to assume the role of the applicants’ representative. He did not.

[19] I turn then to the allegation that the Member pressured the applicants to proceed. After some discussion about the absence of counsel and issues about documents, the issue as to whether the applicants were prepared to proceed was addressed, as follows:

MEMBER: Let me ask you this, are you prepared to proceed without counsel?

CLAIMANT: I am ready. I’ve been here for two years, so I’ve been expecting.

MEMBER: So, you wish to proceed without counsel?

CLAIMANT: Without such a counsel or such a lawyer, yes, I can proceed.

Shortly thereafter, the Member again asked the applicants if they wished to proceed without counsel and indicated that if she were to grant an adjournment it would be only for a short time.

MEMBER: ... now I will ask you again if you wish to proceed without counsel.

CLAIMANT: If it is to adjourn, then in that case I would like to adjourn because I don't have the documents, the originals to prove my point here, to prove what I'm going to say.

MEMBER: Well, I'm not adjourning for that reason.

Sir, sir, you were expected to have documents ready today. I cannot adjourn on that basis.

So, my question to you is if I get you all the documents that we have and we take a recess, because those documents that you're talking about would not be ready for the next hearing either unlikely [*sic*]. If we take this recess and you have an opportunity to look at the documents, are you prepared to proceed?

CLAIMANT: For sure.

[20] There is quite simply nothing in the transcript from which it can be reasonably concluded that the applicants would have felt pressured to proceed. There was no denial of the right to a representative or counsel.

2. *Capricious Findings of Fact*

[21] The Board determined that of the four incidents of mistreatment outlined by the applicants, the police investigated three. The Board based this on the son's testimony that he had received a letter concerning the incident from the police which indicated that the police had investigated the matter with no results. He testified that he did not follow-up with this letter. Of the other incidents the Board determined that the applicants either did not report the incidents or did not inquire into the result of the investigations. The applicants submit that the Board erred by finding that the police had "investigated" the violence that they suffered.

[22] Their main submission is that the alleged investigation by the police into the ticket incident was not a proper one or was merely superficial given that the actor sought was a police officer and he ought therefore to have been easily identified. The applicants seem to be suggesting that “common sense” dictates that it was a sham. What the Board concludes is the police “were unable to locate the perpetrator and the principal claimant did not pursue the matter further.” In my view, these are facts and it cannot be said that the Board’s finding was made capriciously. The Board’s assessment of the evidence was reasonable and this Court will not reweigh the evidence. Accordingly, this application must be dismissed.

[23] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6704-10

STYLE OF CAUSE: LADISLAV LUKACS ET. AL. v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 21, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: June 22, 2011

APPEARANCES:

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