Federal Court  Cour fédérale

Date: 20140612

Docket: IMM-12480-12

Citation: 2014 FC 563

Ottawa, Ontario, June 12, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JOZSEF GALAMB AND ANIKO BORAI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision dated November 6, 2012 (Bench reasons) and November 7, 2012 (Written reasons) of the Immigration and Refugee Board, Refugee Protection Division (RPD or the Board), finding that the Applicants are not Convention refugees or persons in need of protection pursuant to s. 96 and ss. 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] Having reviewed the evidence on file and the parties' submissions, I find that the Board member breached his duty of natural justice and procedural fairness by failing to postpone the hearing as requested by the Applicants. For that reason, this application for judicial review is granted.

I. Facts

[3] The Applicants, Jozsef Galamb, born February 25, 1992, and Aniko Borai, born March 19, 1993, are citizens of Hungary. They have been in a common-law relationship since December 2010, while still in Hungary.

[4] Jozsef Galamb came to Canada on August 20, 2011 and claimed refugee status on August 25, 2011. Aniko Borai came to Canada on December 2, 2011 and claimed refugee status on December 5, 2011. Their refugee claims were based on racism, discrimination, and violent attacks in Hungary. Jozsef alleges that he was attacked twice: in February 2008 when he was 15 years old and in January 2010 when he was 17 years old. Each time the police came to the scene, a report was made but no further investigation or actions were taken as the perpetrators were not known.

[5] Both Applicants allege that they received assistance from the Law Office of Joseph Farkas until approximately August 2012, when they could no longer afford the legal fees and another Legal Aid certificate was required. They further allege that legal services provided by the Law Office of Farkas included assistance in completing the Personal Information Form (PIF) and the narrative. However, they claim that neither document was translated to them in

Hungarian prior to being submitted, despite having signed a declaration that the entire contents of the PIF and all attached documents had been translated.

[6] The Applicants submit that following the end of Mr. Farkas' representation, they did not seek other counsel expeditiously as they did not realize they needed counsel during the waiting period. They were also attempting to obtain another Legal Aid certificate in the hopes of returning to Mr. Farkas for further representation.

[7] Following receipt of the Notice to Appear from the Board on October 11, 2012, they claim they returned to Mr. Farkas' office but were told they could not be helped because they still did not have the Legal Aid certificate. The Applicants submit that they tried to contact Legal Aid Ontario on their own but were unsuccessful. They went to the Parkdale Community Legal Services (PCLS) for assistance on October 22, 2012.

[8] The Applicants claim that in fact, Mr. Farkas' office continued to act as their counsel of record, as they submitted documentary evidence to the Board on October 31, 2012. The Applicants claim that they were unaware of this at the hearing.

[9] The Applicants were unable to secure a Legal Aid certificate and on November 1, 2012, the PCLS gave them a letter requesting the postponement of the November 6, 2012 hearing, due to lack of representation by counsel. The PCLS could represent them; however, they did not have sufficient time to prepare and requested that the hearing be postponed until the last week of January or the first week of February, 2013, at which time they would be able to represent the

Applicants. As there were only two days to go until the hearing, the PCLS recommended that the Applicants attend the hearing in person to request an adjournment. The Applicants attended the hearing with the letter, but the Board member refused to grant an adjournment and indicated that if they were not ready to proceed, he would declare the claim abandoned. Feeling pressured and confused, the Applicants decided to go ahead with the hearing, despite the fact that they were not prepared and had no legal representation.

[10] The refugee claim was refused. The Board member found that the Applicants' credibility was diminished due to contradictions between their PIFs and oral testimonies, and that they had failed to rebut the presumption of state protection.

II. Decision under review

[11] The Board Member first explained that he could not agree with the Applicants' request to postpone the hearing pursuant to Rule 48 of the *Refugee Protection Division Rules*, SOR/2002-228 (since repealed and replaced with *Refugee Protection Division Rules*, SOR/2012-228). On this subject, the Board member wrote:

> You were making this application only today, but the letter from Parkdale Legal Services is dated November 1, and I believe with reasonable effort it could have been communicated to the Division sooner than today. You have had since the submission of your Personal Information Form (PIF) in September 2011 to be prepared to proceed today. From your testimony you have not made any serious effort in the past 14 months to be prepared to do so today. Your testimony about your relationship with previous counsel, a barrister and solicitor, was at times vague and contradictory. You initially told me you could not remember when the relationship broke down. Then when I probed further you said you started speaking to Parkdale after receiving the notice to appear today, sent to you in October. Later still you said the

> relationship with your previous counsel broke down as early as August 2012. In any event, as per the notice to appear, if you elect to change counsel, that counsel should be prepared to proceed on the date established, that is today. There have been no previous delays and this sitting is not a peremptory one. I am however under an obligation to proceed with the hearing as expeditiously as natural justice permits. I felt that to grant the postponement would unreasonably delay the proceedings and finally that failing to grant it would not cause an injustice. This is not an especially complex claim. After considering all the factors, I denied your request to postpone the hearing and we went ahead with your hearing.
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> Application Record, pp 7-8

[12] With respect to credibility, the Board member noted that Jozsef testified that he enrolled in vocational school in June 2008 and withdrew in June 2009, as he had failed a number of courses. The Board member pointed out that this education was not included in his PIF and Jozsef explained that it had been omitted because he had not successfully completed it. The Board Member took issue with this explanation on the grounds that it is clearly stated in the PIF that all education should be included. Jozsef also wrote in his narrative that following the attack in February 2008, he was scared and did not return to school. However, he also testified that he completed his primary school in June 2008 and then enrolled in vocational school that same year. The Board member concluded that Jozsef was trying to embellish the allegations of discrimination and he commented on the fact that Aniko did not experience any serious incidents herself.

[13] The Board Member also found that both Applicants did not rebut the presumption of adequate state protection. He acknowledged documentary evidence that the Roma are marginalized and subject to discrimination in Hungary, but found that such discrimination does not amount to persecution. He considered state protection in Hungary and concluded that it is

adequate. He noted the presumption that states are capable of protecting their citizens and that the burden is on the Applicants to rebut the presumption of state protection, by providing credible and trustworthy evidence that satisfies the Board on a balance of probabilities. The Board member concluded that the Applicants did not submit any credible and trustworthy evidence that state protection in Hungary is not adequate.

[14] Furthermore, the Board member found that the Applicants did not take any steps to seek protection in Hungary. Their evidence about their interaction with police was found to be contradictory. The Board member noted that Jozsef testified that the police came to the hospital after he was attacked in February 2008, but made no reference to this police involvement in his PIF. Jozsef testified as well that the police sent him a report three months after the incident, closing out the investigation; however, he did not submit a copy of this report as evidence. The Applicant claimed that his grandmother in Hungary could not obtain a copy of this report; however, relying on documentary evidence, the Board member found that relatives can in fact obtain police reports. The Board member also noted that Jozsef had a lawyer in Canada until the summer of 2012 and could have obtained the report with reasonable effort. Moreover, the medical report of January 2010 indicates that the police attended at the scene of the attack, but Jozsef failed to mention this in either his oral or written evidence. The Board member concluded that this further diminished his credibility.

[15] Finally, the Board member acknowledged that police protection for Roma people in Hungary is far from being consistent. However, based on the evidence before him and in light of the Applicants' interaction with police, he concluded that the police had assisted them at the

scene of the attack and in follow-up investigations. As such, the Board member concluded the Applicants did not refute the presumption of adequate state protection in Hungary and consequently, their claims under s. 96 and ss. 97(1) of the *IRPA* were refused.

III. Issues

[16] The Applicants raised two issues in their application for judicial review. First, they argued that the Board member breached the duty of natural justice and procedural fairness by failing to postpone the hearing so that they could be represented by counsel. Second, they contended that the Board's assessment of state protection in Hungary was unreasonable. Having found in favour of the Applicants on the first issue, there is no need to address the second issue.

IV. Analysis

[17] The Applicants submit that while the decision to postpone the hearing is discretionary, it remains a question of procedural fairness which attracts the correctness standard. I disagree. As I stated in *Stephens v Canada (Minister of Citizenship and Immigration)*, 2013 FC 609, the decision of the RPD to postpone or adjourn an applicant's refugee claim hearing is a discretionary one, even if such discretion is circumscribed by the factors listed in subsection 48(4) of the *Refugee Protection Division Rules*. For this Court to intervene, an applicant must show that the RPD was unreasonable in applying the factors listed in subsection 48(4).

[18] A denial of an adjournment request will not necessarily result in a breach of natural justice or procedural fairness. It is well established, for example, that the right to counsel is not

absolute in the context of immigration proceedings. Accordingly, the absence of counsel as a result of a refusal to grant an adjournment will only render a decision invalid when such an absence leads to a denial of a fair hearing: see, for ex., *Wagg v Canada*, 2003 FCA 303, at para 19; *Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206, at paras 20-21; *Julien v Canada (Minister of Citizenship and Immigration)*, 2010 FC 351, at para 33; *Guzun v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1324, at para 13; *Vazquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 385, at para 10 [*Vazquez*]; *Tecuapetla v Canada (Minister of Citizenship and Immigration)*, 2012 FC 225, at para 25.

[19] Counsel for the Respondent argued that the Board reasonably found that the Applicants had failed to bring their request for a postponement in a timely manner. According to counsel, the Applicants had obtained a letter from PCLS dated November 1, 2012, requesting that the Board postpone the hearing, and they should not have waited until the day of the hearing (November 6, 2012), to make such a request.

[20] I find that the Applicants acted in accordance with Rule 48(3) of the *Refugee Protection Division Rules*, according to which the party who wants to make an application two working days or less before the proceeding, must appear at the proceeding and make the application orally. This is precisely what the Applicants did in the case at bar. November 1, 2012 was a Thursday, and it was therefore only two business days prior to the actual hearing. The Applicants could not have gone to the Board earlier because they did not know before November 1, 2012 whether or not the PCLS would be willing to help them, nor were they aware that PCLS would only be able to represent them if the hearing was adjourned. Moreover, it was reasonable for the

Applicants to have acted on the advice of the PCLS, who had recommended they attend the hearing in person to make the request for an adjournment.

[21] The Respondent also claims that the Applicants were not diligent in attempting to obtain new counsel between August 2012, when they were made aware that their former counsel would not be representing them, and the date of the hearing. Jozsef also testified that he did not think they needed to seek out new counsel during the waiting period, as it was their understanding that all of their documents had been submitted. Moreover, it appears that in the approximately 20 working days between receiving the Notice to Appear (sometime after October 11, 2012) and their hearing on November 6, 2012, they made efforts to clarify their Legal Aid situation, sought representation from PCLS and obtained their file from the previous lawyer so they could prepare for their hearing.

[22] The main problem with the Board member's decision, however, is his failure to consider several relevant factors that militate in favour of granting a postponement. The factors to be considered when determining whether or not an adjournment should be granted are clearly set out at Rule 48(4) of the *Refugee Protection Division Rules*, which reads as follows:

(4) In deciding the application, the Division must consider any relevant factors, including	(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;	a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

(b) when the party made the application;	b) le moment auquel la demande a été faite;
(c) the time the party has had to prepare for the proceeding;	c) le temps dont la partie a disposé pour se préparer;
(d) the efforts made by the party to be ready to start or continue the proceeding;	d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
(e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
(f) whether the party has counsel;	f) si la partie est représentée;
(g) the knowledge and experience of any counsel who represents the party;	g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
(h) any previous delays and the reasons for them;	h) tout report antérieur et sa justification;
(i) whether the date and time fixed were peremptory;	i) si la date et l'heure qui avaient été fixées étaient péremptoires;
(j) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and	j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;
(k) the nature and complexity of the matter to be heard.	k) la nature et la complexité de l'affaire.

[23] The Board member acknowledged that there have been no previous delays and that it was not a peremptory sitting. There were, however, many other factors that militate in favour of granting a postponement:

- The length of the requested adjournment (less than three months), and the lack of evidence that such a brief postponement would have a negative effect on the immigration system or unreasonably delay the proceedings;
- The PCLS had undertaken to represent the Applicants and had provided availability dates should the hearing be postponed;
- The Applicants could not afford legal representation without the Legal Aid certificate;
- The Applicants explained that the reason why they did not seek counsel from August 2012 to the time of receipt of the Notice to Appear was because they knew that all documents had been submitted and that they had not been contacted by the Board to schedule their hearing;
- As soon as they received the Notice to Appear, they took action to secure representation for their hearing;
- The mix-up with the Legal Aid certificate and the workload of the PCLS were outside their control;
- The Applicants were clearly uncomfortable proceeding without legal representation;
- The Applicants had alerted the Board member to problems with the preparation of their PIF and the fact that the PIF and the narrative were not translated to them before signing.

[24] The facts of this case are very similar to those under review in *Vazquez*, supra, where Justice Bédard also found that the Board member erred in failing to consider a number of positive factors in deciding not to grant an adjournment. While the Applicants eventually and reluctantly agreed to proceed, they were essentially induced into proceeding with the hearing out of fear that their claim would be deemed abandoned, a circumstance also present in *Vazquez*. As a result, it cannot be said that their decision to proceed was free and informed.

[25] Can it be said, however, that the Applicants were nevertheless provided with a fair hearing despite their lack of representation by counsel? As previously mentioned, the Board member considered that the issues in this case were not complex. Counsel for the Respondent added that the Applicants have not identified specific arguments they were unable to make or evidence they were unable to provide because they lacked counsel, which would have affected the final determination.

[26] There is no doubt that in order to fulfil the duty of fairness, an applicant must be able to participate in a meaningful way at the hearing. This capacity must be assessed in light of the particular circumstances of each applicant. In the case at bar, the Applicants are only 20 and 21 years of age and have only completed an eighth grade education. They clearly did not understand what was required of them on several points, including submissions on how the Member should consider or weigh the evidence in their cases.

[27] Moreover, I disagree with counsel for the Respondent that the issues raised in this case are not complex. The required level of state protection has given rise to an elaborate and nuanced

jurisprudence, and counsel most certainly would have been quite helpful in that respect. Submissions could have been made, in particular, on objective evidence regarding similarly situated persons; the Board member limited the Applicants' testimony by requiring them to only speak to their own personal experiences of harm, and they could not have been expected to make legal submissions on this point.

[28] Counsel would also have been more familiar with the Applicants' case and could have been afforded an opportunity through examination, to have the Applicants clarify perceived inconsistencies and provide explanations for the information missing from their PIFs. This would include the fact that the PIF had not been translated for them prior to their making submissions to the Board.

[29] As previously mentioned, the Board concluded that Jozsef's evidence concerning his interactions with the police in Hungary and his education, was not credible. However, the circumstances herein render it impossible to appreciate the true extent of the prejudice to the Applicants, of the Board's decision not to postpone the hearing to allow for legal representation. It is clear from the transcript that the Applicants' ability to present their case was significantly impaired by the lack of counsel. Moreover, the Board did not pay attention to the fact that the PIF narratives were submitted separately from the forms, and were apparently not translated for the Applicants.

[30] Had the Applicants been represented by counsel, the perceived inconsistencies with regard to Jozsef's continued education following the February 2008 attack and police attendance

at the scene of the January 2010 attack, could have been better explained and contextualized. It is not implausible, for example, that the police came to the scene but then followed him to the hospital to get his testimony and begin their investigation. After all, the Board did not doubt the substance of Jozsef's claim (i.e. that he was attacked on several occasions and that these attacks were racially motivated). Counsel could have attempted to show that even if the explanations for the inconsistent statements were not accepted, discrepancies were neither significant nor central to the Applicants' claim for protection. Finally, I agree with the Applicants that there may be instances where, having accepted an applicant's identity, the objective documentary evidence is such that the applicant's particular circumstances make them persons in need of protection, a legal argument that these Applicants were obviously unable to make.

[31] For all of these reasons, I find that the credibility findings cannot be extricated from the procedural fairness shortcomings. The Applicants' ability to meaningfully participate in the hearing and present their case in a full and fair manner was impaired by lack of counsel, and it is difficult to appreciate the full extent of the prejudice, if any, to the Applicants. In those circumstances, the course of prudence is to send the file back for re-determination.

[32] The application for judicial review is therefore allowed. The parties did not propose any question for certification, and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed.

No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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