Federal Court  Cour fédérale

Date: 20160104

Docket: IMM-3971-13

Citation: 2016 FC 3

Ottawa, Ontario, January 4, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

SZABINA SVECZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is a citizen of Hungary. She left that country in 2008 after having been charged with fraud pursuant to the Hungary Criminal Code (the Hungarian Code). She was convicted of that offence, *in abstentia*, in May 2009. Her conviction was upheld on appeal in April 2010.

[2] On November 29, 2012, the Applicant travelled to Canada in order to seek refugee status but was denied entry on grounds of serious criminality pursuant to subsection 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act). That provision provides that a foreign national is inadmissible on such grounds where he or she has been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[1] This inadmissibility finding was confirmed on May 27, 2013 by the Immigration Division of the Immigration and Refugee Board of Canada (the Board) pursuant to a referral hearing held under subsection 44(1) of the Act. The Applicant is challenging that decision pursuant to the present judicial review application. She has since been removed from Canada.

II. Background

[2] The Applicant's conviction in Hungary is related to the activities of Vertical Invest Real Estate (Vertical Invest), a company founded in January 2003 by the Applicant, her common-law spouse, Zoltan Klivinyi, and several others. Vertical Invest's main purpose was to collect money from investors in order to pursue real estate investments such as building hotels and vacation resorts. The Applicant held the position of Vertical Invest's CEO, which she claimed to be a purely nominal position, and was called upon, in that capacity, to sign a number of real estate transactions.

[3] Since its incorporation, approximately $7.5 million Canadian dollars was invested in Vertical Invest. However, in August 2003, as a result of negative media attention, investors became worried about their investments and sought the return of their money with little success. When investors discovered they were being scammed, the company quickly dismantled.

[4] Criminal proceedings were soon instituted against the Applicant and others involved in the scheme. On May 25, 2009, a trial court found that the Applicant and others, including her common-law spouse, Mr. Klivinyi, had misled the investors by promising very high profits on a short term investment that was based on a non-feasible project. As a result, the Applicant was convicted of fraud pursuant to section 318(1) of the Hungarian Code and sentenced to a 4 year and 6 month term of imprisonment. The Budapest Court of Appeal upheld the conviction with a final and binding decision on April 15, 2010.

[5] As a result of these convictions, an international arrest warrant was issued against the Applicant and Mr. Klivinyi who arrived in Canada a few days prior to the Applicant and who faced the same inadmissibility finding based on the same convictions arising out of the same circumstances.

[6] The Applicant does not deny that she was convicted of fraud in Hungary. However, she contended before the Board that subsection 36(1)(b) of the Act is not applicable to her because the offence of fraud in Hungary is not equivalent to the offence of fraud in Canada pursuant to subsection 380(1)(a) of the *Criminal Code*, RSC, 1985, c C-46 (the Criminal Code). She further contended that she should not be found inadmissible on the ground that the charges laid against

her were politically motivated and that she was victimized by a corrupt criminal justice system subjected to political influence.

[7] On the equivalency argument, the Board compared the wording of subsection 318(1) of the Hungarian Code and subsection 380(1)(a) of the Criminal Code, and found that the offence of fraud in Hungary is equivalent to the offence of fraud in Canada as the essential ingredients of both offences are similar in that they both require the use of deceit as a means of depriving someone of money to the detriment of that person's economic interests. Having then found that by defrauding persons in an amount exceeding five thousand dollars, the Applicant, if convicted of fraud in Canada, would have been subject to a maximum term of imprisonment of at least 10 years as provided for under subsection 380(1)(a) of the Criminal Code, the Board concluded that the Applicant was inadmissible to Canada pursuant to subsection 36(1)(b) of the Act.

[8] The Board further rejected the Applicant's claim that the proceeding instituted against her in Hungary was politically motivated, that the criminal justice system in Hungary is corrupt and tarnished by political interference, and that the trial court engaged in a number of unlawful practices. These findings are not at issue in the present proceedings.

[9] The Applicant contends that the Board's decision on equivalency is flawed in two main respects. First, the Applicant claims that the Board failed to establish the Applicant's *actus reus* and *mens rea* to satisfy the requirements of the offence of fraud as formulated in the Criminal Code. The Applicant argues that the *actus reus* element for both offences are not equivalent since under the Canadian offence, a person must be found guilty of having committed any act of

"deceit, falsehood or other fraudulent means" while Hungarian law indicates that a person must be found to have "lead into error or keep [a person] in error." The Applicant further argues that she never formed the "initial requisite intent" to "lead someone into error" since the evidence does not indicate that the Applicant committed any dishonest act in signing the real estate transaction documents.

[10] The Applicant claims in this regard that pursuant to the testimony of her lawyer in Hungary, Mr. Andras Gal, subsection 318(1) of the Hungarian Code does not require any actual criminal *actus reus* on the part of the accused since for a person to be convicted under that provision of the Hungarian Code it is sufficient that the person: (i) hold a position within the corporation and (ii) have knowledge of what is going on in the corporation. According to Mr. Gal, the offence of fraud requires no participation in any fraudulent act under Hungarian law, which is fundamentally different than what is required under the Criminal Code.

[11] The Applicant further contends that *mens rea* is not established either since she lacked subjective awareness of an objective dishonesty as she did not attend board meetings, had no desire to run the company, and did not partake in Vertical Invest's business development plans or day-to-day activities. In other words, she claims that under these same circumstances, she would not be convicted of fraud in Canada.

[12] Second, the Applicant submits that after ruling that evidence presented by Mr. Gal during Mr. Klivinyi's admissibility hearing under subsection 44(1) of the Act be admitted in evidence, the Board breached the requirements of natural justice by refusing to allow an adjournment to

arrange for Mr. Klivinyi to testify on the Applicant's behalf after it was discovered that a half-day of Mr. Gal's testimony was lost and not available.

III. Issues and Standard of Review

[13] The issues to be determined in this case are:

i. Whether the Board committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7, in finding that the offence of fraud in Hungary is equivalent to the offence of fraud in Canada; and

ii. Whether it was procedurally unfair for the Board not to allow an adjournment to arrange for Mr. Klivinyi to testify on the Applicant's behalf.

[14] It is well established that determinations of equivalency engage questions of mixed fact and law and therefore attract deference by the Court. As such, the appropriate standard of review is reasonableness (*Abid v Canada (Citizenship and Immigration)*, 2011 FC 164, at para 11, 384 FTR 74; *Sayer v Canada (Citizenship and Immigration)*, 2011 FC 144, at para 4; *Edmond v Canada (Citizenship and Immigration)*, 2012 FC 674, at para 7 [*Edmond*]).

[15] As for allegations regarding a breach of procedural fairness, the standard of correctness applies (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43, [2009] 1 SCR 339 [*Khosa*].

IV. Analysis

A. *Was the Board's Decision Reasonable?*

[16] According to subsection 36(1)(b) of the Act, a foreign national is inadmissible on grounds of serious criminality for, *inter alia*, "having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under any Act of Parliament punishable by a maximum term of imprisonment of at least 10 years" ("être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins 10 ans").

[17] For a foreign conviction to engage subsection 36(1)(b) of the Act, the foreign offence must be "equivalent" to the Canadian offence stipulated therein. In other words, both offences must involve sufficiently similar criteria or ingredients to establish that the foreign conduct falls within the purview of the Canadian offence (*Brannson v Canada (Minister or Employment and Immigration*, [1981] 2 FC 141, at paras 4 and 38, 34 NR 411; *Tomchin v Canada (Citizenship and Immigration)*, 2011 FC 231, at para 10).

[18] In *Hill v Canada (Minister of Employment and Immigration)* [1987] 3 ACWS (3d) 20, 73 NR 315 [*Hill*]; the Federal Court of Appeal held, at paragraph 16, that equivalency is determined by using one of the following three methods:

i. By a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences;

ii. By examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; or

iii. By a combination of the first two methods.

[19] The Federal Court of Appeal also held in *Li v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 235, 119 FTR 130 [*Li*], at paragraph 25, that the "Act does not contemplate a retrial of the case applying Canadian rules of evidence, [n]or does it contemplate an examination of the validity of the conviction abroad."

[20] In the case at bar, the Board, using the first method outlined in *Hill*, reviewed the wording of the Hungarian offence and compared it to subsection 380(1) of the Criminal Code. To that end, the Board used two different translations of subsection 318(1) of the Hungarian Code. These two versions read as follows:

> i. "Fraud" shall mean when a person uses deceit, deception, or trickery for unlawful financial gain, and thereby causes damage;
>
> ii. The person who – for unlawful profit-making – leads somebody into error or keeps in error and causes damage thereby, commits fraud.

[21] The Board was satisfied that "leading someone into error" has the same meaning as "deceiving someone" and that, as a result, both translations convey the same essential ingredients. The Board also referred to the evidence of Mr. Gal who testified that for the Applicant to be convicted of fraud under subsection 318(1) of the Hungarian Code, it was

sufficient that she hold a position of CEO in the company and that she be aware of what is happening in the company.

[22] Then, the Board turned its mind to subsection 380(1)(a) of the Criminal Code, which provides as follows:

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,	380. (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or	a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;
[…]	[…]

[23] The Board found that under Canadian law, to defraud means to deprive someone dishonestly of something to which, but for the fraud, he is entitled and that the elements of deprivation are satisfied on proof of detriment, prejudice or risk of prejudice to the economic interest of the victim. As indicated previously, the Board concluded, in the following terms, that the Applicant's fraud conviction in Hungary was equivalent to fraud pursuant to subsection 380(1)(a) of the Code:

> Both the Hungarian law on fraud and the Canadian law on fraud and the actions ascribed to Ms Svecz in the criminal proceedings involve the use of deceit as a means of depriving someone of money to the detriment of that person's economic interests. The Court in Hungary made a finding that, through deception, investors were deprived of their money through false promises of high return on their real estate investments. This finding was also upheld on appeal.

[24] The Applicant claims that under Canadian law, the actions ascribed to her in the criminal proceedings would not give rise to a conviction under subsection 380(1)(a) of the Criminal Code as both the *actus reus* and *mens rea* are missing.

[25] I disagree.

(1) Actus Reus

[26] In *R v Théroux*, [1993] 2 SCR 5, the Supreme Court of Canada, in a majority decision, explained the offence of fraud found at section 380(1) of the Criminal Code. It described the *actus reus* component of the offence in the following terms:

> [13] […] Speaking of the actus reus of this offence, DicksonJ. (as he then was) set out the following principles in Olan:
>
> (i) The offence has two elements: dishonest act and deprivation;
>
> (ii) The dishonest act is established by proof of deceit, falsehood or "other fraudulent means";
>
> (iii) The element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

[27] It was therefore open to the Board, in my view, to find, based on *Théroux*, that the offence of fraud in Canada means "to deprive someone dishonestly of something to which, but for the fraud he is entitled" and the elements of deprivation are established "on proof of detriment, prejudice or risk of prejudice to the economic interest of the victim."

[28] In analyzing the *actus reus* component of the offence in particular, the Board defined the act of fraud in Hungary as deceiving or tricking someone to deprive that person of money to the detriment of that person's economic interests. I agree with this definition and that the *actus reus* of the offence of fraud in Canada and Hungary appear to be equivalent. This finding certainly falls, in my view, within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[29] Yet, Mr. Gal's testimony indicates that the Applicant need not take part in any fraudulent activities to be convicted of fraud in Hungary. The Applicant argues that according to Mr. Gal's testimony, for a conviction in Hungary, the Applicant need not commit the *actus reus*, as contemplated by the Canadian offence, since being a director of a corporation and being aware of the corporation's activities is sufficient for conviction.

[30] Since according to *Li* above, the equivalency test does not include a comparison of the evidentiary rules of both jurisdictions, I cannot agree with the Applicant's argument that the offence is different in Canada on the basis that the only thing she did was sign property transfers and purchases on behalf of the corporation, which in and of itself is not a fraudulent act. The

role of the Board is to determine whether the offences of fraud are equivalent, not whether signing property transfers is considered a fraudulent act in Canada since to do so would be to retry the Applicant's conviction based on Canadian standards of evidence.

[31] Furthermore, the evidence provided by Mr. Gal on this point is conflicting. At one point, Mr. Gal defined fraud in Hungary as "illegally obtaining wealth by misrepresentation" and then later testified that the Applicant need not commit any fraudulent acts in order to be convicted of fraud since being the CEO of the corporation and being aware of what was happening in the company was enough for conviction. I therefore cannot agree with the Applicant's position that Mr. Gal testified to the effect that deception is not an ingredient of the offence of fraud in Hungary since it is simply unclear from Mr. Gal's testimony whether the Applicant needed to deceive anyone in order to be convicted of fraud in Hungary.

[32] In these circumstances, I see no reason to interfere with the Board's equivalency finding regarding the *actus reus* of the offence of fraud in Canada and Hungary.

(2) Mens Rea

[33] In *Théroux*, above, the majority described the *mens rea* component of the offence of fraud in the following manner:

> [21] […] The *mens rea* would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was

> doing, provides no defence.[…] [T]he proper focus in determining the *mens rea* of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation).

[34] The Board discusses the subjective component of fraud under the Hungarian Code at paragraphs 17 and 18 of its reasons and reproduces an excerpt of Mr. Gal's evidence who testified that for the Applicant to be convicted of fraud under Hungarian law, it was not necessary for her to have participated in any fraudulent acts, instead, all that was needed for a conviction was, as indicated above, "to have the position of the CEO and be aware of what's happening in the company." The Board found, on that basis, that:

> In light of the findings of fact at trial, which includes findings regarding Ms. Svecz's participation in Vertical Invest, and in light of Mr. Gal's testimony that, in order to be convicted of fraud in Hungarian law, one has to be aware of what is happening, I am not persuaded by Ms. Svec's claim that she was subjectively unaware of any fraudulent activities of Vertical Invest. She may not have been intimately aware of all the activities which eventually led to the criminal charges, she was nevertheless, directly involved in real estate purchases which were, in turn, directly related to the fraud charges.

[35] In my view, the Board properly assessed the "essential ingredients" of the offences since it had to determine whether "being aware of what's happening in the company" is equivalent to the *mens rea* element of the offence of fraud in Canada, namely, "subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk."

[36] I agree with the Respondent that the Applicant's argument that to lead someone into error may only require *actus reus* and not the *mens rea*, is without merit. In this regard, Mr. Gal's evidence was that the Hungarian offence involves one to be aware of what is happening in the company. Therefore, it was reasonably open to the Board to find that there is a *mens rea* requirement to the *actus reus* of leading someone into error.

[37] I further agree with the Respondent that the Applicant's argument that she should not be punished for the fraudulent activities of others within Vertical Invest as she did not personally commit any prohibited acts amounts to a request to retry the evidence that was before the Hungarian courts under Canadian law and shall, therefore, be dismissed. As indicated previously, subsection 36(1)(b) of the Act does not contemplate a retrial of the case applying Canadian rules of evidence, nor does it contemplate an examination of the validity of the conviction abroad (*Li*, above at para 25).

[38] In *Théroux*, above at paragraph 22, the majority held that a person is not saved from conviction "because he or she believes there is nothing wrong with what he or she is doing," the question being whether the accused "subjectively appreciated that certain consequences would follow from his or her acts, not whether the accused believes the acts or their consequences to be moral."

[39] The Board reasonably found that the Hungarian offence, as does the Canadian offence, requires an assessment of an accused's subjective awareness of carrying out a prohibited act. The Board was not required to find whether it was open to the Hungarian courts, on the basis of

the evidence that was before them, to conclude that the Applicant subjectively appreciated that certain consequences would follow from his or her acts. Again, I see no basis to interfere with the Board's equivalency finding respecting *mens rea*.

B. *Did the Board Breach the Principles of Natural Justice?*

[40] In my view, there was no breach of the principles of natural justice.

[41] In *Chelaru v Canada (Citizenship and Immigration)*, 2012 FC1535, Justice Mandamin found that "a decision-maker is entitled to limit repetitive testimony" and did not find that the Refugee Protection Division breached principles of natural justice in that case by not allowing testimony that was not "central to the claim" (at para 29).

[42] In this case, the Board only admitted the transcript of Mr. Gal's testimony from Mr. Klivinyi's hearing into evidence because the Applicant did not make Mr. Gal available to the Minister's counsel for cross-examination. The transcript was therefore admitted for the benefit of the Minister's counsel. After admitting the transcript into evidence, the Board informed the parties that if neither party submitted further evidence, she would operate under the assumption that the parties were prepared to make their oral submissions at the next hearing date. At the next hearing, the Applicant requested that Mr. Klivinyi testify as a witness in light of some missing portions of Mr. Gal's testimony because the Applicant spoke in general terms and did not understand her own case.

[43] In my view, it was entirely open to the Board to decide that Mr. Klivinyi's testimony was not relevant to the Applicant's case since the Applicant already testified to her case (making Mr. Klivinyi's testimony repetitive if he were to testify) and since Mr. Klivinyi's testimony was not central to the main issue of determining whether there is equivalency between the two offences. Mr. Klivinyi is not an expert of Hungarian law. Moreover, the purpose of entering the transcript into evidence was for the benefit of Minister's counsel and not to further explain the Applicant's case. In light of the foregoing, in my view, it was well within the Board's discretion not to adjourn the hearing to allow Mr. Klivinyi to testify in order to ensure the efficiency of the proceeding.

[44] No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;
2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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