

**Date: 20070726**

**Docket: IMM- 5574-06**

**Citation: 2007 FC 776**

**Toronto, Ontario, July 26<sup>th</sup>, 2007**

**PRESENT: The Honourable Maurice E. Lagacé**

**BETWEEN:**

**BELA ATTILA BIRO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Leave for judicial review of this matter was granted with the consent of the respondent. The applicant, Mr. Biro, seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act* S.C. 2001, c 27 (“the Act”) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated September 6, 2006, which found him not to be a Convention Refugee or a person in need of protection.

[2] Mr. Biro is a 41 year old man from Romania who argued before the Board that he was wrongfully convicted of fraud and theft in Romania prior to his arrival in Canada and will be forced to serve twelve years in prison if forced to return. Mr. Biro stated that he was framed by the government as retribution for his past attempts to expose the corruption in the Romanian government.

[3] The applicant addressed his claim to the Federal Court before, and for ease of reference the Court reiterates the facts, as resumed by Madam Justice Tremblay-Lamer in *Biro v. Canada (Minister of Citizenship and Immigration)* (2005) FC 1428 at paragraphs 6-11.

6. The applicant alleges that he wrote anonymous newspaper articles naming corrupted officials involved in an oil scam. He maintains that it was leaked that he was behind the articles and, as a consequence, the company he worked for was fined repeatedly. The company eventually dismissed him to avoid bankruptcy.

7. He also alleges that he received anonymous letters, threatening phone calls and that the windshield of his car was broken. In 1997, he was attacked by five men who threatened his life and beat him up. He was stabbed in the chest and suffered broken ribs and a concussion. He was hospitalized for 22 days. The applicant states that he went to the police with the medical report but that nothing was done

8. In order to leave Romania, the applicant purchased a car with foreign license plates, a false Hungarian passport and a false driver's license. He was stopped by police patrol and charged. In November 1997, he was sentenced to a two year suspended term and probation for forgery, use of false identity and documents and unauthorized use of a car. In 1999, he alleges that he was falsely accused of fraud

9. In February 2002, the applicant was convicted and sentenced in Romania for fraud and forging documents under private signature.

10. The applicant alleges that his wife and his father also suffered consequences because of the false charges against him. He met an old friend who helped him procure false documents to leave the country. In France, a Canadian Official did not allow

them to board the airplane for Canada and so he returned to Hungary where he resided from August 1999 to May 2002.

11. In the spring of 2002, he traveled to Italy and from there, to Mexico after which he traveled through the USA to Canada in a truck and on July 4, 2002, he claimed refugee protection maintaining that if returned to his country, he would be unjustly imprisoned or killed.

### **The Decision of the Board in the Present Application**

[4] The Board found there were serious reasons for considering that the applicant committed serious non-political crimes prior to entering Canada, and consequently excluded him from refugee protection under both sections 96 and 97 of the *Act*.

[5] The Board noted that the mere allegation of a criminal act or even the presence of conviction itself is not sufficient to meet the threshold required to exclude a person from refugee status *per se*. Rather, the Board correctly determined that the burden of proof upon the Minister was to demonstrate “serious reasons for considering” that the applicant had committed the acts in question.

[6] The Board addressed two separate convictions, one in 1997 and a second one in 2002.

[7] In 1997 the applicant was convicted while fleeing Romania following an alleged assault as explained above. The Board was not convinced on a balance of probabilities that the applicant legally purchased the car and the documentation used in order to flee Romania. Further, the Board found no evidence that this conviction was unfair or that the applicant did not commit this offence.

[8] In 2002, the applicant was convicted for fraud and forgery. The Board member accepted that a certain degree of corruption existed in the Romanian justice system. However, the Board did not accept that the entire system was corrupt to the extent that the prosecution and the judicial decision makers framed the applicant as he claimed.

[9] The Board appeared to accept however that the applicant was not able to cross-examine an adverse witness, a refusal that would constitute a clear breach of fairness in a Canadian criminal trial. However, the Board received no evidence to fully explain the legal requirements to fulfill the obligation of due process in a Romanian criminal trial and concluded there were:

“...other opportunities afforded him to meet the case against him.”

[10] The Board refused to consider that the witnesses that testified against the applicant in Romania also had fraud convictions and therefore their testimony should have been discounted. The Board found this to be overstepping his role, as the degree of weight a witness's testimony should receive was a matter for the Romanian court to decide.

[11] Additionally, the Board did not place weight on a document that the applicant sent to the Romanian court to postpone his trial so an adverse witness could be “audited.” The Board was unsure what this request meant in the Romanian legal system and was not convinced that this

document established that the applicant was not able to defend himself properly. In the absence of evidence to the contrary, the Board found that he must assume a “fair trial”.

[12] The Board found that the fraudulent acts in question, which involved hundreds of thousands of dollars, could have attracted a 10 year sentence if committed in Canada, and therefore met the definition of serious criminality under the *Act*. It rejected the applicant’s argument that based on the wording of s 101(2) (b) of the *Act* there was also a requirement that the alleged criminal acts must also possess a “danger element” to the public.

[13] The Board found that the applicant was not credible since after fleeing Romania he remained in Hungary from 1999-2001, without any harm occurring to him and without making a claim for asylum. It pointed out that the applicant did not even make inquiries to obtain legal immigration status to remain in Hungary during this period. The Board also placed weight on the fact that the applicant did not claim asylum in Italy, Austria, or Spain during his passage through these countries on his flight to Canada.

[14] The Board found it implausible that three anonymous letters to the editor of a newspaper could result in a physical attack and the police, the prosecutor’s office, and several levels of the judiciary, bringing a false case against him. This implausibility was heightened in the Board opinion, given it was established that identified media personnel frequently made reports on government corruption and there was no evidence of any retribution or punishment for their reports.

[15] The Board concluded that even if there was a breach of due process in Romania, the applicant had not shown what impact it had on his convictions. The Board, relying on the

Romanian court documents, and documentation from Interpol, excluded the applicant for his serious non-political crimes.

[16] **Legislation**

**Immigration and Refugee Protection Act**  
(S.C. 2001, c.27):

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail oneself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

**Loi sur l'immigration et la protection des réfugiés, (S.C.2001, c. 27)**

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retour

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

**98.** A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection

**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

**Convention Relating to the Status of Refugee**  
(189 U.N.T.S.150)

**Art. 1F.** The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

**Convention relative au statut de réfugié**  
(189 U.N.T.S.150)

**Art. 1F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:

a) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

c) qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

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**Issues**

[17] The applicant raises eight issues; that however the Court will re-frame more appropriately in two broader issues:

1. Did the Board err by making findings of fact in a perverse or capricious manner, or without regard for the totality of the evidence before it?
2. Did the Board comply with its obligation to provide clear reasons, in particular, in relation to the s. 97 analysis?



### **The Applicable Standard of Review**

[18] It is undisputed that if the Board makes findings of fact that are erroneous or made in a perverse or capricious manner, or without regard for the material before it, the Board will have committed a reviewable error as stated in *Herb v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 108. (FCA).

### **Analysis**

[19] In the present decision the Board specifically states that:

“...I find as a fact that even if there was a lack of due process, as I understand the term in the Canadian common law context, the claimant has failed to show what impact it had on his convictions. I therefore find that the Romanian court documents and Interpol documents establish that there are serious reasons for considering that the claimant committed serious non-political crimes prior to entering Canada.”

This is an untenable finding directly contrary to the decision of October 20 of this Court in this applicant’s previous judicial review application... In that decision Justice Tremblay-Lamer held at paragraphs 17-18 in *Biro*:

17. While the Board accepted that there was evidence of corruption, it did not accept that the applicant was not afforded due process. In support of its conclusion, the Board reasoned that the applicant had had two appeals. However, the evidence shows that the first appeal was conducted by the court without the applicant or his counsel being involved. In my view, this indicates a serious flaw in the judicial process. In the 2002 proceeding, the applicant's lawyer was denied permission to examine the witnesses who gave written statements. This case involved the alleged theft by fraud of approximately \$700,000 CDN worth of gasoline. To conduct this trial based solely on written statements does not, in my view, amount to due process.

18. In conclusion, the Board's finding that the applicant was afforded due process is patently unreasonable. In my view, in light of the serious consequences of an exclusion under Article 1F(b), the Board should have considered whether, in the

circumstances of this case, the lack of due process had an impact on the applicant's convictions.

[Emphasis added]

[20] The present Board member specifically noted at page 4 of its decision:

“I understand from reviewing the evidence before me that Romania has a very different legal system from Canada’s.”

However, the Board does not refer to any documentation to demonstrate that cross examination of adverse witnesses in Romania is not necessary to comply with the requirements of due process. Quite to the contrary, the present Board, at page 5 of its reasons finds:

“...I have not been presented with cogent evidence about what the proper course of proceedings would be in the legal system in Romania.”

[21] The Board had evidence before it in the request to “audit” a witness presented by the applicant to support his position that the trial was unfair. While the Board expressed confusion as to what this document referred, and was not sure as to its relevance, the previous decision in *Biro* was quite clear that the document was evidence that the Court “...denied permission to examine the

witnesses”. Therefore, the Board clearly erred when it concluded that the applicant had received a “*fair trial*”. This finding is clearly contrary to the finding of Justice Tremblay-Lamer, in *Biro*

that a “fair trial” in these circumstances is patently unreasonable. This Court concurs with this finding.

[22] The issue, as articulated in *Biro* now becomes if “...*the Board [...] considered whether, in the circumstances of this case, the lack of due process had an impact on the applicant's convictions.*”

[23] While the present Board seemingly couched its language with the caveat “...*even if there was a lack of due process...the claimant has failed to show what impact this had on his convictions*”, still the analysis of the impact of the breach of due process is not given in the Board’s reasons. Merely stating the claimant has “failed to show what impact” is insufficient. And where there is such a clear breach of due process, a negative impact should be presumed to have occurred to an accused.

[24] The applicant has established a significant negative impact flowing from the breach of due process. The Court agrees that given two of the adverse witnesses to the applicant were charged with fraud, there was a strong basis to cross-examine them and challenge their credibility and evidence in Court. This did not happen; therefore the Court cannot see how it could be said that this is not a negative impact on the applicant’s defense at trial. The Board member made no mention of

this point, but rather found that since the witnesses had been charged with fraud, “...*the Romanian penal system is in fact functioning adequately*”. Clearly, this is a patently unreasonable finding,

particularly when coupled with the Board’s earlier acceptance of a degree of corruption within the judiciary.

[25] The *Act* is clear. Canada does not condemn people for acts that would not be crimes if those acts were committed in Canada. The natural extension of this is that Canada should not respect convictions resulting from an unfair hearing.

[26] This is not to say that the facts underlying these convictions could not be used to support a future finding that the applicant should be excluded. However, a deeper analysis will be required with an in-depth look at the actual events that transpired and not just the result of the criminal proceedings. The presence of convictions from an unfair trial cannot be used as the sole reason to exclude a refugee claimant.

[27] The Court finds no error on the Board’s conclusions regarding the implausibility of the applicant’s testimony, or the negative credibility findings of the applicant.

[28] But the Court however finds that the Board unfortunately made unreasonable findings, in that it did not properly consider the totality of the evidence presented before concluding on the presence of convictions from an unfair trial, rather than proceeding with an in depth look at the actual events that transpired. The Court will therefore allow the judicial review on this first issue.

[29] Consequently there is no need at this stage for the Court to decide the second issue, except to say that it appears to be settled law that when an applicant is excluded under article IF9b of the *Convention Relating to the Status of Refugee* he is not entitled to have his inclusionary claim determined under s.97; *Xie v. Canada (Minister of Citizenship and Immigration)* (2004) FCA. 250.

[30] No question was submitted for certification.

**JUDGMENT**

**THIS COURT ADJUDGES that** the application for judicial review is allowed and the matter returned to a different panel of the Board for redetermination.

“Maurice Lagacé”

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Deputy Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5574-06

**STYLE OF CAUSE:** BELA ATILA BIRO  
v.  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

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**DATE OF HEARING:** July 24, 2007

**REASONS FOR :** LAGACÉ, D.J.

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