**Date: 20090506**

**Docket: IMM-4832-08**

**Citation: 2009 FC 458**

**OTTAWA, Ontario, May 6, 2009**

**PRESENT: The Honourable Max M. Teitelbaum**

**BETWEEN:**

**Imre GORZSAS**

**Applicant**

**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*, S.C. 2001, c. 27 (the Act) for judicial review of a decision by a Pre-Removal Risk Assessment (PRRA) officer (the officer), dated October 10, 2008 rejecting the applicant's PRRA application. The PRRA officer found that there is less than a mere possibility that the applicant faces persecution if he were returned to Hungary, his country of origin, as described under section 96 of the Act, and that it was not likely that he would face a risk of torture, risk to life, or a risk of cruel and unusual punishment within the contemplation of subsection 97(1) of the Act.

**Background**

[2] Imre Gorzsas (the applicant) is a 34 year old citizen of Hungary. His ethnic background is Roma. The applicant arrived in Canada in August 2000. The applicant's claim for refugee protection was dismissed on November 3, 2003. The basis for the applicant's claim was risk of persecution related to his ethnicity and his sexual orientation. The Board found that the applicant was not a homosexual and that he had not proven that his Roma ethnicity put him at risk in accordance with the Act. In any event, the Board stated that state protection would be available to the applicant. Leave to appeal the decision was denied.

[3] In July 2007, the applicant submitted an application for a PRRA that was rejected on October 2007. The rejection was based on the finding that there was no breakdown of state apparatus in Hungary and that certain organizations could be approached for assistance. Since that decision, the applicant learned that he has Human Immunodeficiency Virus (HIV) in February 2008. Another PRRA application was submitted in June 2008 which was also rejected on October 10, 2008. Mr. Justice Phelan stayed the applicant's removal in September 2008 pending judicial review of the PRRA decision.

[4] On November 13, 2008 the applicant was advised that he was to be removed from Canada on November 23, 2008. Mr. Justice Zinn granted a stay of the removal on November 20, 2008.

**Decision under Review**

[5] The officer began his analysis by reviewing the evidence submitted by the applicant. The affidavit evidence stating that the applicant was homosexual and HIV positive was accepted as fact.

[6] The documentary evidence provided by the applicant consisting of several publications and internet articles was considered by the officer although it was found to be “general in content” and did not “provide evidence of risks which are personal to the applicant”. It was, however, used on assessing country conditions in Hungary.

[7] The medical evidence from Dr. Hedgcock was not disputed by the officer, but its value insofar as providing expert information on the medical treatment the applicant could receive in Hungary is questionable.

[8] In relation to evidence that Hungary lacks medical treatment for persons diagnosed with HIV/Aids, the officer reviewed numerous reports including the *Joint United Nations Programme on HIV/Aids 2008 Progress Report* for Hungary and was not persuaded that treatment would not be available to the applicant. Another report cited was an *Immigration and Refugee Board Research Directorate* document titled, “*Hungary: Entitlement to free medical care and treatment for a citizen’s HIV positive condition on his or her return to Hungary, following a three year absence from the country*”. Based on these reports it was found that there was insufficient evidence that the applicant would be denied medical treatment.

[9] The officer then turned to the issue of discrimination of Roma in Hungary. He found that the Hungarian government has made “serious efforts” to combat discrimination as outlined in a Freedom House Report for 2008 but that discrimination persists nonetheless.

[10] The officer then addressed the issue of persecution as a homosexual in Hungary. He turned, in particular, to an incident where right-wing groups subjected homosexuals to physical abuse during a gay pride parade and the reaction to it by the Prime Minister of Hungary denouncing the acts. Further, the officer highlighted captions of documentary evidence which outlined that while police officers were criticized in that incident for failing to respond, they were later praised for protecting marchers in a subsequent gay pride parade. For the officer, this was evidence that the government is making serious efforts to combat discrimination despite the fact that “discrimination against homosexuals continues to be a concern in Hungary”.

[11] Finally, the officer turns to the most specific report detailing HIV care in Hungary provided by the applicant’s counsel titled “Discrimination against HIV patients in health care” from 2008. The report outlined the experiences of three men with HIV in Hungary. The officer while sympathetic to their experiences did not find that they were “indicative of the entire health care system in Hungary”.

[12] The officer then cited *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 99 D.L.R. (4th) 334 (F.C.A.) for the principle that governments cannot be expected to guarantee the safety of its citizens all of the time and, as long as a state is in effective control of its

territory and is making serious efforts to protect its citizens, then that is sufficient to show protection of its citizens.

[13] In conclusion, the officer held that there was insufficient evidence to conclude that the applicant fit under the grounds of sections 96 and 97(1)(a) and (b) of the Act to warrant a positive finding.

**Issues**

[14] The applicant submitted the following issues:

1. *Did the officer err by failing to consider the evidence with respect to discrimination against HIV positive persons?*
2. *Did the officer err by failing to address whether the mistreatment the applicant would be subjected to for being gay, HIV positive, and Roma would cumulatively amount to persecution?*

[15] I find that the issues are as follows:

1. *Did the officer err in his finding of fact regarding discrimination against HIV positive persons in Hungary?*
2. *Did the officer err in failing to address the cumulative factors of being gay, HIV positive, and Roma?*

**Standard of Review**

[16] In *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 the Supreme Court of Canada stated that the process in determining the standard of review to apply involves first establishing whether the standard of review has already been established in jurisprudence involving similar circumstances. If a standard of review has already been cited then that standard would apply.

[17] Previous to the important administrative law case of *Dunsmuir*, decisions in the PRRA context used the reasonableness *simpliciter* standard; *Figurado v. Canada (Solicitor General)*, [2005] F.C.J. No. 458. This standard was collapsed to the standard of reasonableness by *Dunsmuir* and subsequent cases have continued to adopt reasonableness as the standard to use; *Christopher v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1199.

[18] I am satisfied that the standard of review from *Christopher* applies. This review similarly involves the process of analyzing questions of facts and law in a PRRA such that the standard of reasonableness is the correct one.

[19] The analysis by the PRRA officer involving facts personal to the applicant as well as country conditions in Hungary will be assessed in relation to the relevant sections of the Act. This analysis must be reasonable as enunciated in *Dunsmuir* and related jurisprudence.

[20] What is reasonable with regard to all the evidence is discussed in many cases including *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 843, and *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407.

[21] At paragraph 47 of *Dunsmuir*, reasonableness has been articulated as:

> …concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

**Analysis**

1. *Did the officer err in his finding of fact regarding discrimination against HIV positive persons in Hungary?*

[22] The applicant submits that the officer erred in evaluating the risk faced by the applicant in relation to the HIV treatment available in Hungary. <u>By focusing on this issue alone</u>, the officer ignored important evidence crucial to the issue of risk related to "discrimination in employment and education and general health care, and abuse from within the Roma community" which were all documented and before the officer.

[23] The respondent submits that the officer cannot be faulted for focusing on the issue of medical treatment for individuals with HIV because the overall evidence focused on discrimination

related to medical services. Further, specific discrimination evidence was not ignored. The particular evidence the applicant highlighted in his submissions was considered by the officer with respect to discrimination faced by HIV positive Hungarians. The respondent submits that in any case, a failure to "mine all statements buried in documentary evidence does not constitute an error and is not fatal to the decision".

[24] In the reply to the respondent's submissions, the applicant argued that "mining" was unnecessary as the evidence related to discrimination against HIV positive persons in employment, education, and non-HIV related health care was "in plain view on the very surface of the application" and to dismiss this evidence as details in the overall evidence regarding medical services was an error as this Court has held that officers must consider all evidence in relation to an individualized risk.

[25] The applicant also submits that the decision failed to acknowledge the difference between "denial of health services related to HIV treatment on the one hand, and denial of health care services for non-HIV related health issues, on the other". The failure of the officer to address the latter issue is an error as the "materials disclosed serious discrimination" related to physicians refusing to treat HIV positive patients especially outside of the lone HIV-Aids clinic in Budapest.

[26] In my view, the officer's finding of fact was unreasonable and did not adequately focus on the issue of personal risk for the applicant in returning to Hungary with this very serious medical condition. The applicant's evidence pointed to a personal risk based on discrimination documented

in various sources. The applicant's evidence of risk was not focused on the availability of medical treatment in Hungary but ratheron the fact that the availability of medical treatment and employment would be compromised, being a gay HIV-positive Roma.

[27] The response by the officer to the report that detailed discrimination against three HIV positive gay men in Hungary is demonstrative of this flawed reasoning. The officer stated that while sympathetic to the experiences of these men, "I do not find their experiences to be indicative of the entire health care system in Hungary". Personal risk to the applicant does not require proving that the entire health care system in Hungary is inadequate, rather it is proving that his personal circumstances, which have similarities to these men, put him at risk.

[28] The officer further states that his "own research does not indicate a sustained or systemic denial of core human rights which target gay HIV positive Roma". A sustained or systemic denial of core human rights is not essential in proving personal risk under the Act. I therefore do not find that this falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law as articulated in *Dunsmuir*.

*2. Did the officer err in failing to address the cumulative factors of being gay, HIV positive, and Roma?*

[29] The applicant submits that in some cases cumulative discrimination can amount to persecution as stated in the *Handbook on Procedures and Criteria for Determining Refugee Status of the Office of the United Nations High Commissioner for Refugees* (Geneva, January 1988) and

that the totality of the discrimination borne of factors such as being Roma, homosexual and HIV positive were never adequately addressed by the officer. The applicant submits that the documentary evidence before the officer showed that Roma face discrimination in education, employment and the provision of health care. The applicant stated that the officer failed to take into account the "intersectionality and cumulative nature of the mistreatment" the applicant could face.

[30] The jurisprudence also points to a finding of error by the officer. The applicant cited *Ramirez v. Canada (MCI),* 2008 FC 466 for the proposition that cumulative effects of homophobia and discrimination against HIV positive persons could amount to persecution. In *Ramirez*, the Board failed to address discrimination in employment and medical services as opposed to merely addressing the availability of treatment. The applicant also cited *Mete v. Canada (MCI),* 2005 FC 240 and the recent holding in *Munderere v. Canada (MCI),* 2008 FCA 84 for its findings that persecution can be found from the cumulative effects of discrimination and it must be considered.

[31] The respondent submits that the cumulative nature of discrimination was properly understood and addressed by the officer. The respondent points to the officer's statement that "[t]he applicant believes that he will be at greater risk in Hungary because he is gay, Roma and HIV positive". The respondent notes that the officer did a thorough analysis of the three risk areas identified by the applicant and concluded that it did not indicate a sustained or systemic denial of core human rights.

[32] The respondent further responds to the assertion by the applicant that his personal circumstances and particular vulnerabilities were not considered in light of the potential for discrimination having a cumulative effect. The respondent states that the officer specifically quoted the applicant's solicitor who explained the applicant's circumstances as a gay man with HIV.

[33] I am satisfied, and the parties agree that the <u>cumulative effects</u> of discrimination should be considered. They disagree, however, in whether this was done.

[34] I turn to the recent Federal Court of Appeal decision in *Munderere*, at paragraph 41, which cites Madam Justice Dawson in *Mete* at paragraphs 4-6 as enunciating three principles of cumulative discrimination amounting to persecution.

> [4] The following three legal principles are not controversial. First, in *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129, the Federal Court of Appeal defined persecution in terms of: to harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently; to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship; a particular course or period of systematic infliction of punishment directed against those holding a particular belief; and persistent injury or annoyance from any source.
>
> [5] Second, in cases where the evidence establishes a series of actions characterized to be discriminatory, and not persecutory, there is a requirement to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation of present fear. See: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 53 (F.C.A.). This is also expressed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook on RefugeeStatus") in the following terms, at paragraph 53: [Citation omitted]

> [6] Third, it is an error of law for the RPD not to consider the cumulative nature of the conduct directed against a claimant. See: *Bobrik v. Canada (Minister of Citizenship and Immigration)* (1994), 85 F.T.R. 13 (T.D.) at paragraph 22, and the authorities there reviewed by my colleague Madam Justice Tremblay-Lamer.

[35] While *Mete* is based on a different set of facts, it is informative. Of particular note is the third principle which states that the cumulative nature of the conduct directed towards an applicant must be considered.

[36] Findings of the cumulative effects of discrimination require an analysis beyond a bare acknowledgement that the individual had these risk factors. It requires canvassing specifically in this case, what risks would face a gay, HIV positive Roma returning to Hungary. This type of analysis is different than analyzing singly what risks faces a gay man, then a HIV positive person, and then a Roma person which is what was done by the officer. I agree with the applicant that the officer's reasons fail to address the "intersectionalities of the evidence and failed to treat the applicant as a sum of his parts". The officer did not consider the evidence in the manner that is in accordance with jurisprudence and, as such, failed to truly gauge the cumulative effects of the discrimination faced by the applicant.

[37] The decision in *Ramirez*, is persuasive as it involves a similar set of facts. In that case, Madam Justice Gauthier found that the Board committed an error when "it appeared to only deal with the availability of medical services and accessibility thereof to those infected", *Ramirez* at paragraph 16, and not also with the allegation of discrimination by doctors and nurses in the actual

delivery of health care. In that case, the applicant also raised concerns about employment-related discrimination.

[38] I am not implying that there was no finding of discrimination. The officer acknowledged that the Roma community continues to experience discrimination in Hungary as well as homosexuals. And, I am dubious of the officer's lack of finding of discrimination towards HIV positive men. His rejection of the NGO report based on the discriminatory experiences of three HIV positive men in Hungary as unhelpful in assessing the health care system as a whole (as stated in issue one, he chose to instead point to his own research which is not specified) is arguably unsound.

[39] The applicant has submitted evidence that not only does he face discrimination from the factors enunciated and discussed above, but also from his own Roma community which has its own problems with homophobia. The potential for the applicant to experience ostracism from friends and family if returned to Hungary is likely. Justice O'Keefe stated in *Diaz v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1543 at paragraph 36 that "[d]iscrimination because of the applicants HIV status has the potential for far more devastating and serious consequences" for an HIV positive male that would not have the support of his family because of his diagnosis and because he was gay.

[40] In conclusion, in the decision under review, the officer addressed each risk factor separately and each time concluded that the risk did not amount to persecution instead of addressing the impact of cumulative discrimination.

[41] His conclusion that "[m]y own research does not indicate sustained or systemic denial of core human rights" and that there is "insufficient evidence before me that the applicant, being a gay HIV positive Roma, would be denied the required medical treatment in Hungary" was an insufficient analysis to the extent of being unreasonable in accordance with *Dunsmuir* and is in error. I therefore allow the judicial review application on this ground.

**JUDGMENT**

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the matter is referred back to a different PRRA officer for a further assessment in accordance with the above Reasons for Judgment. No question of general importance was submitted for certification.

"Max M. Teitelbaum"
Deputy Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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