Federal Court  Cour fédérale

Date: 20120413

Docket: IMM-5301-11

Citation: 2012 FC 432

Ottawa, Ontario, April 13, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

FERENC BOZSOLIK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated July 20, 2011, finding that the applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow the application is dismissed.

Facts

[2] The applicant, Ferenc Bozsolik, is a citizen of Hungary. He alleges fear of persecution based on his part-Romani ethnicity (his father is Romani and his mother is a Hungarian). He states that he suffered discrimination and persecution throughout his life and was assaulted on many occasions by members of the Hungarian guard, skinheads and the police. He fled Hungary in 2000, and lived in the United States (US) for several years, but did not seek asylum. He was eventually deported because he was in the US without status.

[3] The applicant states that when he returned to Hungary, he found that the treatment of Romani people had worsened. He traveled to Canada in February 2010 and claimed refugee protection at the port of entry (POE).

[4] At the hearing before the Board, counsel for the applicant made a motion for a new hearing with a different panel on the grounds that the Board member's conduct gave rise to a reasonable apprehension of bias. The applicant alleged that the Board had closed its mind and predetermined the credibility of the applicant and refused to allow counsel for the applicant to make oral submissions.

Decision Under Review

Motion for new hearing because of bias

[5] The Board denied the motion for a new hearing and found that it was permitted to question the applicant in order to ascertain the truthfulness of his story. The Board rejected the assertion that

the presumption of truthfulness of testimony meant that the Board could not question a claimant on that testimony.

[6] The Board noted that counsel for the applicant had argued that contradictions between the POE notes and the applicant's testimony were not a valid basis for a negative credibility finding. The Board emphasized that it had not made any such findings at the hearing but was simply seeking clarifications of apparent discrepancies. The Board also noted the applicant's characterization of his demeanour as angry and cynical, but rejected these assertions. The Board found that extensive and energetic questioning was permitted and necessary to determine credibility.

Credibility and Subjective Fear

[7] The Board reviewed the legal principles related to credibility, including the presumption that testimony is truthful unless there is a valid reason to doubt its veracity. The Board accepted that the applicant had some Romani ethnic links, that he served in the military and lived in the US before being deported. However, the Board rejected the applicant's claims to have been subject to discrimination, persecution, harassment and violence in Hungary. The Board stated that it reached this conclusion because of omissions and inconsistencies.

[8] The Board noted that at the Port of Entry, the applicant indicated that nothing had happened to him personally for being Roma, but when he completed his Personal Information Form (PIF) narrative he alleged to be the victim of repeated assaults and police harassment. The Board found that the applicant did not provide a satisfactory explanation for this discrepancy and his answers in

respect of his failure to do so were evasive. The Board rejected the applicant's assertion that the POE notes had not been translated back to him in Hungarian.

[9] The Board found that there was no credible evidence that the applicant had ever personally been subject to discrimination or persecution for his Romani ethnicity. The Board noted a supporting document from the Roma Minority Local Government, but found that the applicant was the likely source of information in that document and therefore accorded it very little weight. The Board also noted that the applicant stated in his PIF that he had reported the violence against him to the police, but that in oral testimony he said he had never made such a report. The Board also drew a negative inference regarding subjective fear from the applicant's failure to seek asylum in the US.

State Protection

[10] The Board went on to consider whether there was adequate state protection in Hungary for Romani people. The Board noted the problem of discrimination and violence against Roma in Hungary, but found that state protection was available.

[11] The Board noted that the applicant had never made an official report to police about the alleged violence he experienced and found that protection would have been reasonably forthcoming if the applicant had sought it. The Board considered the documentary evidence on state protection in Hungary in considerable detail, concluding that the applicant had not presented clear and convincing evidence that protection would not be available to him. The applicant's claim was therefore refused.

Standard of Review and Issue

[12] This application raises the following issues:

a. Did the Board's conduct give rise to a reasonable apprehension of bias?

b. Did the Board breach the principles of procedural fairness by refusing to allow oral submissions?

c. Were the Board's credibility findings reasonable?

d. Were the Board's state protection findings reasonable?

Analysis

Issue: Did the Board's conduct give rise to a reasonable apprehension of bias?

[13] The test for a reasonable apprehension of bias was articulated by Justice de Grandpre in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[14] The applicant relies principally on the argument that the Board Member was angry and hostile during the hearing, gave the impression that his mind was closed and he had predetermined the applicant's credibility. However, the examples presented by the applicant from the hearing transcript do not support this argument.

[15] Counsel for the applicant engaged the Board Member in many disputes over his questioning, particularly regarding the POE notes. Counsel objected to this line of questioning and tried to prevent the Board Member from pursuing it. The Board Member indicated repeatedly that counsel could address any issues he felt had arisen during re-examination of the applicant and during his submissions. This was the correct response to counsel's objections. The Board Member acted in a reasonable manner in light of counsel's conduct, which came dangerously close to attempting to dictate how the Board could question the applicant.

[16] The passage urged on the Court as the most egregious example of bias is attached as Appendix A to this decision. It does not support the suggestion of bias. The assessment of an allegation of bias is necessarily informed by its context. In this case, the context includes the fact that Board members play an inquisitorial role. They are charged with making multiple determinations of fact and credibility, without the formalism of judicial proceeding and often without the benefit of counsel, who, in usual adversarial context, would ensure that the hard questions were asked. In consequence of the structure of the Board as established by its constituent legislation, Board members necessarily play an inquisitorial role in a manner that would not be appropriate for a court in the context of an adversarial proceeding.

Issue: Did the Board breach the principles of procedural fairness by refusing to allow oral submissions?

[17] The applicant also argues that the Board's refusal to allow oral submissions raises a reasonable apprehension of bias. The Board indicated that it had "been a long day" and would therefore require written submissions from counsel within two weeks of the hearing. In my view, there was nothing unreasonable in this decision and it does not amount to a breach of procedural

fairness. The applicant has the right to make submissions through counsel, but there is no right to make submissions orally as opposed to in writing.

[18] The applicant has the right to make submissions in support of his refugee claim, but it is for the Board to decide on its own procedures, including whether submissions will be oral or written; *Thamotarem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para 49. The applicant has not demonstrated any prejudice from having to provide written instead of oral submissions and the cases relied upon by the applicant only stand for the proposition that it is a breach of fairness to deny the opportunity to make any submissions, not that there is a right to make oral submissions; see for example *Kaldeen v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1033 (TD); *Niedzialkowski c Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] FCJ No 459 (CA).

Issue: Were the Board's credibility findings reasonable?

[19] The applicant argues that the Board erred by equating the POE notes with sworn evidence. The applicant also submits that the Board misconstrued the POE notes by indicating that the applicant had filled them out instead of the officer. Most of the applicant's arguments relate to the Board's questions at the hearing about the question in the POE notes regarding whether the claimant had been charged with an offence. However, the Board made no finding on this point in its decision. The applicant is therefore challenging a credibility finding that was never made.

[20] There is no merit to the argument that the Board should not rely on inconsistencies between the POE notes and oral testimony. The Board is not bound by the strict rules of evidence and can

base its decision on evidence it finds credible and trustworthy. There is ample support in the jurisprudence for considering inconsistencies between the POE notes, the PIF and oral testimony in determining a claimant's credibility; *Yontem v Canada (Minister of Citizenship and Immigration)*, 2005 FC 41 at para 15; *Navaratnam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 856 at paras 14-15. These cases, and the facts of this case, stand in distinction to the situation where an adverse inference was drawn because the claimant adds further details, consistent with or reasonably ancillary to, the initial statement; *Argueta v Canada (Citizenship and Immigration)*, 2011 FC 1146. In this case, there was a great divergence between the POE and his subsequent testimony.

[21] The aspect of the POE notes on which the Board did rely was the applicant's statement that "nothing had happened to him personally" in Hungary; however, for the reasons noted, it was open to the Board to rely on this statement to make a negative credibility finding. The applicant initially stated in his POE interview that nothing had happened to him personally and then changed his story and recounted in his PIF and oral testimony numerous violent incidents he experienced. The events omitted were significant, and it was reasonable to have expected them to have been referenced. The Board found his explanation for this inconsistency unconvincing and made a negative credibility finding as a result. This was reasonably open to the Board and there is no basis to intervene.

[22] As the decision can be upheld on the basis of the credibility finding the Court need not address the Board's analysis of state protection.

[23] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

Appendix A

COUNSEL FOR CLAIMANT: Yeah, I know you have and as a former police officer you should know the difference between arrested and charged; with all due respect. Your question was "Why did you say that you'd been charged with a crime or offence in Canada" in the port of entry notes.

MEMBER: Not just in Canada.

COUNSEL FOR CLAIMANT: In Canada or another country ---

MEMBER: Yes.

COUNSEL FOR CLAIMANT: -- charged.

MEMBER: Charged or what?

COUNSEL FOR CLAIMANT: In the port of entry notes; charged. I too have read the file.

MEMBER: Have you ever been charged with a crime or an offence.

COUNSEL FOR CLAIMANT: Right. Right and the officer said "yes".

MEMBER: It is checked off "yes".

COUNSEL FOR CLAIMANT: Yeah, by the officer. Now you compare it to the PIF that wasn't completed by the officer.

MEMBER: Sir, this is what is asked the Claimant. The Claimant answered the question. The officer checked off the answer that was given to him.

COUNSEL FOR CLAIMANT: How do you know?

MEMBER: Counsel ---

COUNSEL FOR CLAIMANT: How do you know that that's what he said?

MEMBER: In your cross-examination revisit this point.

COUNSEL FOR CLAIMANT: I think you're making a mistake about the facts, why not deal with it now, you brought up ---

MEMBER: You do that in your cross-examination.

COUNSEL FOR CLAIMANT: You brought up ---

MEMBER: I am moving on.

COUNSEL FOR CLAIMANT: You brought up the PIF, you can't leave it, you brought up the PIF and the question ---

MEMBER: And I'm not staying on this matter any longer. You raise it when you come in your cross-examination, sir.

COUNSEL FOR CLAIMANT: I think we need to because you raised it as a credibility issue.

MEMBER: No, and I am moving

COUNSEL FOR CLAIMANT: No, I think -- I think you've closed your mind to this issue because of the credibility issue and we need to address it now.

MEMBER: And I am moving on, you will return to it if you so wish when you have your opportunity.

COUNSEL FOR CLAIMANT: Have you closed your mind to this credibility ---

MEMBER: I have not closed my mind on anything.

COUNSEL FOR CLAIMANT: Well, your facial expression seemed to suggest you have because you're angry at me for following up on your question.

MEMBER: No, I am -- I am moving on now and I do not wish you to prevent me from moving on, counsel.

COUNSEL FOR CLAIMANT: That's a mischaracterization of what I'm doing.

MEMBER: Well that's what you're trying to do.

COUNSEL FOR CLAIMANT: No, sir, you brought up the PIF ---

MEMBER: I want to move on.

COUNSEL FOR CLAIMANT: So you're not interested in what you just brought up.

Very well, for the record, you brought up the PIF and now you won't deal with the PIF and I think you've closed your mind to this issue.

MEMBER: You're at liberty to say what you wish.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5301-11
STYLE OF CAUSE:	FERENC BOZSOLIK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto
DATE OF HEARING:	March 14, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	April 13, 2012

APPEARANCES:

Mieszko Wlodarczyk	FOR THE APPLICANT
Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rochon Genova Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT