

Federal Court



Cour fédérale

Date: 20170123

Docket: IMM-97-16

Citation: 2017 FC 79

Toronto, Ontario, January 23, 2017

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**SANDORNE BOTRAGYI, ATTILA HRANEK,
VERONIKA RAMONA HORVATH,
SANDOR ERIK BOTRAGYI**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2011, Ms Sandorne Botragyi and other members of her family sought refugee protection in Canada based on their fear of persecution in Hungary. A panel of the Immigration and Refugee Board denied their claims. They sought and obtained leave to seek judicial review of that decision, but the Court dismissed their application.

[2] The applicants then sought a pre-removal risk assessment (PRRA) and submitted to the PRRA officer some additional information that had not been part of their refugee claims. In particular, the applicants informed the officer that they had not been competently represented by counsel during the prosecution of their claims.

[3] The officer refused to consider much of the documentation the applicants provided. Specifically, the officer declined to accept information relating to the conduct of their former counsel because, in his view, any issue of alleged incompetence was remedied when the applicants were allowed to seek judicial review of the Board's decision. Given that they lost on their application, that issue, according to the officer, was no longer relevant.

[4] The applicants argue that the officer unreasonably failed to consider their new evidence. In particular, they maintain that the officer failed to appreciate the fact that they had no choice but to present what appeared to be new evidence to the officer because their former counsel had failed, out of incompetence, to present to the Board the evidence that was then available. They ask me to quash the officer's decision and order another officer to reconsider their PRRA.

[5] I agree with the applicants that the officer failed to appreciate that the allegations of incompetence not only affected the hearing before the Board, but also had to be taken into account in deciding whether the evidence before the officer could have reasonably been submitted previously. In the circumstances, I will allow the application for judicial review.

[6] While the applicants presented a number of grounds for challenging the officer's decision, I will confine my reasons to the alleged incompetence of counsel.

II. The PRRA Officer's Decision

[7] The applicants contended that their former counsel gave them only 20 minutes to complete their written narratives and did not give them any guidance about what to include. Counsel then arranged for the narratives to be translated. The translations were poorly done, and the applicants had no chance to review them before the hearing of their refugee claim. Counsel met with them only once before the hearing, and did not give them any advice about what kinds of evidence they should gather. The same counsel represented the applicants at the hearing, on their application for leave, and on their judicial review.

[8] Based on these circumstances, the officer concluded that any issue about the competence of counsel was resolved by the fact that the applicants obtained leave to seek judicial review, and then failed in their application.

III. Did the Officer Err?

[9] In my view, yes.

[10] In deciding whether to admit new evidence, the officer first had to consider whether that evidence was reasonably available to the applicants at the time of their hearing before the Board. The officer then had to consider whether, in the circumstances, the evidence could reasonably

have been presented to the Board (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 113(a) – See Annex).

[11] Here, at least some of the evidence the applicants provided the officer was reasonably available at the time of their hearing before the Board. However, the PRRA officer did not go on to consider whether that evidence could reasonably have been presented to the Board under the circumstances. As I see it, the officer did not appreciate the possibility that the applicants had been denied a reasonable opportunity to put their evidence before the Board due to the conduct of their counsel at the time.

[12] This is not to say that the officer should have admitted the new evidence. Rather, the officer should have considered the full circumstances before concluding that the evidence was not admissible. It was an error of law not to have done so.

IV. Conclusion and Disposition

[13] The PRRA officer erred by excluding evidence tendered by the applicants before considering whether, in the circumstances, they had been denied an opportunity to present their evidence to the Board. On that basis, I will allow this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT in IMM-97-16

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and no question of general importance is stated.

"James W. O'Reilly"

Judge

ANNEX

*Immigration and Refugee
Protection Act, SC 2001, c 27*

*Loi sur l'immigration et la
protection des réfugiés, LC
2001, ch 27*

Consideration of application

Examen de la demande

113 Consideration of an application for protection shall be as follows:

113 Il est disposé de la demande comme il suit :

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-97-16

STYLE OF CAUSE: SANDORNE BOTRAGYI, ATTILA HRANEK,
VERONIKA RAMONA HORVATH, SANDOR ERIK
BOTRAGYI v MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 3, 2016

JUDGMENT AND REASONS: O'REILLY J.

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