

Federal Court



Cour fédérale

Date: 20181106

Docket: IMM-1513-18

Citation: 2018 FC 1113

Toronto, Ontario, November 6, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

**ROBERT DANYI
DAVID DANYI
EVA KIS
ALEXANDRA DANYI
ROBERT MARK DANYI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated March 7, 2018, [Decision] of the Refugee Protection Division [Board] of the Immigration and Refugee Board [IRB] of Canada. In the Decision, the Board member [Member] rejected the Applicants' Roma-based refugee claim

against Hungary under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. I agree with the Applicants that the matter should be redetermined due to flaws in its fairness.

II. Background

[2] The five Applicants claim they were persecuted by white Hungarians on a cumulative basis in virtually all aspects of their lives, from the treatment they received in school, to their housing situation, to their lack of employment opportunities.

[3] The Applicants also describe racially-motivated violence, both verbal and physical, that they suffered at the hands of individuals who harbour hatred towards Roma. Although the Applicants say they made some attempts to involve the police, they claim nothing ever materialized from these attempts.

[4] The family moved around to avoid further violence, but ultimately decided to seek refuge in Canada, with two arriving in 2011 and the remaining three in 2012.

III. Issues and Standard of Review

[5] The Applicants claim that the Board, by using specialized knowledge, breached their rights to fairness, and made unreasonable credibility findings by relying on the wrong Personal Information Form [PIF]. As these two issues are determinative of this application, I will not address other issues raised by the Applicants.

[6] Credibility issues are reviewed on the basis of reasonableness. The Court will only intervene if the decision lacks “justification, transparency and intelligibility within the decision-making process”, and must ultimately determine “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Questions of procedural fairness, on the other hand, are addressed on the basis of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

IV. Analysis

A. *Procedural Fairness Regarding Specialized Knowledge*

[7] The Applicants claim that the Board violated their rights to procedural fairness in its treatment of the psychological report [Report]. At paragraph 50 of the Decision, the Board criticizes the Report’s author, stating:

. . . the doctor makes statements that extend beyond her area of specialized knowledge: specifically, she wrote that being homeless is ‘an act that is criminalized in Hungary.’ Once again, the panel presumes that the psychologist is repeating what the female claimant told her because there is no evidence before the panel to show how this psychologist was able to make that kind of statement or furnish such an opinion. However, no negative inference is imported to the female claimant because of the doctor’s overreach vis-a-vis opinion evidence.

[8] The Board goes on to use its own specialized knowledge to discount the Report based on its previous experiences with the psychologist in question:

This panel has reviewed numerous reports over the years, which were crafted by this particular psychologist, for refugee claimants in preparation for their hearings. The panel has historically

assigned very little weight to this doctor's reports on claimants' psychological functioning; like the case at hand, these observations constitute little more than restatements of claimants' narratives, which were already provided to her in advance of meeting the claimant, summarized under 'Reasoning for Refugee Claim', followed by "Opinion and Diagnosis" — all of which flow directly from the narrative. Without probing the veracity of the narratives and by accepting all their evidence as true without accessing the narrative, the psychologist invariably makes findings that derive solely from the account in the narrative as well as whatever the claimants tell the psychologist at the time of their assessments. The panel is unwilling to place significant weight on a report that constitutes restatements of the PIF narrative and then makes findings that derive solely from whatever the claimants have told her [at para 51].

[9] The Applicants submit that when a Board uses specialized knowledge, it must provide notice, as required by Rule 22 of the *Refugee Protection Division Rules*, SOR/2012-256

[Rule 22]:

22 Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person and, if the Minister is present at the hearing, the Minister, and give them an opportunity to

(a) make representations on the reliability and use of the information or opinion; and

(b) provide evidence in support of their representations.

22 Avant d'utiliser des renseignements ou des opinions qui sont du ressort de sa spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre — si celui-ci est présent à l'audience — et leur donne la possibilité de faire ce qui suit :

a) présenter des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;

b) transmettre des éléments de preuve à l'appui de leurs observations.

[10] I agree with the Applicants. When the Member noted that reports from the doctor “usually lack efficacy”, and that he “has historically assigned very limited weight to this doctor’s reports”, he used information from other sources and from evidence presented in other cases before the RPD, for which Rule 22 requires notice be given to the Applicants and an opportunity to respond. Failure to have done so amounts to a breach of procedural fairness.

[11] The Member then went further, finding the claimant’s demeanor inconsistent with the psychologist’s assessment, as follows:

[52] Fortunately, there have been several exceptions to this doctor’s reports, where the temperament and cognitive/emotional difficulties reported by this psychologist are also displayed by refugee claimants during their hearing, who have in fact experienced the effects of severe and persistent discrimination. This is not the case here, however, and in the circumstances of this case, the panel is unable to place persuasive weight on the psychologist’s findings. Her statements that characterize the functioning of the female claimant as being impacted by all her experiences in Hungary were not evidenced by the panel in this claimant at her hearing. The female claimant was composed and respectful of the proceedings; she listened carefully to her family’s testimony and she followed astutely the instances when the panel raised issues with her son during elements of his confused and contradictory testimony, as already referenced in these reasons. Most importantly, it is the panel’s responsibility to assess and weigh these types of medical reports, but also the comportment of the claimants. In probing and testing the statements made by the female claimant, the panel noted that, unlike the contents of the psychologist report, the female claimant was able to answer all the questions put to her without problems and she never became emotional or confused. However, given the panel’s concerns with aspects of the female claimant’s credibility, it finds that she has embellished her evidence by making broad statements, as referenced in these reasons, in order to bolster the family’s claims for protection as well as to create a sense of contemporaneity and immediacy in the fears that she and her family face if they return to Hungary. The panel does not find elements of the female claimant’s story to be plausible as stated. Accordingly, the panel

assigns little weight to the psychologist report based on evidence that is untested and as referenced herein.

[12] I agree with the Applicants that these findings are troubling given the Member's earlier comments. Certainly, had the findings regarding the psychological evidence not been otherwise flawed, this conclusion may have been sustainable, as has been the case in past decisions (see for instance, *Mubiala v Canada (Citizenship and Immigration)*, 2011 FC 1105 at para 15).

However, my conclusion regarding lack of procedural fairness directly impacts this aspect of the Decision, since it is based on the same doctor's report and the Member's tainted process regarding the reliability of the psychologist.

B. Credibility

[13] The Respondent argued that, should a breach of procedural fairness be found, it should not be fatal to the Decision because the Report was not central to the Decision, in that it only spoke to the female applicant's ability to testify, and to her mental state. I do not agree, given that the Report contained other conclusions as to how her experiences impacted her psychological state. However, even if the Board's comments regarding this aspect of the claim are set aside, as the Respondent suggests, there is another central error which also renders the Decision unreasonable.

[14] The female applicant stated in her updated narrative that the lawyer who represented the Applicants until April 2017 was suspended for negligence and misrepresentation. She stated that their first lawyer had asked them to sign blank PIFs, which, once filled by the lawyer's team, contained incorrect information. The Applicants only realized this after their new lawyer

provided them with a translation of the PIFs and narratives that were transmitted to the Board. The Applicants subsequently provided updated PIFs and narratives to replace the original, incorrect ones.

[15] For reasons unknown to this Court, the Board nonetheless made negative credibility findings based on statements in the original PIFs and narratives. The Board found inconsistencies in those original forms with other, updated testimony, and drew negative credibility inferences as a result.

[16] Based on the record, I am satisfied that the Applicants' first lawyer was indeed suspended for professional misconduct.

[17] The Applicants argue that the Board's consideration of the tainted original PIFs and narratives led to negative credibility findings that infect the Board's Decision as a whole, and render it unreasonable.

[18] The Respondent replies that these negative credibility findings are not determinative. Rather, state protection is the determinative element of the Decision.

[19] I do not agree. It is unclear that one can exorcise the flawed credibility finding (based on the outdated PIFs) from the rest of the Decision. As a result of this error, the Board did not believe parts of the Applicants' testimony pertaining to their life in Hungary. It is impossible to

know if the Board would have approached the state protection analysis differently without the flawed reliance on old forms.

[20] Given the findings on the first two issues regarding specialized knowledge and credibility, there is no need to address the remaining two issues of state protection and IRPA section 97 risk.

V. Conclusion

[21] The Decision is fatally flawed, first due to a failure to inform the Applicants of the use of specialized knowledge, resulting in a breach of procedural fairness, and second, by using inaccurate previous PIFs to find inconsistencies, which formed part of the negative credibility findings. The matter will accordingly be remitted for redetermination by a differently constituted panel.

JUDGMENT in IMM-1513-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The March 7, 2018 Decision is set aside, and the matter is to be redetermined by a different panel.
3. No questions for certification were argued, and none arose.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1513-18

STYLE OF CAUSE: ROBERT DANYI, DAVID DANYI, EVA KIS,
ALEXANDRA DANYI, ROBERT MARK DANYI V
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 23, 2018

JUDGMENT AND REASONS: DINER J.

DATED: NOVEMBER 6, 2018

APPEARANCES:

Phillip Trotter FOR THE APPLICANTS

Nicole Paduraru FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates FOR THE APPLICANTS
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario