

Date: 20061013

Docket: IMM-7804-05

Citation: 2006 FC 1221

Ottawa, Ontario, the 13th day of October 2006

PRESENT: THE HONOURABLE MR. JUSTICE LEMIEUX

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

LASZLO TOTH

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] On October 4, 2005, in oral reasons, the Refugee Protection Division (the “panel”), concluded that Laszlo Toth (the “respondent”) a Romanian citizen of Hungarian Gypsy descent, born on April 30, 1978, was a Convention refugee. This decision is challenged by the Minister of Citizenship and Immigration (the “Minister”) by means of the present application for judicial review, leave for which was granted by a judge of this Court.

[2] Essentially, the Minister argues that the panel's decision is patently unreasonable, since it is based on an erroneous finding of fact made without regard for the material before the panel, which is a ground for setting aside a decision under paragraph 18.1(4)(d) of the *Federal Courts Act*.

[3] According to the respondent's personal information form ("PIF"), the event that triggered his flight from Romania occurred on July 26, 2004, when the respondent was falsely charged with theft and arrested by the police, who allegedly detained and beat him. He states that, during this detention, he was cut on the right arm when he smashed through a glass door while attempting to flee from the advances of a homosexual policeman. It is alleged that, after realizing how serious this injury was, the policeman drove him to the hospital emergency ward, where he received treatment.

[4] In his PIF, he describes another incident of persecution, which happened on December 22, 2001. He claims to have been assaulted by ethnic Romanians in a bar. He was allegedly pushed against an overheated stove and burned on the thigh. The police were of no help and turned against him, allegedly hitting him and threatening further action if he continued to lie. At that time, he was told by the police that [TRANSLATION] "we Gypsies were always troublemakers".

[5] The main issue to be resolved by the panel was to determine whether or not the respondent was physically present in Romania on December 22, 2001, and July 26, 2004, the dates on which he claims to have been persecuted.

[6] His absence from Romania in December 2001 and July 2004 was mentioned by the Solicitor General of Canada (the "Solicitor General"), who intervened in the case, although he limited his

participation to submitting three documents. In other words, counsel for the Solicitor General was not present at the hearing of Mr. Toth's claim for refugee protection and did not cross-examine him. I also note the absence of the refugee protection officer (RPO), which means that only the Member, Mr. Toth, Mr. Toth's adviser and an interpreter were present at the hearing.

[7] Two of the documents filed by the Solicitor General were from American government sources. The first document, "M-1", contains computerized notes from the U.S. Border Patrol, Swanton Sector Intelligence Unit, which are similar to the notes which are found in the FOSS/SSOBL computer system of Citizenship and Immigration Canada ("CIC"). This document concerns a man named Laszlo Toth, a Romanian citizen born on April 30, 1978. This person had been admitted as a visitor to the United States on June 10, 2001, and lived there illegally until he left in 2004.

[8] The second document, "M-2", is an FBI analysis comparing fingerprints of the respondent, taken by CIC and sent to the FBI by the Royal Canadian Mounted Police ("RCMP"), with those of a person who had been arrested near Buffalo N.Y. by the Border Patrol on October 7, 2003. The FBI analysis bears number 943000CC7, and this same number appears on one of the file cards of document "M-1", sent to CIC by the Swanton Border Patrol. The FBI had concluded that Mr. Toth and the person who had been arrested near Niagara Falls, New York, on October 7, 2003, were the same person.

[9] Another issue arose to complicate the panel's consideration of the applicant's claim. At the beginning of the hearing on May 3, 2005, after intervention by the Solicitor General, the applicant

amended his PIF to admit having stayed in the United States from September 27, 2003, to December 20, 2003, the alleged date on which he claimed to have returned to Romania. According to his testimony, he used a false Finnish passport issued in the name of Poikoran Temu to enter and leave the United States in 2003 and also to travel directly to Canada from Romania on September 4, 2004. He also testified that he destroyed this passport immediately after his arrival in Canada.

The panel's decision

[10] The panel was well aware of the scope of the documentation submitted by the Solicitor General and of the lack of documentary evidence from Mr. Toth corroborating his account. This is why, at the end of the hearing on May 3, 2005, the panel required the applicant to submit certain documents to show that he had been in his native country at the time of the persecution, *inter alia*, his hospital records, the police report and confirmation from the airline of his flight to Canada.

[11] On October 4, 2005, the panel resumed its study of the respondent's claim. It noted that the only documents the respondent was able to submit were his hospital records. On this point, the panel wrote the following: "This file is genuine; it may be said that it is not a copy of the file, but the original file. The panel does not know how the claimant was able to obtain this document, but the file confirms that the claimant was in his country in 2002, in August 2003 and in 2004".

[Emphasis added]

[12] The panel acknowledged that the hospital file "contradicts" the computerized notes of the Border Patrol, filed as Exhibit M-1, which establish that on June 10, 2001, the respondent entered the United States through the port of New York City. According to the panel, "[t]his could lead the

panel to believe that the claimant could have been in the United States in June 2001 instead of in his country. This would contradict the fact that the claimant was allegedly beaten or had problems on December 22, 2001 . . .”.

[13] The panel continued its analysis:

However, the claimant produced another document today (Exhibit P-9) [his driver’s licence] that states that his driver’s licence was issued on July 17, 2002, thus seven months after the event that occurred in December 2001, and one year after his arrival in the United States . . . It was also mentioned that the passport was apparently issued in 2002 as well or in 2003. [Emphasis added]

[14] In addition, the panel mentioned certain problems in the documentation forwarded to CIC by the Border Patrol, more specifically, the file card at page 20 of the Minister’s file, which concerns a Laszlo Toth, born in Romania on April 30, 1978, who entered the United States on June 10, 2001 (FBI number 943000CC7), but which shows that his father’s name was Laszlo and his mother’s name was Eviolica. The panel noted that, in his PIF, the respondent had written that his father’s name was Ladislau Toth and that his mother’s name was Viorica. The panel concluded as follows: “This is not at all the same given name. There is therefore a possibility that the person who entered in 2001 is someone other than the claimant”. [Emphasis added]

[15] The panel accepted the testimony of the respondent to the effect that he did not enter the U.S. through the port of New York, but through Hartford, Connecticut, where his friends lived. The panel also rendered its decision on the basis of the June 2002 entry in the Romanian hospital records to the effect that the claimant had been at the hospital clinic to obtain his driver’s licence. According to the panel, from this medical consultation record, “it clearly appears that the claimant went there

on June 3, 2002, that is, before his driver's licence was issued. Therefore, he could not have been in the United States". [Emphasis added]

[16] The panel went on to write the following:

In addition, the claimant has maintained from the beginning that he never used his own passport to go to the United States How is it possible that his name can appear there [on the Border Patrol file card]? The only explanation is that there is another Toth Laszlo with the same date of birth. This could have appeared to be a fairly major contradiction in his file. The claimant's testimony convinced the panel that he did not enter the United States on June 10, 2001, but rather in September 2004 [sic].[Emphasis added]

As well, another factor that would allow the panel to say that the claimant returned to his country in December is that the airline ticket says [Translation] "return in December 2003", as the claimant has always maintained in his testimony. [Emphasis added]

[17] With regard to the amendment of his PIF at the beginning of the second hearing, the panel wrote the following:

Another fact is the claimant's failure to declare that he had been in the United States. This is an important fact that the claimant did not mention in his narrative. The claimant's explanation is entirely satisfactory since the event that triggered his decision to leave his country had not yet occurred. Moreover, the claimant had not made a claim in the United States, as he mentioned, he had returned to his country, and he had not gone to the United States, in order to make a claim. As he said, he had gone to visit his friends. The panel feels that this is a fairly reasonable and satisfactory explanation, as is his return to his country. [Emphasis added]

[18] The panel was of the opinion that the "claimant testified very well and the panel was able to note that it is very clear that he experienced the alleged problems. This is clear to the panel and the claimant never hesitated to give an answer. He was direct and spontaneous and, as a result, there was nothing that would allow the panel to say, with the evidence filed here, that the claimant was

not a credible person. The panel gives the claimant the benefit of the doubt with regard to the facts, as alleged". [Emphasis added]

[19] The panel ruled as follows:

The contradictions that may have arisen as a result of the claimant's entry into the United States no longer exist. The panel would also like to note that it is bizarre that the claimant went to the hospital before, but during a certain period that could coincide with 2001, that is, the second-last entry in his hospital record. Even in his narrative, he talks about 2001 and 2004. Although in the panel's opinion this seems quite bizarre and suspicious, the panel would nevertheless like to mention it because the panel will consider this when rendering a decision. [Emphasis added]

Analysis

[20] According to the Minister, the panel made several errors, including:

- Capriciously ignoring Exhibit M-1 simply because the Border Patrol notes contained typographical errors;
- Arbitrarily concluding that Exhibit M-1 concerned another Laszlo Toth;
- Ignoring the fact that the fingerprints taken by the FBI under number 943000CC7 (Exhibit M-2) had been inserted into the Border Patrol's notes on M-1.

[21] The respondent contests the Minister's allegations. He filed an affidavit in the Minister's application for judicial review. He states that he never set foot in the United States before September 2003 and, consequently, did not have to submit samples of his fingerprints before October 2003. However, he admitted having been arrested on October 7, 2003, by the New York State Border Patrol, who took his fingerprints. He relies on the hospital file in which the doctors noted the medical examination for obtaining his new driver's licence on June 3, 2002, and on the note written on August 3, 2004, by the doctor who removed the stitches in his right forearm one

week after he was assaulted on July 27, 2004. He also states that he had two official documents on record: his passport issued on September 19, 2003, and the new laminated driver's licence issued on July 17, 2002.

[22] Mr. Toth was cross-examined on his affidavit dated February 24, 2006. During his cross-examination, Mr. Toth was shown an investigation report drafted by Daniel F. Allman, a Supervisory Border Patrol Agent. This report concerned a Laszlo Toth, born in Romania on April 30, 1978, in Balan, Wargita, whose permanent address was Dozsa Street, Saint George, Romania. The report shows that this Laszlo Toth had a passport bearing number 00327927 and had an American visa. I quote the relevant excerpts from this report:

Subject last entered the United-States at New-York, N.Y. has a B-2 visitor on June 10, 2001 and was admitted until December 9, 2001. There is no record of an extension. Admission number 19150056909.

Toth was in a position of his Romanian passport number 00327927. ... there is no record of departure and there is no record of an extension granted in claims.

... Toth claimed to be a crewman on the Victory, a cruise ship on the Carnival Cruise Lines. He stated that he was returning to New-York to join his ship. No record could be found to substantiate his claim. The Carnival office was contacted. Carnival could not verify that Toth was employed by Carnival and stated the ship was currently in Norfolk Virginia and not in New-York as Toth had claimed.

Toth was a passenger in a vehicle operated by Szabolcs Luka.

[23] Given the cross-examination on Mr. Allman's report, the Minister submits that the respondent committed perjury.

[24] The parties agree that the standard of review applicable in this case is patent unreasonableness. I agree with this point of view.

[25] It seems to me that the errors that the Minister claims were made by the panel are factual errors. Under paragraph 18.1(4)(d) of the *Federal Courts Act*, this Court may set aside a decision if a federal board, commission or other tribunal “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it”. This standard is equivalent to that of patent unreasonableness.

[26] A patently unreasonable decision has been described as being “clearly irrational” or “evidently not in accordance with reason”. A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. (See *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.)

[27] In *Voice Construction Ltd v. Construction General Workers’ Union, local 92*, [2004] 1 S.C.R. 609, Major J., writing for the Supreme Court of Canada, stated the following: “A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd”.

[28] For two reasons, I dismiss the objection made by counsel for Mr. Toth concerning the inadmissibility of Mr. Allman’s report on the ground that it was not before the panel.

[29] First of all, this report was submitted by the Minister in the context of his cross-examination of Mr. Toth on his affidavit in support of his contestation of the application for judicial review. In submitting the report, the Minister aimed to show that Mr. Toth had perjured himself.

[30] Secondly, the rule to the effect that an application for judicial review must be based on the record as submitted to the court does not apply when issues of procedural fairness or jurisdiction are raised. (See *Ontario Association of Architects v. Association of Architectural Technologists of Ontario* [2003] 1 F.C. 331 at paragraph 30 (F.C.A.) and *Encinas v. Minister of Citizenship and Immigration* 2006 FC 61.) In this case, I am of the opinion that procedural fairness is at issue. Justice requires that a document showing the falsity of a refugee claimant's testimony to the panel be admissible on judicial review, as this is a ground for vacation of refugee protection under section 109 of the *Immigration and Refugee Protection Act*.

Conclusions

[31] For the following reasons, I will allow this application for judicial review.

[32] The panel ignored the evidence—important evidence—because it concluded that the Mr. Toth identified in Exhibit M-1 was a person other than the respondent without having considered the FBI analysis, which showed that the person identified in Exhibit M-1 and admitted into the United States on June 10, 2001, was the same person as the respondent.

[33] The report drafted by Mr. Allman and submitted as Exhibit A-1-1, shows that the respondent entered the United States on June 10, 2001, with his Romanian passport bearing number 00327927 and with an American visa, and that he was in possession of this passport when he was arrested on October 7, 2003, which contradicts his testimony before the panel.

[34] The panel did not give appropriate reasons for its decision and was inconsistent in its analysis of the evidence. A study of the written records of both panel hearings shows that the panel had several concerns about the evidence submitted by the respondent to establish his presence in Romania in 2001 and in 2004. I note the following points, among others: • the respondent's obtaining a driver's licence in 2002 and a Romanian passport in 2002 or 2003; • the fact that it was mentioned that it was possible to obtain a driver's licence without being physically present and that there was no evidence of the Romanian passport; • the date of the last hearing before the American tribunal, that is, August 8, 2004, according to Exhibit M-1; • the way in which the respondent was found to be credible even after several aspects of the evidence were identified as "bizarre" in the panel's reasons; • the fact that the panel attached probative value to the hospital records after having stated that such records were easy to obtain; and the panel's conclusion to the effect that the hospital record proved that the claimant was present in Romania in 2002, after having expressed the opinion that the date of the consultation was vague and was probably 2001, not 2002.

[35] I am surprised that the panel did not make any comment about the claimant's conduct, that is, about the fact that he travelled to the United States and Canada with a forged passport when he had one if not two Romanian passports.

[36] The panel dismissed document M-1 mainly because of typographical errors involving the names of the respondent's parents, concluding that there "is therefore a possibility that the person who entered in 2001 is someone other than the claimant". The panel was not supposed to apply the evidentiary standard of a "mere possibility" when making this finding. It should have used the "balance of probabilities" standard.

ORDER

THE COURT ORDERS that: The application for judicial review is allowed, the decision of the panel is set aside, and Mr. Toth's claim for refugee protection must be reconsidered by a differently constituted panel. No question of general importance was proposed.

"François Lemieux"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7804-03

STYLE OF CAUSE: MINISTER OF CITIZENSHIP
AND IMMIGRATION

Applicant

and

LASZLO TOTH

Respondent

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: July 25, 2006

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** THE HONOURABLE MR. JUSTICE LEMIEUX

DATED: October 13, 2006

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