

Date: 20080214

Docket: IMM-553-07

Citation: 2008 FC 191

Ottawa, Ontario, February 14, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ELENA MARYLENE BOTEZATU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant's refugee claim failed because the Refugee Protection Division (RPD) found that there was no objective basis for her fear that she would not receive a fair trial in Romania, that her treatment in prison would be cruel for which she required protection and that she would be

subject to reprisals from her former employer. The Applicant challenges the legal test used and the reasonableness of the findings.

II. BACKGROUND

[2] Ms. Botezatu, then a 61-year old, is a Romanian citizen. She was implicated in a political and legal scandal involving the sale of oil products and the tax investigation related to the sale price of those products.

[3] Shortly after leaving Romania in April 2002 to visit a friend in the United States, Romanian authorities issued subpoenas for her, and she was charged with “abuse of duty” and “incitement to falsify documents”. A warrant for her “preventive arrestment” was also issued. The Applicant says that she first learned of these legal steps in July 2002 when she came to Canada to visit another friend.

[4] Since that time, the Applicant has fought the Romanian judicial proceedings from afar. She applied for protection in Canada in June 2003, approximately one year after learning of these proceedings.

III. ANALYSIS

[5] The standards of review at issue here are straightforward (see *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 and *Resulaj v. Canada (Minister of Citizenship and*

Immigration), 2006 FC 269). On the legal test applicable, it is correctness. As to findings of fact, for purposes of this case, I will apply that of patent unreasonableness. I do so bearing in mind Justice Major's caveat in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, that the patent unreasonableness standard should be a rarity.

[6] The Applicant has attempted to weave an argument that despite the RPD stating the test to be "a serious possibility of harm", the RPD mixed up the test with that of "balance of probabilities" throughout the balance of the reasons.

[7] Having read the reasons carefully, I can find no such error. The RPD simply acknowledged that the burden of proof of the "serious possibility" must be established on the balance of probabilities. That is a correct, although somewhat awkward, statement of the law.

[8] I am more troubled by the RPD's consideration of Romanian prison conditions and its assessment that the Applicant would not be subject to torture. As the trier of fact, the RPD is entitled to significant deference. In this case, the DOS Reports show that prison conditions fail to meet international standards. The fact that Romania was entering the European Union, subject to certain conditions of reform, might be relevant but was not considered as such. The RPD's conclusions about the physical and operating conditions of prisons might not, in and of itself, be patent unreasonableness (although it does not stand up to a probing examination) but linked as it was to the possibility of torture in prison, the conclusion is patently unreasonable.

[9] As to whether the Applicant was subject to a serious possibility of risk, the RPD failed to adequately consider that the Applicant's co-accused in the scandal suffered torture and to explain why treatment of a person in a like situation is not a strong indicator of the risk the Applicant would face.

[10] Therefore, this judicial review is granted, the RPD's decision quashed and the matter remitted to the RPD for a new determination by a differently constituted panel.

[11] On the basis of these Reasons, the Court does not see that any question of general importance arises. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the RPD's decision is quashed and the matter is to be remitted to the RPD for a new determination by a differently constituted panel.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-553-07

STYLE OF CAUSE: ELENA MARYLENE BOTEZATU

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: February 14, 2008

APPEARANCES:

Ms. Barbara Jackman FOR THE APPLICANT

Ms. Alexis Singer FOR THE RESPONDENT

SOLICITORS OF RECORD:

JACKMAN & ASSOCIATES FOR THE APPLICANT
Barristers & Solicitors
Toronto, Ontario

MR. JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario