Federal Court  Cour fédérale

Date: 20101119

Docket: IMM-988-10

Citation: 2010 FC 1162

Vancouver, British Columbia, November 19, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LUCAS GABOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] Mr. Gabor seeks to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board that found him to be neither a Convention refugee nor a person in need of protection.

[2] He submits that the Board's decision was unreasonable in that the Board made capricious findings of fact and failed to canvass objective country conditions for Roma in the Czech Republic. He further submits that recent comments made by the Minister of Citizenship and Immigration

created an apprehension that the Board was biased in assessing claims made by Roma from the Czech Republic.

[3] He has failed to persuade me of any of his submissions and this application must be dismissed.

Background

[4] Mr. Gabor is a 21-year-old man. He claims that he has been persecuted in the Czech Republic because he is Roma. In his Personal Information Form (PIF), he outlines his belief that Roma are in danger in the Czech Republic, states that he has been attacked by skinheads on many occasions, and specifies that the most dangerous incident involved him being attacked on a bus while he was on his way to see his friends.

[5] The applicant was self-represented at his hearing before the Board. The Board Member rejected the applicant's claim, specifically finding that Mr. Gabor did not suffer a serious attack from skinheads in the Czech Republic and further finding that while the treatment of the applicant in the Czech Republic may amount to discrimination, it did not rise to the level of persecution.

[6] In its reasons, the Board reviewed the applicant's allegations of mistreatment at school and at work. The Board then considered the applicant's allegation that he was attacked by skinheads in December 2008 while he was shopping with his mother. The applicant said that he was seriously beaten and had to go to the hospital, but that he had forgotten the medical report he had received in the Czech Republic. The applicant explained that he had tried to get the report for the hearing but

that his mother could not find it. The applicant said that he went to the police to report the incident but they told him that because there were no witnesses they could not do anything. His mother's attempts to approach more senior police officers were unsuccessful.

[7] At the hearing the applicant stated that he was subjected to other attacks by skinheads but that they were not as serious as the incident involving him and his mother. The Board took note of his testimony that he went to the police and reported the attacks and that sometimes they would write reports, but that there was no follow-up and it was difficult to get the police reports for the hearing.

[8] The Board's ultimate conclusion that Mr. Gabor did not suffer a serious attack by skinheads stemmed from the fact that in his PIF narrative, he stated that the most serious attack occurred on a bus, whereas at the hearing he stated that the most serious attack happened while he was shopping with his mother. At para. 13 of his reasons, the Board Member wrote that:

> When he was asked for an explanation as to this inconsistency, he said he did not know why he did not tell the Board about the attack on the bus. If the claimant had been attacked in either of these incidents he would have remembered them and related both of them in his testimony and in his PIF narrative. The claimant was unable to provide a medical report of either incident. He said that he forgot a medical report when he left the Czech Republic and he said that his mother could not find it when he asked for it. I do not accept this explanation. I conclude that he did not suffer a serious attack by skinheads in the Czech Republic.

[9] The Board determined that while the applicant may have suffered discrimination in the Czech Republic because he was Roma, the examples he presented were not persuasive evidence of a sustained or systemic violation of basic human rights demonstrative of a failure of state

protection. Accordingly, the Board determined that there was no serious possibility that he would be persecuted or would be at risk to life, cruel and unusual treatment or punishment, or torture if returned to the Czech Republic.

[10] No allegation of bias or a perception of bias was raised by the applicant with the Board. However, he has raised the issue in this application with respect to comments made by Minister of Citizenship and Immigration Jason Kenney during the spring of 2009. The Minister made public comments relating to refugee claims from the Czech Republic, including a statement that "it is hard to believe that the Czech Republic is an island of persecution in Europe." The applicant says that these comments, in combination with a decline in the number of successful refugee claimants from the Czech Republic, raise a reasonable apprehension of bias.

Alleged Errors by the Board

[11] I do not accept the applicant's submission that the Board made capricious and thus unreasonable findings of fact by concluding that he did not suffer beatings from skinheads and by doubting his credibility because his identification of the most serious incident varied from his PIF narrative to his oral testimony.

[12] Contrary to the applicant's submissions, the Board did not make its negative credibility finding because of any categorization issue, or because of a failure of the applicant to identify one incident as the "most serious." Rather, the Board did not accept the applicant's allegations because the applicant described different events on his PIF and at his oral hearing. On his PIF he described the alleged bus attack but not the alleged attack while he was with his mother; before the Member

he described only the attack while he was with his mother, even after probing by the Member. During the hearing, after discussing the attack that allegedly occurred while the applicant was with his mother, the Board Member and the applicant had the following exchange:

> MEMBER: Any other times, that you were attacked?
>
> CLAIMANT: Those were attacks of much smaller attitudes, that I don't even – I was basically, most of the time, spending at home, behind closed doors because I was worried about my mom.
>
> …
>
> MEMBER: Did you go for medical attention after any of these attacks?
>
> CLAIMANT: No.

However, in his PIF, the applicant stated that after the attack on the bus he received medical attention from a friend who was a nurse.

[13] It was not unreasonable for the Board to expect that the applicant would have described both of these evidently serious incidents in his PIF and at the hearing. The Board had the advantage of hearing directly from the applicant and coming to a conclusion on his credibility based on his live testimony. Furthermore, the Board also considered the very serious failure of the applicant to provide either medical reports or police reports, a failure for which the applicant was not able to provide any satisfactory explanation.

[14] The applicant submits that a "long line of decisions" (*Sivalingam v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 773; *Balasubramaniam v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1438 (F.C.); *Satkunarajah v. Canada (Minister of Citizenship*

and Immigration), [2004] F.C.J. No. 28 (F.C.); and *Mylvaganam v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1195 (T.D.)) from the Federal Court have held that once the Board accepts that a claimant is who they claim to be, the Board has an obligation to canvass objective country condition materials notwithstanding a negative credibility finding. The applicant says that since the Board accepted that he was of Roma ethnicity, it was an error not to consider country condition evidence.

[15] The applicant's submission must fail in light of the decision of the Federal Court of Appeal in *Sellan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, wherein, in answering a certified question, the Court stated:

> [W]here the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[16] The applicant did not present any "independent and credible documentary evidence" to the Board, and as the onus rested upon him, the Board had no duty to canvass country condition evidence.

[17] The applicant reproduces parts of another decision by the Member who decided his claim in which the Member allowed the claims of Roma persons fleeing the Czech Republic. In that decision, the Member engaged in an analysis of country condition reports; the applicant submits the same should have been done here.

[18] I agree with the respondent with respect to the inappropriateness of comparing Board decisions. It is trite law that the Board's decisions are based on the specific facts of each case and are not binding. In any case, the decision partially reproduced by the applicant has significant differences from the case before the Court.

Allegations of Bias

[19] The applicant submits that the comments made by the Minister of Citizenship and Immigration create an apprehension of bias and raise an issue of procedural fairness.

[20] The respondent submits that the applicant was unfair to the respondent in bringing this evidence "at the last minute" and not bringing it to the attention of the Board when it heard his application. Allegations of bias are to be raised at the first instance: *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, *Re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.) leave to appeal to the Supreme Court refused. The respondent made an identical submission in *Dunova v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 438. It was rejected by Justice Crampton because there was no evidence that the applicant was aware of the comments at the time of her hearing. The same is true here and the respondent's submission is rejected.

[21] The applicant bases his submissions on bias on two statements made by the Minister. The first was made in Paris in April 2009: "Although, like every other democracy, it has its challenges and its shortcomings, it's hard to believe that the Czech Republic is an island of persecution in Europe." The second statement was made in June 2009 with reference to an IRB

report on the Czech Republic: “If someone comes in and says that the police have been beating the crap out of them, the IRB panelists can then go to their report and say, ‘Well actually, there’s been no evidence of police brutality’.”

[22] The applicant submits that the drop in accepted refugee claims from the Czech Republic is evidence of the negative impact the Minister’s statements have had. The Board’s statistics show that such refugee claims had a 94% acceptance rate in 2008 and an 81% acceptance rate between January and March 2009, the first full quarter prior to the impugned statements. The acceptance rate in the quarter after the statements were made (July to September 2009) dropped to 30%, and the rate dropped to 0% in the last quarter of 2009.

[23] An allegation of apprehension of bias based on these same comments and referring to these same statistics was recently considered by Justice Crampton in *Dunova*. The applicant urges me not to follow *Dunova*; he submits that the facts before me are distinguishable.

[24] *Dunova* involved an application for judicial review of a Pre-Removal Risk Assessment (PRRA) application, not a refugee claim; however, like Mr. Gabor, Ms. Dunova is a citizen of the Czech Republic and a Roma.

[25] In *Dunova*, Justice Crampton found that the evidence presented failed to meet the “applicable standard of the well-informed individual considering the matter in depth in a realistic and practical way” articulated by Justice Tremblay-Lamer in *Zrig v. Canada (Minister of*

Citizenship and Immigration), 2001 FCT 1043, aff'd 2003 FCA 178. Justice Crampton's reasons for his finding included the following:

> (i) The Board released a report on conditions faced by Roma in the Czech Republic in the period between the Minister's two statements and "it is entirely possible that the content of the report affected the number of accepted, rejected, abandoned and withdrawn refugee claims."
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> (ii) The statistics adduced are those of the Immigration and Refugee Board and the PRRA unit from which the decision was made is not a part of the Board.
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> (iii) The statistics cited are for all claims from the Czech Republic and other than counsel's "bald statement that 99% of such claimants are Roma, no evidence was adduced on this point."
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> (iv) The PRRA officer was completely independent of the circumstances giving rise to the alleged apprehension of bias, unlike in *Geza* where the Member who heard the case was involved in the planning of the "lead case" strategy.
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> (v) Unlike *Geza* where an "explicit strategy" was adopted by the Board, Minister Kenney's comments were "spontaneous and not made pursuant to or in relation to any strategy."
>
> (vi) No evidence was adduced to show that the PRRA officer was influenced by the comments.
>
> (vii) The decision-maker must be presumed to be impartial.

[26] The applicant's response to Justice Crampton's findings in *Dunova* is as follows:

(i) The statements contained in the reports of the Board released in June and July 2009 cannot reasonably be said to have led to the "free-fall" in acceptance rates from the Czech Republic.

(ii) The statistics adduced are those of the Immigration and Refugee Board which is the decision-maker in this case, unlike in *Dunova*.

(iii) While the Board's statistics are for all claims from the Czech Republic, counsel repeats the assertion he made in *Dunova* that the vast majority of such claimants are Roma.

(iv) It is irrelevant whether the Minister's comments were spontaneous or not; what is relevant is whether they lead to a reasonable apprehension of bias.

(v) The applicant submits, more forcefully perhaps than in *Dunova*, that comments from experts support the submission of an apprehension that the Board is biased.

[27] I agree with the applicant that the fact that statements are made spontaneously does not mean that they can never be used to establish an apprehension of bias; however, Justice Crampton did not say otherwise. His observation that the comments were made spontaneously meant, he said, that they "were less potentially problematic than had they been made in a different context or as statements of official policy" [emphasis added].

[28] I cannot accept the applicant's submission that the release by the Board of "Czech Republic: Fact-Finding Mission Report on State Protection" (June 2009), and "Czech Republic: Fact-Finding Mission Report on the Situation and Treatment of Roma and Potential for Internal Relocation" (July 2009) could not have led to the dramatic decrease in accepted claims from the Czech

Republic. At the hearing the applicant offered the Court selected pages from one of these reports and asked me to assess whether the statements contained therein could reasonably lead one to the view expressed by Justice Crampton that the Reports could have led to the drop in acceptance rates. Since the hearing I reviewed both reports in their entirety.

[29] It must be noted that Justice Crampton asserted only that it was "entirely possible" that the reports affected the number of claims accepted, rejected or withdrawn. He did not assert that the reports did impact the success rate of the claims.

[30] In my view, it is not for the Court to weigh these reports to reach the conclusion the applicant urges unless it is clear on the face of the documents that they support only that view. For example, if the reports unambiguously stated or supported the conclusion that there is persecution of Roma in the Czech Republic and there is no adequate state protection available to them, then one would conclude that these reports could not lead to the increased rejection rate for refugee claims. However, the reports say nothing of the kind. They are a fair and balanced reporting of facts, comments and observations from both the state authorities and non-governmental organizations as to the treatment of Roma and state protection measures that are available to them in the Czech Republic. Absent evidentiary support divorcing these reports from the acceptance rate for refugee claims, the submission of the applicant is mere speculation and insufficient to warrant the conclusion he urges upon the Court.

[31] The applicant submits that he has evidentiary support for his allegation of an apprehension of bias in addition to the statistics from the Board. He says that he has "expert evidence" of the

alleged bias and referred the Court to comments from “many prominent immigration advocates and critics” contained in the July 22, 2009 edition of *Embassy* magazine.

> Peter Showler, a former chairman of the IRB and director of the Refugee Forum at the Human Rights Research and Education Centre at the University of Ottawa, said Mr. Kenney has absolutely introduced institutional bias into the refugee board's decision-making. He said Mr. Kenney's comments have caused a "significant amount of damage" to individual refugee claimants from Mexico and the Czech Republic, as well as to the judicial process.
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> "I am not aware of a single previous minister of immigration who has made such remarks, who has intruded on the judicial process in this way; not one," Mr. Showler said. "This is extraordinary and I think he has overstepped the line, and I think the courts are going to tell him that he's overstepped the line."
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> The Refugee Lawyers' Association of Ontario has also spoken out against Mr. Kenney's comments, which they say undermines the IRB's independence and tarnishes its integrity.
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> "The Canadian public should be shocked that a minister would interfere so blatantly in the work of an independent body," Geraldine MacDonald, president of the association, said in a July 13 press release.
>
> …
>
> Experts say Mr. Kenney's disrespect of the principle of independence is of grave concern because it introduces external political factors into the members' decision-making process.
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> "The people who are members of the IRB ultimately depend on the minister of citizenship and immigration, and more generally the government, to keep them in their jobs," said Audrey Macklin, an associate professor at the University of Toronto's Faculty of Law. "When the minister pronounces on the validity, or lack thereof, of refugee claimants from any country without having heard the particular case and knowing the individual circumstances, there is the risk that individual decision makers whose jobs ultimately depend on the minister's decision to appoint and reappoint them, will be unduly influenced. They might be fearful when their time comes up for reappointment that he will examine their acceptance rates from the countries where he has deemed refugee claimants to be bogus, and penalize them."

> …
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> Errol Mendes, a professor of international law at the University of Ottawa, said Mr. Kenney's "blanket statements" about claimants from other countries, such as Mexico and the Czech Republic, are dangerous. As the most senior person in the immigration department, the onus is on Mr. Kenney to respect the 1951 Convention relating to the Status of Refugees, Mr. Mendes said, adding there is nothing in the '51 convention which suggests claimants from democratic countries, such as the Czech Republic and Mexico, are not entitled to a fair hearing.
>
> "Given all that, at least in terms of the spirit of the rule of law, I think he has abdicated his responsibility to be a responsible minister of immigration and citizenship," Mr. Mendes said. "And we could add to that multiculturalism too, because this certainly goes against the spirit of multiculturalism, to basically stereotype entire peoples as potential fraudsters."

[32] This evidence was put before the Court as an exhibit to the affidavit of the applicant and was also before Justice Crampton in *Dunova*. Justice Crampton did not deal with this “expert evidence” directly as he found that the observations of these experts related to the Board and not to the PRRA officer who made the decision under review before him.

[33] I find that the introduction of the alleged “expert evidence” upon which the applicant relies is unfair to both the respondent and to the Court and I give it little weight for the following reasons:

(i) The persons who are reported to have made these comments have not and cannot be cross-examined because they have not sworn affidavits in this proceeding.

(ii) The *Embassy* report largely provides a summary of the experts’ views; verbatim quotes are limited. As a consequence, it is impossible to determine whether the report is an accurate summary of the views of the individuals quoted.

(iii) The *Embassy* report and the experts' remarks are not directed solely to the two comments of the Minister at issue here. The article refers to statements made by the Minister concerning U.S. war deserters and refugee claims of Mexicans in addition to refugee claims of Czech Roma. As a consequence, it is uncertain whether the purported views of these experts would be the same if they were speaking only to the two statements that are at issue here.

(iv) Only one of the alleged experts, Audrey Macklin, provides any rationale for the conclusion that the Minister's statements may unduly influence the decision-makers at the Board. However, even her rationale that Board Members are dependent on the Minister for reappointment and may thus be fearful if they fail to rule as the Minister wishes is speculative and unsupported.

[34] Allegations of the possibility or apprehension of bias by an independent decision-maker are serious allegations. I agree with the respondent that the allegations in this case "call into question the professionalism of the panel member, the functioning of the administrative tribunal and the impartiality of decision-making. They should be made in only the clearest of cases where the grounds for the apprehension are substantial." I find no substantial grounds here for the allegations raised by the applicant. His allegations are speculative and there is no evidence before the Court that the Board was or could be influenced by the Minister's statements.

[35] In my view, an informed person, viewing the matter realistically and practically and having thought the matter through, would not think it more likely than not that the Board would consciously or unconsciously decide a refugee claim of a Czech Roma unfairly.

[36] For these reasons the application is dismissed.

[37] At the close of the hearing of this application, the Court reserved its decision and undertook to distribute reasons to counsel and to provide them with an opportunity to make representations on certification of a question before Judgment issues. The applicant will have ten (10) days to serve and file any submissions on certification of a question only. The respondent will have seven (7) days thereafter to serve and file any responding submissions. After the Court has had an opportunity to consider any submissions, Judgment will issue.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Max Berger	FOR THE APPLICANT
Sally Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MAX BERGER PROFESSIONAL CORPORATION Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT