Federal Court  Cour fédérale

Date: 20110408

Docket: IMM-3940-10

Citation: 2011 FC 443

Ottawa, Ontario, April 8, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ANNA FERENCOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of the Czech Republic and a member of the Roma minority. She sought judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision dated June 7, 2010 by a member of the Immigration and Refugee Board, determining that the applicant is not a Convention refugee or person in need of protection, pursuant to sections 96 and 97 of IRPA.

[2] The applicant arrived in Canada on December 8, 2008 with her husband who is now deceased. The couple claimed protection on the ground of persecution by reason of their ethnicity.

[3] At the hearing of the claim, the applicant's counsel brought a preliminary motion to stay the proceedings pending the outcome of a decision by this Court in another file. The applicant argued that certain comments made by the Minister of Citizenship and Immigration (the Minister) disclosed a reasonable apprehension of bias against Czech Roma. A similar argument had been raised in the other case. The hearing in this matter proceeded and the Member rendered a decision on the motion at the conclusion.

DECISION UNDER REVIEW:

[4] The Board Member determined that the Minister's comments did not give rise to a reasonable apprehension of bias because the Board is an independent, quasi-judicial body. The Member noted that the comments did not go to the merits of the applicants' claim and that the Minister did not criticize any of the Board's decisions involving Czech Roma claimants. The Member cited the decision of this Court in *Dunova v. Canada (Citizenship and Immigration)*, 2010 FC 438, 367 F.T.R. 89 in support of the disposition of the motion.

[5] With respect to the merits of the claim, the Member accepted that Czech Roma are discriminated against but found that the cumulative effect of this discrimination fell short of persecution and that adequate state protection was available. The applicant had not sought help from the police in many years. The Member concluded that it was unreasonable for her not to have availed herself of state protection given the significant changes in the Czech Republic in that period.

There was insufficient evidence, in the Member's view, to find that the applicant was in need of protection because of the denial of health care in the Czech Republic.

ISSUES:

[6] The issues raised on this application are as follows:

a. Do the Minister's comments about Czech Roma give rise to a reasonable apprehension of bias?
b. Was the Board's determination that the discrimination did not amount to persecution reasonable?
c. Did the Board fail to conduct a s. 97 analysis?
d. Did the Board fail to consider evidence that supported the applicant's claim?

ANALYSIS:

Standard of Review;

[7] Under section 18.1 (4) (b) of the *Federal Courts Act*, judicial intervention is authorized where a federal board, commission or other tribunal has failed to observe a principle of natural justice or procedural fairness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para 43. When procedural fairness is invoked, the question is not whether the decision was "correct" but whether the procedure used was fair. See: *Ontario (Commissioner Provincial Police) v. MacDonald*, 2009 ONCA 805, 3 Admin L.R. (5th) 278 at para. 37 and *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19, 3 Admin L.R. (5th) 261 at paras. 30-32.

[8] Questions of law such as whether the Board failed to conduct a s. 97 analysis attract the correctness standard: *Khosa* at para 44. The issue of whether the Board failed to consider evidence in the record is a factual one that attracts deference: *Khosa* at para 46. Similarly, the Board's determination that the discrimination did not amount to persecution is based on an application of the factual findings to the law. This determination also requires deference and is reviewable on the standard of reasonableness: *Kaleja v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 252, at para. 19.

Do the Minister's comments about Czech Roma give rise to a reasonable apprehension of bias?

[9] The starting point in any analysis of an allegation of bias is the presumption that the board or tribunal is impartial. The threshold which an applicant must meet to establish bias is very high: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259; *R.. v.Curragh Inc.*, [1997] 1 S.C.R. 537.

[10] The test for a disqualifying apprehension of bias and the proper manner of its application are set out in the dissenting reasons of Justice Louis-Philippe de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at pp. 394-95. His discussion of the principles was subsequently applied by all members of the Supreme Court in *R. v. S(R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 at para. 31. The test is whether an informed person, viewing the matter realistically and practically and having thought it through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly. The grounds

must be substantial. A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough.

[11] The applicant relies on the decision of the Federal Court of Appeal in *Geza v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 124, [2006] 4 F.C.R. 377 which found that a reasonable apprehension of bias arose from the Board's treatment of the cases of Hungarian Roma through the adoption of a lead case strategy and the manner in which it was carried out. While a similar procedure was not used by the Board in the case of the Czech Roma, the applicant has attempted to ground the allegation that there is a reasonable apprehension of bias in public comments made by the Minister, and in a chart of statistics recording a decline in the success rate of Czech claims.

[12] These arguments were discussed by Justice Paul Crampton in *Dunova*, above. *Dunova* dealt with a decision by a Pre-removal Risk Assessment (PRRA) officer. It was argued that the Minister's comments had fettered the officer's discretion. There was no evidence in *Dunova* that the officer was even aware of the comments and the presumption of impartiality was applied.

[13] At paragraphs 56-59, Justice Crampton found that *Geza* was distinguishable for several reasons, notably that the finding of an apprehension of bias was based on the strategy employed by the Board to obtain a decision with persuasive precedential value. Moreover, one of the architects of the lead case strategy was also a member of the panel that determined the applicants' claims. In this case, there is no evidence that the Board has employed a similar approach and no grounds to question the impartiality of the panel member.

[14] With respect to the decline in the success rate of Czech claims, I agree with Justice Crampton's comment at paragraph 54 that "scepticism of the relevance of statistics is particularly warranted" for the reasons that he sets out in that paragraph.

[15] Justice Russel Zinn addressed similar evidence and issues in *Gabor v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1162 and in supplementary reasons at 2010 FC 1231. Also before him were quotations from persons who were critical of the Minister's public statements, introduced as exhibits to the applicant's affidavit. He disposed of the evidence at paragraph 34 in the following terms:

> 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.

[16] Justice Crampton had the opportunity to revisit these issues in *Cervenakova v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1281, in an application for review of a refugee decision by the Board. At paragraph 43 he made these comments in distinguishing the facts in *Geza* from the matter before him:

> This factual matrix is very different from the one in the case at bar. In short, there is no evidence whatsoever of: (i) any strategy by the Board to reduce the number of positive decisions that might otherwise be made in favour of refugee claimants from the Czech Republic who are of Roma ethnicity; or (ii) any involvement by the Board member who rendered the decision under review in the case at bar in any such strategy or in other initiative targeted at such refugee claimants. Thus, even if the Applicants were able to demonstrate that the Minister had such a strategy, they have not established the critical "link" to either the Board as a whole or the Board member who adjudicated their claims…

[17] The applicant submits that the missing link in *Cervenakova* can be found in paragraph 20 of the reasons in *Geza*. That paragraph refers to an e-mail sent by a Board Member in May 1998. In that e-mail, as described, Mr. Gregory James, a co-ordinating member of the Convention Refugee Determination Division and the predecessor of the RPD, noted that he had recommended a similar lead case strategy to deal with Czech Roma claims and expressed disappointment that this suggestion had not been acted upon. If anything, the message indicates that the Board had not followed through on the proposal as it had with the claims that were before the Court in *Geza*. In my view, this does not help the applicant's case.

[18] I am satisfied that 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 Member in this case would consciously or unconsciously decide the refugee claim unfairly by reason of any external influence.

Was the Board's determination that the discrimination did not amount to persecution reasonable?

[19] The applicant submits that the Board erred in determining that she does not have a well-founded fear of persecution after accepted evidence that Czech Roma are persecuted. She contends that the Board failed to explain why the discrimination documented in the objective evidence fell short of persecution.

[20] The Board accepted that the applicant had been the victim of discrimination but found that the discrimination did not amount to persecution. The analysis of this issue in the decision is brief but there was little evidence before the Board to suggest that the applicant's fundamental rights were being violated. There was no evidence, for example, that she was denied the opportunity to practice her chosen employment. The Board recognized that the quality of the applicant's life in the Czech Republic was not pleasant but that was not the standard on which to determine this question.

[21] The Board did not fail to consider any of the past discrimination suffered by the applicant in determining whether that discrimination was persecutory and it did not misstate the legal test for persecution. In any event, the Board's decision was ultimately based on its state protection finding. The conclusion that the applicant had failed to rebut the presumption of state protection was reasonable based on the objective evidence. The applicant's belief that protection was unavailable to her is insufficient to rebut the presumption and the test is not, as was argued, that the protection must be effective but rather whether it is adequate.

Did the Board fail to conduct a s. 97 analysis?

[22] The applicant argues that the Board was obliged to conduct a separate s. 97 analysis because the Board had accepted that Czech Roma are persecuted. The Board addressed all of the evidence about how Roma are treated in the Czech Republic in its s. 96 analysis. In *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, 254 F.T.R. 244, Justice Carolyn Layden-Stevenson, as she then was, held at paragraph 18 that, “while a separate section 97 analysis is desirable, the failure to conduct such an analysis will not be fatal in circumstances where there is no

evidence that would require it". See also *Soleimanian v Canada (Minister of Citizenship & Immigration)*, 2004 FC 1660.

[23] There was evidence before the Board that Czech Roma are denied proper health care, and that they have a reduced life expectancy as a result. The applicant submits that the Board failed to conduct a meaningful s. 97 analysis of that evidence. I note that in her testimony, the applicant had acknowledged that she had received health care services in the Czech Republic when she needed them. She clearly preferred the quality and type of care that she was receiving in Canada but that does not establish that she was being denied care at home. In my view, the Board adequately analyzed the evidence regarding health care.

Did the Board fail to consider evidence that supported the applicant's claim?

[24] It is trite law that the Board is presumed to have considered all of the evidence before it and the failure to mention a specific piece of evidence does not amount to a failure to consider it: *K.L. v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 95.

[25] The applicant's argument in respect of this issue is not entirely clear but appears to focus on the Board's analysis of the objective evidence regarding the persecution of Czech Roma and the availability of state protection. The applicant relies on *Kaleja v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 252, which also involved a refugee claim by Czech Roma. In that case, the Board focused on the events that led to the claimants seeking refugee protection but determined that

those events did not amount to persecution. The Court set aside the decision because of the Board's failure to analyze the documentary evidence of country conditions.

[26] In this case, the Board did not fail to consider the documentary evidence. And, unlike in *Kaleja*, the Board's decision here turned on the availability of state protection. Its analysis of the question is extensive – over five pages long. The Board is presumed to have considered all of the evidence before it, and the lengthy analysis of state protection supports this conclusion. Further, the applicant admitted that she had not sought help from the police in over 25 years. She claimed that she believed that nothing would be accomplished by going to the police because help had not been forthcoming when she had sought it in the past. That evidence was insufficient to meet her burden of showing that state protection was unavailable: *Canada (Minister of Employment & Immigration) v. Villafranca* (F.C.A.) (1992), 99 D.L.R. (4th) 334, 18 Imm. L.R. (2d) 130, leave to appeal to S.C.C. refused, [1993] 2 S.C.R. xi, 102 D.L.R. (4th) vi.

PROPOSED CERTIFIED QUESTIONS:

[27] The applicant has proposed that the Court certify the following questions:

a. Do the Minister's comments create a reasonable apprehension of bias when he made comments about the well-foundedness of the Czech Roma claims?
b. Should a Minister ever comment on the genuineness of refugee claims from a certain country?

[28] As set out in *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, 318 N.R. 365, the threshold for certifying a question under IRPA s. 74 is whether there is a serious question of general importance which would be dispositive of an appeal. The question should be

one that transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application.

[29] The applicant argues that the Court should apply the principles for certification recently set out in *Re Harkat*, 2011 FC 75 by Justice Simon Noël. In that case Justice Noël found it appropriate to certify questions relating to the application of the *Charter* to security certificate proceedings, whether or not they would be dispositive of an appeal, as the determination of those matters would have an impact on the evolution of similar cases. In my view, the circumstances of this matter do not call for a similar conclusion.

[30] I agree with the respondent that the first question posed by the applicant is not of broad significance or general application as it essentially restates the issue which was before the Court to be determined on its particular facts. The Court has recently considered questions similar to that proposed by the applicant and refused to certify them: *Dunova*, above; *Gabor*, above; *Zupko v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1319 at paragraphs 44-47.

[31] The second question simply invites speculation as to when, if ever, such comment by a Minister is appropriate. Any answer to the question, assuming the Federal Court of Appeal would entertain it, would not be dispositive of an appeal in this case as I have found that the Minister's comments did not influence the outcome of the Board's decision. I note that Justice Crampton refused to certify a similar question in *Cervenakova*, above, at paragraphs 97-101.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review of the decision of the Refugee Protection Division dated June 7, 2010 is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3940-10
STYLE OF CAUSE:	ANNA FERENCOVA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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