

**Date: 20071023**

**Docket: IMM-5538-06**

**Citation: 2007 FC 2000**

**Ottawa, Ontario, October 23, 2007**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**ZSOLT HERCZEG  
ZSOLTNE HERCZEG**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application by Zsolt Herczeg and Zsoltne Herczeg (“the Applicants”) pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c.27 (“*IRPA*”) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated September 27, 2006, wherein the Board determined that the Applicants, who are husband and wife, were not Convention Refugees nor persons in need of protection pursuant to sections 96 and 97 of the *IRPA*.

[2] The Applicants seek an order setting aside the above decision and referring the matter back for re-determination by a differently constituted panel.

### **Background Facts**

[3] Tamas Herczeg left Hungary and arrived in Canada on January 9, 2001. The Applicants also left Hungary and arrived in Canada on November 17, 2001. All three claimed refugee protection on December 14, 2001.

[4] On April 25, 2005, the Board decided that Tamas Herczeg (Zsolt Herczeg's brother), Zsolt Herczeg, and Zolstne Herczeg (Zolt Herczeg's wife) were not Convention Refugees or persons in need of protection under sections 96 and 97 of the *IRPA*.

[5] This decision was judicially reviewed and sent back for re-determination. Upon re-determination, dated September 27, 2006, Tamas Herczeg was granted Refugee status whereas the Applicants were not. This judicial review relates to the September 27, 2006 decision of the Board insofar as it concerns the Applicants.

[6] Tamas Herczeg was found to be a credible witness by the Board. He said that that he was having lunch with his brother in the restaurant of a Roma friend, Tamas Szabo, in Budapest on October 20, 1995 when four men entered the restaurant and had an argument with Szabo. The men assaulted Szabo and his wife. Tamas Herczeg and Zsolt Herczeg as well as other customers tried to

intervene but desisted when the assailants displayed their police identification. The police then took away Szabo and his wife. After his release Szabo told Tamas Herczeg that the police were demanding 500,000 forints from him.

[7] Szabo took the officers to court for unlawful activities. Tamas Herczeg appeared in Court twice in 1999 despite being threatened by the police officers not to testify. Szabo and his family were the subject of continued police pressure and fled Hungary in 1998 before the case was decided. The Szabo family, after an initial rejection by the Board and a successful judicial review application, were accepted as Convention Refugees in Canada.

[8] In March or April 2000, police officers started visiting Tamas Herczeg at the business which he jointly owned with his brother, Zsolt Herczeg. The police officers demanded Tamas Herczeg pay the 500,000 forints because the Szabos had fled the country. Tamas Herczeg refused. The police officers began visiting the place of business two to three times per week. They would search the store and also search the two brothers. Customers stopped coming to the store as a result of the police presence. The police officers would also stop the two brothers for minor 'traffic violations' and gave them tickets.

[9] Tamas Herczeg left for Canada in January 2001. Zsolt Herczeg said he remained behind in order to wind-up the business. The police officers continued to visit the business and pressure Zsolt Herczeg for payment of the 500,000 forints. The traffic ticketing also continued. Zsolt Herczeg and his wife left for Canada later that year in November 2001.

[10] The female Applicant bases her claim on that of her husband Zsolt Herczeg.

### **Decision Under Review**

[11] The Board accepted that the Szabo incident happened. It found Tamas Herczeg to be a credible witness. The Board placed emphasis on the fact that Tamas Herczeg had testified at the Hungarian court proceeding on behalf of Szabo. The Board found that there was more than a mere possibility of his facing danger of persecution on account of his imputed political opinion as a backer and ally of Roma.

[12] The Board noted that Zsolt Herczeg said his problems began in March or April 2000 when the police first began to visit the business, five years after the initial Szabo incident. The Board accepted that the police went to the clothing shop Zsolt Herczeg and his brother owned because his brother testified on behalf of a Roma friend against the police officers. The Board noted that Zsolt Herczeg was not arrested by the police, or beaten, or threatened with harm.

[13] The Board found that even if the claims made by Zsolt Herczeg were true, that the police officers continued to demand the money from Zsolt Herczeg because he was the brother of Tamas Herczeg after the latter's departure, the treatment by the police officers would amount to harassment and fall short of persecution

[14] The Board discussed the problem of police demands of bribes from citizens and decided the state government was taking measures to address problems of police misconduct and bribe-taking.

[15] The Board found that Zsolt Herczeg suffered harassment rather than persecution. Further, the behaviour of the police officers did not amount to cruel and unusual treatment or punishment. It concluded that the Applicants were first required to seek protection from their own government rather than look internationally and that the Applicants did not rebut the presumption of state protection. The Board concluded that Zsolt Herczeg had not demonstrated he was personally in danger or at risk if removed back to Hungary. The Board found that there is no more than a mere possibility that the Applicants would face persecution in Hungary on a Convention ground and that the Applicants are neither Convention Refugees nor persons in need of protection.

### **Issue**

[16] Did the Board make a reviewable error in the process of determining that Zolt Herczeg suffered harassment rather than persecution?

### **Standard of Review**

[17] The Federal Court of Appeal in *Sagharichi v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 796 held that the determination of whether the harassment that an applicant fears is sufficiently serious to constitute persecution is a question of mixed fact and law. The process which a Tribunal must undertake is to first assess the evidence and make a finding of fact. Upon judicial review this Court will only intervene if it finds that the finding of fact is patently unreasonable. Once the Tribunal has made the finding of fact, the Tribunal will then be required to determine whether or not, based on the facts as found, the person has a well-founded fear of

persecution. In making its assessment, the Tribunal will be making a mixed finding of fact and law and the standard of review will be reasonableness *simpliciter*.

### **Analysis.**

[18] At page 9 of the Tribunal Record, the Board states:

He [Zsolt Herczeg] stated that these problems continued after his brother's departure for Canada in January 2001. The officers kept coming to the store to ask for money and to search the store, and also that he was given traffic tickets. Even if this were true, this treatment would amount to harassment, even cumulatively, and fall short of persecution which has been defined as much more severe and systemic, and a violation of basic human rights. It also does not amount to cruel and unusual treatment or punishment.

He has never been arrested by the police, or beaten, or threatened with harm. They went to the shop he and his brother owned because his brother had testified on behalf of a Roma friend two times against the cops.

[19] Firstly, the emphasis placed by the Board on the fact that Zsolt Herczeg was not subject to physical violence nor arrested and thus not able to avail himself of Convention protection while granting this same protection to Tamas Herczeg, who also was not beaten nor arrested, on the same set of facts, is inherently contradictory. Physical mistreatment is not an essential element in determination of whether or not an applicant has suffered persecution in the past.

[20] In *Luis Rene Amayo (Encina) v. Minister of Employment and Immigration*, [1982] 1 F.C. 520 at paras. 2-3, Justice John Urie for the Federal Court of Appeal in setting aside the decision of the Board and determining that it had erred in law stated:

In our view it is implicit from a careful reading of the whole of the reasons for judgment of the Board that it considered that physical mistreatment is an essential element in a determination of whether or not a person has, in the past, suffered from persecution. If that is not a correct reading of its reasons, then its finding that the applicant was not persecuted for his political beliefs is against both the evidence and the weight of evidence. There is, in our view, ample evidence in the transcript of the examination under oath before the Senior Immigration Officer and in the applicant's declaration filed pursuant to subsection 70(2) of the *Immigration Act*, 1976, S.C. 1976-77, c. 52, to demonstrate that the applicant over a period of years suffered persecution from various sources at his place of work and, after his discharge therefrom, during his period of unemployment prior to coming to Canada, all as a result of his former political activities and beliefs.

Secondly, the Federal Court of Appeal has also held that a Board will err if, in its reasons, it implies that “arrest” is an essential element in persecution (*Alfredo Manuel Oyarzo Marchant v. Minister of Employment and Immigration*, [1982] 2 F.C. 779 at para. 11). It is clear that physical violence and deprivation of liberty are not components of persecution as the Board, in this case, implies in its reasons.

[21] After Tamas Herczeg had fled to Canada, Zsolt Herczeg said the police officers visited his place of business and demanded the money “owing”. Zsolt Herczeg described the incident in the following manner:

I told them my brother, Tamas, had left the country because he didn't want any problem with them. They replied I would have to pay the 500,000 forints. I told them I would not pay the money. The one officer said, ‘OK, your problem starts now’. (Applicants Record, Vol. 1, Tab 3 at para. 36)

[22] Zsolt Herczeg is the brother of Tamas Herczeg. Justice Simon Noël in *Velasquez v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1982 at paras. 4-5, held that family relations can fit within Convention grounds. It is to be remembered that Zsolt Herczeg acted in concert with his brother and intervened against the police assailants on behalf of the Szabos during the original restaurant incident. While the Board recognizes Zsolt Herczeg is the brother of Tamas Herczeg, it does not consider if that familial relationship is a factor to be weighed in its assessment.

[23] In *Szabo v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 104, the judicial review of a split decision of the Board where one panellist found that Mr. and Mrs. Szabo were eligible for refugee status whereas the nine remaining members of the family were not and where the other panellist concluded that none of the 11 applicants were eligible for refugee status, Justice John O’Keefe held that the Board’s decision was unreasonable. It is important to note that the Szabo family, in this issue, is the same Roma family on behalf of whom Tamas Herczeg testified and that Zolt Herczeg was a witness of the initial police mistreatment of the Szabos.

[24] Justice O’Keefe held at paragraph 12:

The board member who found that the principal applicants were Convention refugees in the course of her decision found that the principal applicants did not have an IFA within Hungary, but found that the other applicants did have an IFA within Hungary. The board member also noted that there was widespread discrimination against Roma in Hungary, including the access to police by Roma. There is no doubt that the applicants can rely on the persecution of similarly situated people in order to make their claim for Convention refugee status (see *Salibian v. Canada (Minister of Employment and Immigration)* (1990), 11 Imm. L.R. (2d) 165 (F.C.A.)). It would



appear to me the fact that the principal applicants and the applicants ran a family business together and this business was targeted, that this should be considered in the assessment of whether or not the applicants are Convention refugees. From a review of the decision, I cannot find that this factor was considered by the board members in coming to their actual decisions. Therefore, this is an unreasonable decision and it must be set aside (emphasis added).

[25] In this case, the Board made the same error as made in the initial Szabo application for refugee protection referred to by Justice O’Keefe. The fact that Tamas Herczeg and Zsolt Herczeg ran a business together and that this business was targeted should be considered as a factor in the assessment of whether or not the Applicants are Convention refugees. Discussion of this factor is absent in the Board’s reasoning.

[26] Tamas Herczeg’s description of the police demands was more in the nature of police extortion based as it was on an unfounded debt supposedly owed by Szabo and made against Tamas Herczeg because of his involvement rather than police demands for bribery, that is, a demand for money as a reward for an action by the police, usually illegal or dishonest, in favour of the giver. However, it may be that usage of the term ‘bribery’ in Hungary includes extortion.

[27] The Board tended to describe the financial aspect of the harassment of Tamas Herczeg as a form of extortion, that is, a demand to obtain money by force or threats.

In addition, he testified twice against them. The harassment of Tamas Herczeg could be seen from the evidence as motivated by a desire for revenge, frustration at not being able to extort bribes from the claimant and also the police viewing the claimant as a supporter and friend of a Roma family (emphasis added).

[28] The Board's language describing police conduct differs with respect to Zsolt Herczeg as may be shown by the following passage:

The claimant alleges that the police started harassing him in March-April 2001 by coming to the shop and searching it, scaring away customers, and by giving him highway tickets because he and his brother refused to give them bribes. After the claimant's brother left for Canada in January 2001, the claimant started winding down their business and left the country in November 2001. He had never been arrested, detained or beaten by the police (emphasis added).

[29] The Board concluded that Zsolt Herczeg was not personally in danger or at risk having regard to his own circumstances. The Board did so after a general review of the state government's efforts to deal with police misconduct and bribe-taking.

[30] The facts disclose a chain of linked events. The police attempted to extort 500,000 forints from the Szabos in 1995. After the Szabos fled in 1998, the police demanded 500,000 forints from Tamas Herczeg at the brothers' place of business, subjecting both Tamas Herczeg and Zsolt Herczeg to searches and ticketing. The Board provisionally accepted Zsolt Herczeg's evidence that after Tamas Herczeg left for Canada in January 2000, the police continued to demand payment of 500,000 forints from Zsolt Herczeg and continued with searches and ticketing. The Board's conclusion that Zsolt Herczeg was not personally at risk is irrational in the face of these facts.

[31] Finally, from the wording of section 96 of the *IRPA* it is clear that the cause of the well-founded fear of the Applicants must be for reasons of race, religion, nationality, membership in particular social or political opinion. The Board found that Tamas Herczeg to be a Convention Refugee because of his political opinion as a backer and ally of the Roma. However, the Board

does not consider the question why Zsolt Herczeg was being pressured by the police to pay the supposed Roma debt of 500,000 forints.

### **Conclusion**

[32] The Board failed to assess whether the familial ties and the jointly owned business were factors to consider in assessing whether Zsolt Herczeg and accordingly his wife, Zsoltine Herczeg, were Convention Refugees or persons in need of protection pursuant to sections 96 and 97 of the *IRPA*. The Board's failure to do so is patently unreasonable

[33] Further, the Board assessment that Zsolt Herczeg was not personally at risk or in danger having regard to the police singling him out and demanding that he pay the alleged Szabo debt was similarly patently unreasonable.

[34] This matter should be referred to a differently constituted Board for re-determination

### **Certification**

[35] Neither party has suggested a question for certification, and I find none arises here.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination.
2. No serious question of general importance is certified

“Leonard S. Mandamin”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-5538-06

**STYLE OF CAUSE:** ZSOLT HERCZEG ET AL v.  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

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AND JUDGMENT:** Mandamin J.

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