Federal Court Cour fédérale

Date: 20121205

Docket: IMM-1610-12

Citation: 2012 FC 1423

Ottawa, Ontario, December 5, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MIHALY TUROCZI,
ZSUZSANNA EDINA KARPATI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are failed Convention refugee claimants. They are citizens of Hungary and their refugee claim was dismissed in 2011 by Member David McBean. They submit that they were denied procedural fairness in that determination because there was a reasonable apprehension of bias because the Member's rejection rate is "astronomically different from his colleagues and of the total average."

The Evidence filed by the Applicants and the Submissions of the Parties

[2] The evidence filed by the applicants in support of this allegation consists primarily of a report authored by an assistant professor of law at Osgoode Hall Law School, Sean Rehaag, entitled "2011 Refugee Claim Data and IRB Member Recognition Rates" [the Rehaag Report].

[3] The Rehaag Report, which is based on and summarizes data obtained through an access to information request to the Immigration and Refugee Board, shows that the Member granted two of the 108 refugee claims he heard in 2011 and of the negative determinations he found 21 to have no credible basis pursuant to subsection 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Member's recognition rate of 1.9% was 20.3% lower than "the recognition [rate] that would [have been] predicted based on the average recognition rates for the countries of origins in the cases [the Member] decided." The Member did not grant any of the 12 applications filed by Hungarian citizens that he heard in 2011.

[4] The Rehaag Report also provides a summary of the Member's determinations in prior years and shows that the Member:

(i) did not grant any of the 35 claims he heard in 2008, when the "predicted" recognition rate based on the relevant country averages (15.67%) would have predicted that he grant, rounded to the nearest number, 5 of those claims;

(ii) did not grant any of the 72 claims he heard in 2009, when the "predicted" recognition rate based on the relevant country averages (15.74%) would

have predicted that he grant, rounded to the nearest number, 11 of those claims; and

(iii) did not grant any of the 62 claims he heard in 2010, when the "predicted" recognition rate based on the relevant country averages (14.88%) would have predicted that he grant, rounded to the nearest number, 9 of those claims.

[5] The applicants submit that "in the eyes of the reasonable person […] the number of acceptances by the Board Member is astronomically different from his colleagues [and that] one must be wilfully blind to […] not conclude that there is a reasonable apprehension of bias."

[6] The respondent challenges the admissibility of the applicants' evidence and submits that the test for bias is not met because (a) no evidence supports the methodology used in the Rehaag Report; (b) no evidence addresses the statistical significance of the figures presented; (c) even assuming the methodology used in the Rehaag Report was internally sound, other than country averages (which are accounted for), there are many variables that are not accounted for; and (d) the applicants make no attempt to demonstrate that their case, or any of the other cases heard by the Member were actually wrongly decided.

Admissibility of the Rehaag Report

[7] The respondent submits that "the note is inadmissible as expert opinion evidence," referring to the Rehaag Report's short narrative, because this narrative "provides not only data regarding acceptance rates of the members of the Refugee Division, but draws conclusions based

on the author's assessment of that data." The applicants' submissions concerning the reasonable apprehension of bias does not rely or depend on the opinion of the author of the Rehaag Report, however, but rather the data summarized in the Rehaag Report.

[8] Under the heading "The evidence is not properly before the Court," the respondent submits that the Rehaag Report and its associated materials, which were attached as an appendix to the affidavit of a legal assistant for the applicants' counsel, "must be called into question." No reasons are provided why, except to reference *Benoit v Canada*, 2003 FCA 236, which has no relevance to the respondent's submission. The respondent only asserts that "the applicants' material cannot be adduced as evidence in this manner" because Ms. Fu has "no particular expertise on the subject matter," and because the report is "brief," "posted to a web-site," and "produced by a legal academic." The respondent fails to identify its objection to this evidence with any clarity and I therefore accept the data contained within the Rehaag Report as evidence of the acceptance and rejection rates of the members of the Refugee Protection Division of the Immigration and Refugee Board [the RPD].

Reasonable Apprehension of Bias

[9] The parties agree that the test for determining whether there is a reasonable apprehension of bias was articulated in *Committee for Justice and Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369 at p 394 [*Committee for Justice and Liberty*]:

> [...] the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not

> that [the decision-maker], whether consciously or unconsciously, would not decide fairly." [emphasis added]

[10] Needless to say, the parties disagree about what the "informed person, viewing the matter realistically and practically – and having thought the matter through – [would] conclude."

[11] The applicants made it clear in their submissions that they were not suggesting any actual bias by the Member; this is a much higher test than that required when the allegation is an apprehension of bias. Nonetheless, whether one alleges actual bias or a reasonable apprehension of bias, the allegation is a serious one. A person occupying a judicial or quasi-judicial position against whom it is alleged that there is a reasonable apprehension of bias is entitled to have that allegation properly tested against credible evidence and sound reasoning.

[12] In my view, even if the data in the Rehaag Report is credible evidence, it is credible evidence only of the result of various refugee determinations made by various members of the RPD over a specific period of time. It is not evidence of any of the variables that may impact the inference that the applicants seek to make.

[13] Quite simply, the statistics provided by the applicants are not, without more, sufficiently informative. Furthermore, one must question what the "informed person" would take from them.

[14] The applicants submit, and this is the true focus of their submission, that the acceptance and rejection rate data, standing alone, is such that "one must be wilfully blind not to see that there exists a reasonable apprehension of bias" on the Member's part. This ignores or overlooks

that the acceptance and rejection rate alone says nothing to the "informed person" even if the uninformed person might reach the conclusion that the applicants suggest.

[15] Although the statistical data presented by the applicants may raise an eyebrow for some, the informed reasonable person, thinking the matter through, would demand to know much more, including:

- Were all of the figures, including, importantly, the weighted country origin averages, properly compiled?
- Did the RPD randomly assign cases within each country of origin? If not, how did the RPD assign cases?
- Can factors affecting the randomness of case assignment be reliably adjusted for statistically?
- If so, what are the adjusted statistics, and what is their significance?
- If the RPD did randomly assign cases, what is the statistical significance of the Member's rejection rate?
- Beyond the Member's relative performance within the RPD, is there anything objective impugning the Member's decisions (i.e. that suggests they are wrongly decided)?
- Accounting for appropriate factors (if that is possible), are the Member's decisions more frequently quashed on judicial review than would be expected?
- Has the Member made recurring errors of a certain type, e.g. on credibility, state protection, etc., that bear a semblance to the impugned decision?

In short, the informed reasonable person, thinking the matter through, would demand a statistical analysis of this data by an expert based upon and having taken into consideration all of the various factors and circumstances that are unique to and impact on determinations of refugee claims before he or she would think it more likely than not that the decision-maker would not render a fair decision.

[16] The applicants submit that the data raises a reasonable apprehension of bias in the mind of an informed person, even without the additional evidence and analysis I think necessary. They rely on the following statement attributed to Peter Showler, a former Chair of the Immigration and Refugee Board, in an article published in the Toronto Star on March 4, 2011:

> For Showler, a zero per cent pass rate from a single adjudicator is "tremendously suspicious."
>
> "It certainly hints at bias, that this member has an attitude about either particular claimants from particular countries or claimants in general." [emphasis added]

[17] That something is said to "hint" at a result can hardly be said to raise to the level that one "think[s] that it is more likely than not" as required by *Committee for Justice and Liberty*.

[18] The applicants make no attempt to impugn the Member's decision on their application. It did not involve the exercise of discretion on his part. The applicants claimed refugee protection fearing Ms. Karpati's violent former boyfriend, who could not accept that their relationship was over and that a new one with Mr. Turoczi had begun. The Member determined that the applicants had a suitable internal flight alternative (IFA) in Budapest, which is 200 kilometres away from the applicants' home town, and that they had not rebutted the presumption of state

protection. These findings were straightforward applications of binding legal authorities and the relevant burden of proof. In my view, the fact that the Member was practically obliged, in light of the relevant law and the burden of proof, to decide as he did, is another factor that a reasonable and informed person, examining the issue thoughtfully, would consider. Indeed, in the instant case, there is every likelihood that an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that there was very little likelihood that any member would have decided the claim differently.

[19] Accordingly, this application must be dismissed. No question for certification was proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1610-12
STYLE OF CAUSE:	MIHALY TUROCZI ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 31, 2012
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