Federal Court  Cour fédérale

Date: 20110721

Docket: IMM-7614-10

Citation: 2011 FC 917

Toronto, Ontario, July 21, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ELENA MARYLENE BOTEZATU and VALERIU BOTEZATU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a Member of the Immigration and Refugee Board dated December 2, 2010, wherein it was determined that the Applicants would be excluded from refugee protection because the Board determined that there were serious reasons to consider that the Applicants have committed serious non-political crimes in their country of origin,

Romania. For the reasons that follow, I will allow this application and return the matter for reconsideration by a different Member.

[2] The Applicants are husband and wife; both citizens of Romania. The wife came to Canada in 2002 and made a claim for refugee protection in May 2003. Her husband came to Canada in June 2008 and made a claim for refugee protection within a few days. Their claim was first heard by a Member of the Board. The Board rejected the Applicants' claim. The Federal Court, Phelan J., sent the matter back for a re-hearing by a different Member. The substance of his reasons (2008 FC 191) are set out in paragraphs 8 and 9 as follows:

> ***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.*

[3] The matter was re-heard by a different Member who took into consideration not only the record of the previous hearing, but new materials submitted and new examinations of the Applicants before the Member. The Member concluded in her reasons:

> *[62] Accordingly, the panel finds that the government has met its burden[44] of showing that both the female claimant and the male claimant fall within the purview of Article 1F(b). I find that they are both excluded from the Convention refugee definition and are not Convention refugees or persons in need of protection.*
>
> ***Final Disposition***
>
> *[63] After considering all the evidence, I find there are serious reasons to consider that Elena Marylene Botezatu and Valeriu Botezatu have committed a serious non-political crime in Romania. Therefore, they are excluded from refugee protection.*

[4] The Applicants' Counsel has raised several issues with respect to the reasons and decision of the Member. I believe that this application can be dealt with on the bases that follow.

[5] It is common ground between the parties that the Applicants have never been convicted of any crime in Romania. It is also common ground that the first charges laid were annulled through the Romanian Court procedures and that there is no current warrant for arrest against either Applicant. Further, it is common ground that new charges were laid against the Applicants, which charges are currently being contested in the Romanian Courts. The Applicants allege that these charges are trumped up and are politically motivated. There are two letters in the tribunal record from the Applicants' Romanian lawyer providing some history as to the charges. The lawyer's letter of May 11, 2009 begins and ends as follows:

> *1. As counsel of defense, in agreement with my previous letters, I shall briefly present the **evolution** and **significant aspects** of the criminal trial filed by the Romanian authorities against Mrs. Botezatu Elena Marylene (BEM). The trial is formed of two separate parts carried out simultaneously, the preventive arrest warrant (PAW) and the proper charge. I will show you **how** and **why**, under an apparent legality,*

> a. *PAW was issued and maintained in a completely illegal manner since 25/07/02 up to present* ***[11, 12, 13],***
> b. *the prosecution is a frame-up,* ***[14- 25],***
> c. *BEM was discriminated,* ***[26],***
> d. *the trial was not and shall not be fair* ***[2-27].***
>
> *I will analyze and argue on the basis of the documents in the case trial and the legal provisions.*
>
> . . .
>
> *If we look back at everything that happened to BEM we see an example of "applied justice" with all the aforementioned ingredients. Although she is innocent, if she returns to the country she may be (very probably) preventively arrested up to 180 days, during the trial and then held in prison for years at the end of the trial, when there are high chances that she be convicted****, as a natural continuation of everything that happened to her up to the present, continuously, for 7 years.***

[6] Respondent's Counsel at the hearing attempted to dismiss these letters, including the above, on the basis that they were simply those of a lawyer advocating on behalf of a client. Two points must be made in this regard. First, the Respondent can point to nothing in the tribunal record, except the charges themselves, to the contrary. Second, and most telling, Romania has not requested that either Applicant be extradited to Romania; nor does the Romanian government appear to be pursuing the current charges with any vigour.

[7] The last portion of the letter above-quoted must be particularly noted. It says that the female Applicant would most probably be arrested were she to return to Romania. There is no evidence to the contrary. Justice Phelan's reasons raising concern about the Romanian prison conditions must be remembered. He directed that the Refugee Protection Division consider this matter.

[8] Against this background, the Member's reasoning will be examined.

[9] The Member's reasons indicate that she was under the mistaken belief that the Applicants had been convicted in Romania. This mistake is recited in at least two paragraphs of her reasons. A third paragraph of her reasons suggests that she was in some way confused as to the matter. Respondent's Counsel referred to these errors as "infelicitous wording". I repeat paragraphs 36 and 59 of the Member's reasons where she states that the female Applicant has been convicted of a crime in Romania, and paragraph 45, which suggests that she had only been charged with a crime in Romania.

> *[36] Regarding the standard of proof, the Court has found that "serious reasons for considering", which is a standard of proof that applies to questions of fact, rather than law,[19] is a lesser standard than that of a balance of probabilities.[20] To meet this standard, there need not be evidence that the claimant has been charged, convicted,[21] or criminally prosecuted.[22] In the circumstances of this case, the claimant has been charged and convicted in absentia. Respecting particularly Article 1F(b), the claimant has been charged and convicted in absentia. Respecting particularly Article 1F(b), the UNHCR Handbook,[23] which has been considered by the Supreme Court of Canada to be a persuasive authority,[24] provides that Article 1F(b) is intended:*
>
> > *…to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.*
>
> . . .
>
> *[59] The female claimant has been in Canada since 2002. The onus is on the Minister to show why the claimant should be excluded from refugee protection. And, the onus is on the claimant to demonstrate that she was framed for the oil scam and was not treated fairly by the court system. The male claimant was asked what efforts they had made to overturn the allegedly false convictions. The reforms outlined above were pointed out by the Tribunal Officer. The*

> *documentary evidence referred to above does not indicate that there are any timelines within which complaints about the judicial process must be made. I find that the claimants have not satisfied the onus on them, to show that they have made whatever efforts are possible, to prove that the court proceedings, thus far, have been unfair, and that Romania has failed to follow due process.*
>
> . . .
>
> *[45] The "serious non-political crime" in question has been outlined above. I agree with Minister's Counsel's submission that the female claimant wilfully participated in a crime. There is no indication that the charges against the female claimant have been lifted.*[30] *There is no outstanding arrest warrant against the female claimant. She further agreed that the amount in question (at today's rates) converts to more than $2,000,000 Canadian. The fact that the female claimant says the charges against her were manufactured and that she would not be given a fair trial does not change the fact that she was and is still charged with a crime in Romania.*

[10] Counsel agree that, in considering exclusion under Article 1F(b) of the Convention, it is not necessary that there be a conviction in respect of the alleged crimes. It is agreed that a range of considerations may come into play and that the standard to be applied is that of more than a suspicion, but less than the balance of probabilities. However, the matter must also be considered against the background of the legal system as it exists in the country in which the crimes are alleged to have occurred. Justice Gauthier of this Court recently reviewed this matter in *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454 at paragraphs 27 to 33:

> ***27*** *As mentioned, parties to the Convention chose a fairly low evidentiary threshold to determine if a refugee claimant has committed a serious non-political crime before seeking protection in the country of refuge. Parliament has also given the RPD a lot of freedom to receive any evidence it considers credible and trustworthy [subsections 170(g) and (h) of the Act]. That said, the need for "serious grounds" is protection against arbitrary and capricious action especially in light of the dire consequences*

resulting from an exclusion pursuant to Article 1F(b) of the Convention. For this standard to be meaningful, it requires a proper and objective assessment of the context as well as all the evidence presented by the refugee claimant. Obviously, the RPD must be particularly cautious when charges led have been dismissed by a competent court in accordance with the rule of law.

28 *In Legault v. Canada (Secretary of State) (1997), 42 Imm. L.R. (2d) 192, 219 N.R. 376 (FCA) and Xie v. Canada (Minister of Citizenship and Immigration), 2004 FCA 250, [2005] 1 F.C.R. 304, the Federal Court of Appeal made it clear that the RPD can, in a proper context, rely upon an indictment and an arrest warrant to conclude that there are reasonable grounds to conclude that a claimant has committed serious crime outside of Canada.*

29 *This is based on the premise that in a system where the rule of law prevails, the RPD can reasonably infer that there were reasonable and probable grounds for the police or the judicial investigative system to issue a warrant or lay a charge.*

30 *Naturally, for such premise to apply, the RPD must first be satisfied that the issuing authority does respect the rule of law, that is, for example, that it is not dealing with a country known for the filing of false charges as a means of harassment or intimidation.*

31 *But, by the same token, it also means that the value of the charges laid in a country like the United States is greatly diminished when such charges are dismissed. In fact, I would think that in such a case, the dismissal of the charges is* prima facie *evidence that those crimes were not committed by the refugee claimant and that the Minister cannot simply rely on the laying of charges to meet his burden of proof. The Minister must either bring credible and trustworthy evidence of the commission of the crime* per se *or show that in the particular circumstances of the case, the dismissal should not be conclusive because it does not affect the basic foundation on which the charges were laid. Again, for example, this could be achieved by establishing that crucial evidence on the basis of which the charges were laid was excluded for a reason that does not bind the RPD and does not totally destroy its probative value.*

32 *In the present case, it is evident that the main evidence (if not the only one) available to those who laid the charges and on which their reasonable beliefs were based, was the statement of the alleged victim. There is no evidence that there was anything else in the investigative file. The policeman who interviewed the*

> *complainant specifically noted that there were no visible marks or injuries and that there was no "rape kit". No examinations or tests were made. Thus, the recanting of the complainant's story destroyed the very foundation of the beliefs on which the charges were originally laid.*
>
> ***33*** *This means that the RPD had to be particularly careful in the way it treated the charges and it had to deal thoroughly with the retraction. It is exactly in that respect that I consider the decision under review to be lacking.*

[11] In the present case, the Member made at least three errors in considering Article 1F(b). The first, as already discussed, was her apparent confusion or belief that there had been a conviction in Romania. While it is agreed that a conviction is not determinative, it is a strongly influential factor and may well have tipped the scale in this case.

[12] The second error was the Member's refusal to consider that the Minister had not led any evidence to substantiate the new changes. She said at paragraph 46 of her reasons:

> *Counsel further submitted that the Minister has not provided any new or additional evidence to substantiate the charges currently against the female claimant. In my opinion, this is not necessary, since the claimant has admitted that the charges against her in Romania are still outstanding.*

[13] I asked both Counsel if they could find anything in the tribunal record respecting an admission as to the charges. All that could be found is the following passage in a letter from Applicants' Counsel to the Board dated June 2, 2010:

> *If this information can be verified, it may have important implications for the case. While there is now apparently no current,*

> *outstanding warrant for her arrest, her charges still remain outstanding. And it is unclear at this time what the actual implications of the annulment will be. In particular, it is possible that the Romanian authorities will initiate a new warrant, or appeal the decision to have it re-instated as done previously. A previous warrant which had been annulled by the Brasov Law Court (see Exhibit R-3 (Court Record), Vol. 8, pages 1596-1598, Vol. 11, pages 2017-2043) was subsequently re-instated by the Brasov Court of Appeal (see Ex. R-3, Vol. 11 and 12, pages 2192-2211, esp. page 2210 bottom).*

[14] While this is an admission that certain charges are outstanding, it in no way relieves the Member from considering and weighing all the evidence, including a consideration as to lack of evidence as to the nature and validity of such charges. There is considerable evidence from the Applicants' Romanian lawyer and others, including a statement from one Mihai Florin, who appears to be implicated in the matters in issue, in which he recants earlier statements he made and absolves the Applicants of any complicity. All of this requires careful examination, which simply wasn't done.

[15] The third error is that the Member did not do that which Justice Phelan specifically asked to be done; namely, an examination of the conditions under which at least the female Applicant would find herself if she were to be imprisoned in Romania. The Member declined to do so, on the basis that there was no outstanding warrant for arrest. She wrote at paragraph 54 of her reasons:

> *[54] It appears the main reason this case was returned for another hearing was that there was insufficient examination of Romanian prison conditions and whether or not the female applicant would be subject to torture, if she were imprisoned. Mr. Justice Phelan[39] found that the previous Board member made a patently unreasonable finding about the possibility of torture in prison. Since*

> *there is no longer an arrest warrant out against the claimant, I decline to analyse this issue.*

[16] In so doing, the Member entirely overlooked the evidence of the Applicants' lawyer, as previously quoted, that at least the female Applicant would most probably be arrested if she returned to Romania. There is no evidence to the contrary.

[17] In the written material, and in oral argument, there was much said about the nature of the dealings in which the Applicants are said to be implicated and their degree of complicity, if at all. These are complex matters and may well have been distracting. While these matters need careful examination, it appears that the Member overlooked or failed to consider much of the evidence submitted by the Applicants. In view of the fact that this matter is to be returned for reconsideration, a fresh and thorough examination should be made as to these matters.

[18] Accordingly, the application for judicial review will be allowed, and the matter is returned to the Board for re-determination by a different Member. No Counsel requested certification and I find no reason to do so, nor any special reasons to award costs.

JUDGMENT

FOR THE REASONS PROVIDED;

THIS COURT'S JUDGMENT is that:

1. The application is allowed;
2. The matter is returned for re-determination by a different Member;
3. No certification is made; and
4. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7614-10
STYLE OF CAUSE:	ELENA MARYLENE BOTEZATU and VALERIU BOTEZATU
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DATED:	July 21, 2011

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