

Date: 20051209

Docket: A-16-05

Citation: 2005 FCA 419

**CORAM: LINDEN J.A.
ROTHSTEIN J.A.
PELLETIER J.A.**

BETWEEN:

JANOS ERDOS

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Winnipeg, Manitoba, on October 19, 2005.

Judgment delivered at Ottawa, Ontario, on December 9, 2005.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**LINDEN J.A.
ROTHSTEIN J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] When Janos Erdos first applied for refugee status in Canada in 1992, the Convention Refugee Determination Division (CRDD) believed his account of his life in Hungary and concluded that he was a victim of persecution at the hands of the Hungarian secret services on the basis of his political opinion. However, because of a change in country conditions, his claim for Convention refugee status was dismissed. Ten years later, Mr. Erdos made a second claim for

refugee status, alleging not only persecution on the basis of his political opinion but also on the basis of his Roma ethnicity, a ground which he had not raised in his first application. The panel of the Refugee Protection Division which heard his application purported to apply *res judicata* to the issue of Roma ethnicity so as to preclude him from raising it now when he failed to do so in his first application. The panel went on to find that Mr. Erdos was not credible as to the events giving rise to his claim of persecution on the basis of political opinion, including events which had been accepted by the panel which heard his first claim. His claim was dismissed.

[2] In his application for judicial review, Mr. Erdos argued that the panel had not properly applied issue estoppel as regards the facts found by the panel which heard his first application. The applications judge found that the panel had implicitly considered the factors submitted by the parties relevant to the exercise of its discretion not to apply issue estoppel, as set out in the decision of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (*Danyluk*). The applications judge dismissed the application for judicial review. In doing so, he certified the following question:

On the facts of this matter, did the Refugee Protection Division, when exercising its discretion to apply or not apply issue estoppel, err in a reviewable manner by failing to expressly address in its reasons for decision the factors submitted by the parties before it as being relevant to the exercise of that discretion?

[3] The argument before us focused on the question of issue estoppel but, as will be seen, the panel which heard Mr. Erdos' application dismissed his claim because it simply did not believe him on any material aspect of his second claim. In my view, this is a conclusion to which was open to the panel, quite apart from any question of issue estoppel. I would therefore dismiss the appeal.

THE FACTS

[4] Mr. Erdos is a native of Hungary. He claims that he was a senior construction manager at a secret Hungarian military installation, where he had access to sensitive military information. For various reasons, the Hungarian secret services came to suspect his loyalty and subjected him to inhumane treatment. In 1972, Mr. Erdos left Hungary and resettled in Germany where he made a successful claim for Convention refugee status on the basis of persecution by the Hungarian secret services. In 1985, he returned to Hungary because his wife was critically ill.

[5] In 1989, he left Hungary for Canada where he made his first Canadian application for refugee status. His claim was heard in 1992. The CRDD, satisfied that Mr. Erdos was a credible witness, concluded that he had been persecuted by the Hungarian secret services on the basis of his political opinion.

[6] Because the Hungarian communist regime had fallen by the time Mr. Erdos' refugee claim was decided, the CRDD held that, in light of changed country conditions, he was no longer at risk of persecution in the "new" Hungary. Mr. Erdos did not challenge that decision. In November 1992, he left Canada for the United States where he made another application for Convention refugee status. That application was refused and in November 2002, under threat of deportation, he left the United States for Hungary. His sojourn in Hungary was brief. He alleges that he came to the attention of the Hungarian secret police once again and was arrested, imprisoned and tortured. Upon his release, he left Hungary and returned to Canada where he made his second Canadian claim for Convention refugee status on December 27, 2002.

[7] In that claim, Mr. Erdos alleged for the first time that his persecution, both before and after 1972, was the result of his Roma ethnicity as well as his political belief. A panel consisting of Mr. Andrew Rozdilsky (the Rozdilsky panel) did not believe that Mr. Erdos was of Roma ethnicity and dismissed his claim. When the Rozdilsky panel's decision came before the Federal Court for judicial review, Mr. Justice Russell ruled that there were two aspects to Mr. Erdos's refugee claim, one based on his identification as a Roma, and the other based upon his political belief. Russell J. concluded that the panel was bound to deal with both elements of his claim and that, in rejecting his claim simply because it did not believe that he was Roma, it had failed to do so. He therefore sent the matter back for a new hearing.

[8] At the hearing before the new panel, consisting of Ms. Lamont, (the Lamont panel), counsel for Mr. Erdos argued that since the CRDD had found Mr. Erdos to be credible, the Lamont panel "should also make the same finding in regards to his allegations including frequent arrests, detention, interrogation and torture from the authorities in Hungary before he left in 1989." (A.B., p. 31). This was an invitation to apply the doctrine of issue estoppel, an invitation which the panel declined, on the basis that the CRDD did not have all of the evidence before it when it made the findings in question. Further, it concluded that Mr. Erdos was not credible as to allegations which the CRDD had accepted. The panel stated that it "does not accept the claimant's allegations as outlined in his narrative dated 5 August 1991, 6 March 2001, his amended narrative dated 5 September 2002 or his testimony." (A.B., p. 32).

[9] In so far as his Roma ethnicity was concerned, the panel purported to apply *res judicata* to preclude consideration of that issue because it was something which should have been raised in his first application but was not. The panel found that there were no special circumstances which would warrant the introduction “of evidence in his second claim that was previously available and not presented in his first claim.” (A.B., p. 34). As to the balance of his claim, the panel undertook a detailed examination of the many inconsistencies and contradictions in Mr. Erdos’ previous testimony before the panel, and in the various versions of his personal history. In particular, the panel did not accept that Mr. Erdos returned to Hungary in November 2000. In the end, it concluded that Mr. Erdos’ credibility was so seriously undermined that “other than the claimant’s name, age, citizenship, and that he lived outside Hungary for many years including in Germany, the U.S., and Canada, the panel does not accept any of the claimant’s other allegations.” (A.B., p. 46).

[10] The Lamont panel’s decision was also the subject of an application for judicial review. Mr. Erdos argued that the panel erred in rejecting the findings of the CRDD. The applications judge concluded that, as between the CRDD’s decision and the decision before him, the conditions for the application of issue estoppel were met in that (1) the same question had been decided, (2) the decision was final, and (3) the parties before the tribunal in both cases were the same. He then went on to consider whether or not the discretion to apply issue estoppel had been properly exercised. He was of the view that the Lamont panel’s decision “effectively, if quite inelegantly and indirectly, addresses the factors for and against the exercise of discretion to apply or not apply issue estoppel.” (A.B., p. 16).

[11] In his concluding remarks, the learned judge assessed the decision under review as follows:

[20] ... I read the reasons of the RPD [the Lamont Panel] as in effect favouring the public interest in the finality of litigation over the public interest that may exist in providing the Applicant with another opportunity to present his case on the basis of the shifting grounds of his claim.

[12] In summary, the applications judge found that the Lamont panel was justified in applying *res judicata* to exclude consideration of Mr. Erdos= refugee claim based on Roma ethnicity. The applications judge is silent on the Lamont panel=s conclusion that it was not bound by the CRDD's conclusions as to the other central element of his claim, his political belief. This is an area to which the doctrine of issue estoppel would equally apply.

THE ISSUES

[13] Ever since the decision of the Federal Court in *Vasquez v. Canada (Minister of Citizenship and Immigration)* (1998), 160 F.T.R. 142 (F.C.T.D.), the judges of the Federal Court have consistently held that issue estoppel precludes applicants making a second (or subsequent) claim for Convention refugee status relitigating the issues decided in their earlier claim(s). Repeat claimants are limited to arguing their case on the basis of facts which occurred since their prior claim(s) was (were) decided. In *Danyluk*, the Supreme Court confirmed that the application of issue estoppel was discretionary. The argument before the Federal Court and before us focused on whether the Lamont panel had correctly applied *Danyluk* when it declined to apply issue estoppel.

[14] However, when one reads the Lamont panel's decision, it is clear that it fully canvassed the facts which were alleged to have occurred following the CRDD's decision in 1992. So long as it decided Mr. Erdos' claim on the basis of those facts, its refusal to accept the findings of the CRDD as to events which occurred prior to 1992 is immaterial. The issue therefore is whether the Lamont panel's conclusions with respect to Mr. Erdos' second claim are supported by its view of facts which occurred since 1992.

ANALYSIS

[15] It is necessary at this point to distinguish between issue estoppel and *res judicata* as the terms have been used more or less interchangeably in this appeal. *Res judicata*, the doctrine which holds that a matter can only be litigated once, includes cause of action estoppel and issue estoppel. Cause of action estoppel prevents the relitigation of the same cause of action between the same parties. The case of *Doering v. Town of Grandview*, [1976] 2 S.C.R. 621, is an example of cause of action estoppel. One of the corollaries of cause of action estoppel is that the courts will not allow a person to relitigate a question on the basis of new facts which could have been raised in the course of the original litigation. This is the principle which the Lamont panel invoked in relation to Mr. Erdos' allegation of discrimination on the basis of Roma ethnicity.

[16] Issue estoppel precludes the relitigation of the same issue between the same parties, even though the issue arises in the context of a different cause of action. *Danyluk* is an example of issue estoppel. Ms. Danyluk asked an administrative tribunal to assist her in the collection of unpaid commissions from her former employer. She then commenced an action for wrongful

dismissal in which she claimed arrears of wages, including unpaid commissions. The administrative tribunal found that Ms. Danyluk was not owed any commissions. The employer then moved to strike the portions of her wrongful dismissal claim dealing with commissions on the basis of issue estoppel, arising from the decision of the administrative tribunal. The Supreme Court of Canada agreed that the facts gave rise to the application of issue estoppel but concluded that, in all the circumstances, the Court should exercise its discretion not to apply issue estoppel. In this case, the application of issue estoppel would mean that the Lamont panel would have to accept the findings of the CRDD as to Mr. Erdos' persecution prior to 1992 unless it could show that the circumstances were such that it should exercise its discretion not to apply issue estoppel. This was the subject of the debate before the Federal Court and before us. As it turns out, it was a false debate.

[17] Notwithstanding its declaration that it was applying *res judicata* to Mr. Erdos' allegation of persecution on the basis of his Roma ethnicity, the Lamont panel carefully considered Mr. Erdos' evidence on the issue and concluded that he was not credible. Specifically, at pages 4 to 6 of its decision (A.B., p. 33 to 35), the panel specifically reviewed the evidence as to Mr. Erdos' Roma ethnicity and set out its reasons for finding him non-credible on that issue:

- Mr. Erdos' failure to raise his Roma ethnicity at the time of his 1989 application;
- its disbelief of his explanation that he was counselled by a priest to conceal his Roma ethnicity;

- its disbelief of his evidence that his wife threatened to Acut his throat@ if he disclosed his Roma ethnicity;
- its rejection of an identity card which indicated his ethnicity as Roma;
- the discrepancies between his evidence before the Rozdilsky panel and before it as to his clan membership.

[18] As a result, it is clear that the Lamont panel did not apply *res judicata* to the question of Mr. Erdos' Roma ethnicity. It carefully considered the evidence and came to its own conclusion that he was not Roma. It follows that he could not have a well-founded fear of persecution on that basis if he were returned to Hungary. As it is clear that this finding was not made in a perverse or capricious manner, or without regard to the material before the panel, it is not reviewable.

[19] While the Lamont panel did not specifically address the question of issue estoppel in relation to the CRDD's finding with respect to Mr. Erdos' persecution prior to 1992, it is clear on the face of its reasons that it did not apply issue estoppel. Taking the position most favourable to Mr. Erdos and assuming that issue estoppel applied, what remains to be decided? Given that Mr. Erdos' only experience in Hungary since 1992 was his brief sojourn in November-December 2002, he could only succeed in his application if he persuaded the panel that he had in fact visited Hungary in that time period and had been subject to persecution once again, either on the basis of his political opinion or on the basis of his Roma ethnicity.

[20] The Lamont panel was free to make its own findings of credibility as to events which occurred after 1992, including whether or not Mr. Erdos returned to Hungary for one month or so in 2002 as he alleged, or whether he was of Roma ethnicity. We have already seen that the panel considered and rejected Mr. Erdos' claim of Roma ethnicity.

[21] The panel considered Mr. Erdos' evidence that he returned to Hungary for a short time in November-December 2002 and decided that, in fact, he had not returned to Hungary. It came to that conclusion on the basis of the following:

- Mr. Erdos' various accounts of how he came to have a Hungarian passport;
- its disbelief of his account that he was able to throw his bag containing his money, jewellery and passport over the fence at the Budapest airport;
- its disbelief of his evidence that he was able to leave Hungary by surreptitiously joining a tour group;
- his failure to provide his passport, or his airline tickets and its disbelief of his explanation that these were stolen from him in Winnipeg;
- its rejection of certain Hungarian documents which he tendered in support of his allegation that he travelled to Hungary.

[22] These are all facts which occurred after 1992. All are valid reasons for concluding that Mr. Erdos did not return to Hungary as he claimed.

[23] Given that the panel found that Mr. Erdos was not of Roma ethnicity, and that he did not return to Hungary in 2002, there was no basis on which it could find a well-founded fear of persecution either on the basis of Roma ethnicity, or on the basis of fresh evidence of mistreatment because of Mr. Erdos= political opinion. This left no basis for a finding of a well-founded fear of persecution on either of the principal grounds of Mr. Erdos= claim.

[24] As a result, I conclude that the Lamont panel=s exercise of its discretion with respect to issue estoppel is not material to its conclusions with respect to Mr. Erdos' second refugee claim.

THE CERTIFIED QUESTION

[25] In his representations to us, counsel for Mr. Erdos asked the Court to comment on the issue of certified questions so as to provide some direction to the Federal Court. Counsel for the Minister objected on the ground that the matter was not raised in Mr. Erdos= memorandum so that she had not come prepared to address that question. In the circumstances, I do not believe it appropriate to say anything about certified questions in general.

[26] The applications judge certified the following question:

On the facts of this matter, did the Refugee Protection Division, when exercising its discretion to apply or not apply issue estoppel, err in a reviewable manner by failing to expressly address in its reasons for decision the factors submitted by the parties before it as being relevant to the exercise of that discretion?

[27] The premise of the question is that the Refugee Protection Division (the Lamont Panel) considered the factors submitted by the parties but that it did not articulate its reasoning with respect to those factors. On my reading of its decision, the Lamont panel specifically invoked *res judicata*

as a ground for excluding evidence of Mr. Erdos' Roma ethnicity, but went on to consider that evidence in detail before rejecting it as non credible. To the extent that the applications judge found that the panel had "effectively, if quite inelegantly and indirectly, addresses the factors for and against the exercise of discretion to apply or not apply issue estoppel." (A.B., p. 16), he did so in the context of the issue of *res judicata*.

[28] Insofar as consideration of the factors relating to the exercise of issue estoppel, I have found no indication in the Lamont panel's reasons that it considered such factors. It simply dismissed the CRDD's conclusions on the basis that it did not have all the evidence before it in coming to the conclusions it did. As a result, it appears to me that the certified question does not arise on the facts of this case.

CONCLUSION

[29] I would therefore dismiss the appeal on the ground that notwithstanding the fact that the Lamont panel did not apply issue estoppel, its decision on the question of Mr. Erdos' second claim for Convention refugee status is grounded in facts which occurred after the CRDD's decision and as a result there is no reason for us to intervene.

"J.D. Denis Pelletier"

J.A.

"I agree
A.M. Linden, j.a.

"I agree
Marshall Rothstein, j.a."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-16-05

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE GIBSON,
DATED DECEMBER 17, 2004, IMM-356-04**

STYLE OF CAUSE: *Janos Erdos v. The Minister of
Citizenship and Immigration*

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: October 19, 2005

REASONS FOR JUDGMENT BY: PELLETIER, J.A.

CONCURRED IN BY: LINDEN J.A.
ROTHSTEIN J.A.

DATED: December 9, 2005

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