Date: 20090113

Docket: IMM-1999-08

Citation: 2009 FC 15

Ottawa, Ontario, the 13th day of January 2009

Present: The Honourable Mr. Justice Pinard

BETWEEN:

ANATOLI BENILOV TRESKIBA,
IRINA TRESKIBA,

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the Act) of an April 4, 2008 determination by the Refugee Protection Division (RPD) of the Immigration and Refugee Board that the applicants are neither Convention refugees nor persons in need of protection.

[2] The male applicant, Anatoli Benilov Treskiba, is the son of the female applicant, Irina Treskiba, who has linked her application to his. Both applicants are citizens of Israel. The male applicant has stated that he fears detention for deserting the Israeli army.

[3] According to the male applicant, the panel made a number of errors that warrant intervention by the Court, all with regard to findings of fact, which must therefore be reviewed according to the reasonableness standard.

[4] Section 96 of the Act sets out the following definition of a Convention refugee, which guides the present analysis: "a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion". As well, the following provisions of the United Nations High Commission for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* ("the UNHCR Handbook") are relevant:

171. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.	**171.** Cependant, dans certains cas, la nécessité d'accomplir un service militaire peut être la seule raison invoquée à l'appui d'une demande du statut de réfugié, par exemple lorsqu'une personne peut démontrer que l'accomplissement du service militaire requiert sa participation à une action militaire contraire à ses convictions politiques, religieuses ou morales ou à des raisons de conscience valables.
172. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military	**172.** N'importe quelle conviction, aussi sincère soit-elle, ne peut justifier une demande de reconnaissance du statut de réfugié après désertion ou après insoumission. Il ne suffit pas qu'une personne soit en désaccord avec son gouvernement quant à la justification politique d'une action militaire particulière. Toutefois,

action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

lorsque le type d'action militaire auquel l'individu en question ne veut pas s'associer est condamné par la communauté internationale comme étant contraire aux règles de conduite les plus élémentaires, la peine prévue pour la désertion ou l'insoumission peut, compte tenu de toutes les autres exigences de la définition, être considérée en soi comme une persécution.

[5] As the Supreme Court of Canada clearly indicated in *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593, at paragraph 46, the UNHCR Handbook "must be treated as a highly relevant authority in considering refugee admission practices". Consequently, "[t]his, of course, applies not only to the Board but also to a reviewing court".

[6] Thus the onus is on the male applicant, in supporting his refugee protection claim, not only to establish that he has genuine moral or political convictions, but also to adduce objective evidence that the military action concerned violates international standards. In the present case, the panel expressed no doubt with regard to the genuineness of the male applicant's convictions. The panel also found that the evidence indicated that the Israeli army had committed "serious human rights violations" in Gaza. Thus the subjective and objective aspects of the analysis have been satisfied.

[7] On that basis, the male applicant has stated that the panel erred in concluding that he did not establish that he would have been forced to participate in those violations, given that the panel found that there was evidence that the Israeli army had committed serious violations in Gaza. That argument is erroneous. In fact, the Court endorses the comments by Mactavish J. in *Hinzman v. Canada (M.C.I.)*, [2007] 1 F.C.R. 561, at paragraphs 169 and 170*:*

> [169] It is generally accepted that isolated breaches of international humanitarian law are an unfortunate but inevitable reality of war: see *Krotov*, at paragraph 40. See also *Popov v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 489.
>
> [170] As the British Court of Appeal noted in *Krotov*, at paragraph 51, the availability of refugee protection should be limited to deserters from armed conflicts where the level and nature of the conflict, and the attitude of the relevant government, have reached a point where combatants are, or may be, required, on a sufficiently widespread basis, to breach the basic rules of human conduct (see also *Popov*, above).

[8] As well, in the present case, the panel was not satisfied that the male applicant established that he would be "forced" to participate in the condemned actions. In reaching this conclusion, the panel wrote as follows:

> According to the *Europa World Year Book 2006* (page 2324), which is found at Tab 1.2 of the package [National Documentation Package on Israel, June 28, 2007, The *Europa World Year Book 2006*. June 10, 2006. "Israel," pp. 2308-2348. London: Routledge], in August 2005, Israel had more than a half-million soldiers (168,000 soldiers on exercise and 408,000 reservists) who could be mobilized quickly. Without minimizing the violations committed in Gaza, a very low percentage of those half-million soldiers have fired on civilians. . . .

[9] The male applicant has contested this calculation because it refers to all reservists in Israel, not the proportion serving in Gaza. The panel added a second reason:

> . . . Most deaths are caused by bombings. In addition, the claimant had previously served as a driver mechanic. He had no artillery training, and it is not plausible that he would be incorporated into a unit that carries out bombings. . .

[10] The male applicant has stated that this reason, too, is problematic, since the evidence established that he was given target training. As well, before he deserted he was told that he would be transferred to an "active" unit.

[11] After reviewing the evidence, however, the Court is of the opinion that the panel rightly concluded that the male applicant did not establish that he would be persecuted if he were required to return to Israel.

[12] The male applicant has also alleged that he was insulted and attacked in prison. In the evidence, however, the Court finds no indication that the insults and attacks constitute persecution. As well, the decision in *Ates v. Minister of Citizenship and Immigration*, 2005 FCA 322, 343 N.R. 234, clearly states as follows: in a country where military service is compulsory, prosecutions and incarcerations of a conscientious objector for refusing to do his military service do not constitute persecution based on a Convention refugee ground (see also *Ielovski v. Minister of Citizenship and Immigration*, 2008 FC 739, [2008] F.C.J. No. 931 (T.D.) (QL), at paragraph 12; *Hinzman*, *supra*, at paragraph 224; and *Lebedev v. Canada (M.C.I.)*, [2008] 2 F.C.R. 585, at paragraph 50).

[13] Contrary to the decision in *Tewelde v. Minister of Citizenship and Immigration*, 2007 FC 1103, [2007] F.C.J. No. 1426 (T.D.) (QL), in which Gauthier J. overturned the RPD's reasoning, the Court considers that in the present case the panel carried out a reasoned analysis that took all the important evidence into account.

[14] Lastly, with regard to the female applicant, the panel wrote as follows:

> The female claimant went to Israel at the same time as her son. She divorced, and her former husband returned to Russia. She supported her son's decision to go to Canada. After he left, soldiers went to her house and searched it. Her neighbours were very unhappy that her son had left the army. The soldiers returned to her home two more times, and she also decided to come to Canada to claim refugee protection. She is basing her claim on the consequences for her of her son's desertion and on the problems that she faced because she practises Christianity.
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> . . .
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> The female claimant's testimony added nothing to her allegations. She admitted that it was normal for a deserter to be sought, especially since some of his personal effects were still at home. As for religion, she stated nothing serious that would justify a fear of returning.

[15] In the context of a refugee protection claim closely linked to the claim of the male applicant, the Court considers the panel's findings entirely reasonable. In the circumstances, the fact that the panel did not specifically refer to the threats of imprisonment allegedly received by the female applicant does not constitute a determinative error.

[16] For all these reasons, intervention by the Court is not warranted, and the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the April 4, 2008 determination by the Refugee Protection Division of the Immigration and Refugee Board is dismissed.

"Yvon Pinard"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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