Date: 20090910

Docket: IMM-567-09

Citation: 2009 FC 893

Ottawa, Ontario, September 10, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

OLGA VOLKOVITSKY
VADIM VOLKOVITSKY

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] [11] . . . the death or injury of civilians as a result of military operations was an "ugly fact of battle rather than part of a deliberate campaign" and that violators of human rights were punished. Mr. Sounitsky would not, therefore, be obliged to participate in human rights abuses, directly or indirectly.

This point was made by Justice Richard Mosley in a similar case, *Sounitsky v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 345, 166 A.C.W.S. (3d) 310.

II. Judicial procedure

[2] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated November 13, 2008. The Board found that the applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Facts

[3] The applicants, Olga Volkovitsky and Vadim Volkovitsky, are citizens of Israel who fear persecution and allege a risk to their lives and a risk of cruel and unusual treatment or punishment for reasons of their Russian ethnic origin, their political opinions and Mr. Volkovitsky's refusal to serve as a reservist in the Israeli army.

[4] The applicants are from Ukraine. Mr. Volkovitsky immigrated to Israel in December 1998, and Mrs. Volkovitsky, in January 1999. They lost their Ukrainian citizenship when they obtained Israeli citizenship.

[5] When Mrs. Volkovitsky arrived in Israel to join Mr. Volkovitsky, who had immigrated earlier, Israeli authorities thought that Mrs. Volkovitsky (who was not yet married to Mr. Volkovitsky) was entering the country to engage in prostitution. She was detained at the airport, and proceedings were undertaken to deport her; however, she was released through the intervention of members of Mr. Volkovitsky's family. Mrs. Volkovitsky also complains that she never received a promotion at work, because of her ethnicity.

[6] After having immigrated to Israel, Mr. Volkovitsky was called up for military service. He alleges that he had announced on several occasions his refusal serve in the army or carry a weapon, and that he wanted to perform civilian service. Apparently, he was even seen by a psychologist to assess his conscientious objection. Nevertheless, he was summoned for regular service, which he performed in Israel from December 2000 to December 2002. During his two years in the regular service, he accused the Israeli army of having asked him to raze villages in the occupied territories with a bulldozer, without regard to the civilians living there, and to fire on unarmed civilians. Because of his objections, he was not sent to the occupied territories. However, he alleges that he was punished by being imprisoned at the base twice and made to pay a fine twice on account of his refusal.

[7] Mr. Volkovitsky then served three one-month stints in the reserve, in March 2004, April 2005 and February 2006. On August 14, 2006, upon reporting for his fourth tour of duty in the reserve, he asked again not to carry a weapon or to enter the occupied territories. He alleges that he was required to go into the occupied territories to engage in "cleansing" operations. At that point, he decided that he no longer wanted to serve in the Israeli Defense Forces. He told his superior that he would gladly serve on the base, but not in the occupied territories. His superior allegedly told him that, if he left, he would be considered to have deserted. At the end of his first day, Mr. Volkovitsky left the army and did not return. He left his country for Canada with Mrs. Volkovitsky on September 7, 2006.

[8] At the hearing before the Board, on November 13, 2008, the applicants submitted an official document of the Israeli army, in Hebrew. The Board did not accept this document because no acceptable translation was provided. At the same time, the Board gave the applicants additional time to submit a translation. More than two weeks after the hearing, on December 1, 2008, the applicants submitted a translation of the army document, along with a letter. The translation of the army document confirms that Mr. Volkovitsky served as a reservist one day, on August 14, 2006. The document also indicated that it would not have been issued to someone who had been subject to detention or prosecuted for being absent without leave. The letter accompanying the translation did not comment on the content of the army document, and the applicants did not ask to be heard on the subject of this document.

IV. Decision under review

[9] In a decision dated November 13, 2008, the Board found that the treatment feared by Mr. and Mrs. Volkovitsky was not so serious as to lead one to conclude that their fear of persecution was reasonable. The Board found that the discrimination and stigmatization they suffered did not amount to persecution.

[10] The Board recognized that any country has the right to require its citizens to perform military service. This right stems from the right to impose punishment on those refusing to submit to this generally applied requirement, which is usually not considered as persecution. However, citing the three exceptions in *Lebedev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 728,

[2008] 2 F.C.R. 585 (F.C.A.), the Board noted that there are special circumstances in which a claimant could be recognized as a refugee for having refused to serve in his or her country's army.

[11] Mr. Volkovitsky did not qualify under the first exception in *Lebedev*, which explains that conscription may be considered as persecution if it is conducted in a discriminatory way or if the punishment for desertion is biased in relation to one of the five grounds enumerated in the *United Nations Convention Relating to the Status of Refugees* (the Convention).

[12] The Board also analyzed Mr. Volkovitsky's allegation that he would be incarcerated for at least three years and that this penalty would constitute cruel and unusual treatment or punishment. The evidence revealed that refusal to serve in the reserve is punishable by a maximum of 56 days' imprisonment. Although this sentence can be renewed in the event of repeated refusal, the Board found that the penalty in these circumstances could be as high as one year in prison: "This penalty is certainly not disproportionate to the penalties imposed on objectors in other countries . . ." (Certified record, at p. 11).

[13] The Board also addressed the second exception in *Lebedev*, where it found that the evidence in the record did not support a conclusion that the Israeli army's presence in the occupied territories was fundamentally illegitimate under international law. What is more, Mr. Volkovitsky did not demonstrate that paragraph 171 of the Handbook would apply in his case, because he failed to show that he would have been required, had he not refused to serve in the reserve, to engage in specific acts condemned by the international community as contrary to basic rules of human conduct.

[14] As for the third exception in *Lebedev*, total conscientious objection, the Board cited examples where Mr. Volkovitsky's conduct was at odds with the genuineness of the total conscientious objection. Mr. Volkovitsky testified that he had made several verbal requests to perform civilian service, and, according to the principal applicant, his requests were never considered. The Board stated that "the procedure to follow in such cases is to submit a written request" (Certified record, at pp. 13 to 14).

V. Issues

[15] (1) Did the Board breach its duty of procedural fairness in using the translation of the army document without giving the applicants the opportunity to comment on it?

(2) Did the Board err in finding that the applicants had failed to demonstrate a well-founded fear of persecution for reasons of their ethnicity, religion or social group?

VI. Standard of review

[16] With respect to the duty of procedural fairness, the applicable standard of review is correctness (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 53; *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 908, [2008] F.C.J. No. 1142 (QL) at para. 15).

[17] The Board's finding that the applicants did not have a well-founded fear of persecution is a question of mixed fact and law that is reviewable on a standard of reasonableness (see *Dunsmuir v.*

New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9; *Liang v. Canada (Citizenship and Immigration)*, 2008 FC 450, 166 A.C.W.S. (3d) 950 at paras. 12 to 15). The standard of reasonableness means that deference is owed to the decisions of administrative bodies (*Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, 2009 SCC 12; *Maksoudian v. Canada (Minister of Citizenship and Immigration*), 2009 FC 285, [2009] F.C.J. No. 662 (QL) at para. 6).

VII. Analysis

(1) Did the Board breach its duty of procedural fairness in using the translation of the army document without giving the applicants the opportunity to comment on it?

[18] According to the applicants, the Board breached its duty of procedural fairness because they were not given the opportunity to be heard on the army document. They therefore submit that the Board erred in using the army document to contradict Mr. Volkovitsky's testimony and in finding him to be not credible on the basis of this document. The applicants claim that the army document does not support the Board's conclusion that Mr. Volkovitsky was not prosecuted for being absent without leave after August 14, 2006.

[19] The Board did not breach its duty of procedural fairness. The applicants submitted the translation of the army document a few weeks after the hearing. The letter accompanying the translation did not comment on the content of this document, although it did provide a detailed summary of the applicants' submissions. There is no indication that the applicants asked to be heard on this document. The Board acted properly because it is not required to inform the applicants of all its concerns regarding the evidence (*Ayyalasomayajula v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 248, 155 A.C.W.S. (3d) 941 at paras. 17 to 19).

[20] Even though the applicants presented this aspect of their arguments as an issue of procedural fairness, their submissions also involve findings on Mr. Volkovitsky's credibility and findings of fact made by the Board.

[21] Matters of credibility are questions of fact that require that this Court show deference to the standard of reasonableness (*Aguebor v. (Canada) Minister of Employment and Immigration*) (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.) at para. 4; *A.M. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 579, 139 A.C.W.S. (3d) 153 at para. 14). There were no contradictions regarding the army document confirming that Mr. Volkovitsky served on August 14, 2006. The document itself clearly indicates that it would not have been issued to someone subject to detention or imprisoned or charged with being absent without leave.

[22] The Board was entitled to consider the applicant's failure to provide evidence corroborating fundamental elements of the claim and satisfactorily explain why he could not produce those documents (*A.M.*, above, at paras. 19 to 20; *Amarapala v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 12, 128 A.C.W.S. (3d) 358 at para. 10). The applicants produced no additional evidence to corroborate the claim that Mr. Volkovitsky was wanted by military authorities because of his refusal to serve. The finding that Mr. Volkovitsky was not credible was also based on the fact that he was able to cross the border without being harassed by Israeli authorities. In light of the deference owed to it, it was open to the Board to dismiss Mr. Volkovitsky's claims that he was wanted by military authorities after August 14, 2006.

[23] In any event, the findings of non-credibility were drawn after the Board had analyzed the applicant's explanations with respect to the exceptions in *Lebedev*, above. The Board's conclusions on the "other major aspects of the claimant's evidence" (Certified record at p. 14) have no bearing on the Board's findings that Mr. Volkovitsky did not qualify under the third exception in *Lebedev*. That is, the Board already had enough evidence before it to determine that Mr. Volkovitsky was not a total conscientious objector.

(2) Did the Board err in finding that the applicants had failed to demonstrate a well-founded fear of persecution for reasons of their ethnicity, religion or social group?

Applicant's particular circumstances

[24] According to the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/ENG/REV.1, UNHCR 1979 Reedited, Geneva, January 1992) (the Handbook), a claimant is not a refugee simply because the claimant refuses to serve in his or her country's army:

168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.	168. Il va de soi qu'une personne n'est pas un réfugié si la seule raison pour laquelle elle a déserté ou n'a pas rejoint son corps comme elle en avait reçu l'ordre est son aversion du service militaire ou sa peur du combat. Elle peut, cependant, être un réfugié si sa désertion ou son insoumission s'accompagnent de motifs valables de quitter son pays ou de demeurer hors de son pays ou si elle a de quelque autre manière, au sens de la définition, des raisons de craindre d'être persécutée.

[25] As Justice Mark MacGuigan explained in *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540, [1993] F.C.J. No. 584 (QL) (F.C.A.), the onus is on the claimant to prove that the law is inherently persecutory in relation to a Convention ground:

> [19] After this review of the law, I now venture to set forth some general propositions relating to the status of an ordinary law of general application in determining the question of persecution:
>
> [20] (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
>
> [21] (2) But the neutrality of an ordinary law of general application, vis-à-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
>
> [22] (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
>
> [23] (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.
>
> (Although there is a French translation, it is not official).

[26] Laws of general application are presumed to be valid and neutral. At the same time, there are particular circumstances that, in themselves, constitute exceptions to this rule. Inspired by the book *The Law of Refugee Status* (Markham: Butterworths, 1991), by Professor James C. Hathaway, Justice Yves de Montigny adopted three exceptions where a claimant who refuses to serve in his or her country's army could be recognized as a refugee (*Lebedev*, above, at paras. 14 and 29).

[27] The Board summarized the three exceptions in *Lebedev* as follows:

> 1- Military evasion might have a nexus to one of the five Convention grounds if conscription is conducted in a discriminatory way or if the punishment for desertion is biased in relation to a Convention ground;
>
> 2- Evasion reflects political opinion that the service in question is fundamentally illegitimate under international law, as in the case of military action intended to violate human rights or breach the Geneva Convention standards, and non-defensive incursions into foreign territory;
>
> 3- Evasion by persons with conscientious objections grounded in deeply held moral or religious principles;

(Decision at p. 7)

First exception in *Lebedev*: discriminatory conscription or punishment that is biased in relation to a Convention ground

[28] In *Ates v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322, 343 N.R. 234 (F.C.A.), the Federal Court of Appeal confirmed that, in a country where military service is compulsory, and there is no alternative thereto, repeated prosecutions and incarcerations of a conscientious objector for the offence of refusing to do his or her military service do not constitute persecution based on a Convention refugee ground. Therefore, the punishment imposed by Israeli authorities for military evasion is a law of general application. The applicants provided no evidence that the Israeli army conducted conscription in a discriminatory way or that the punishment for desertion in Mr. Volkovitsky's case was biased in relation to a Convention ground.

[29] According to his testimony, which the Board rejected, Mr. Volkovitsky refused to enter the occupied territories during his regular military service and was then sentenced to detention at the base and made to pay fines. Mr. Volkovitsky alleges that he will be incarcerated for three years

upon returning to Israel for having deserted while serving in the reserve in 2006 and that he will subsequently have to serve, thus risking repeated incarceration, since he will refuse again. The Board assessed the severity of the penalty that would be imposed on Mr. Volkovitsky for draft evasion and determined that the punishment imposed by authorities would not constitute cruel and unusual treatment or punishment under section 97 of the IRPA.

[30] In its decision, the Board noted that, according to the evidence filed by the applicants themselves, in the article "Conscientious objection to military service in Israel: an unrecognised human right" published by War Resisters' International (WRI), refusal to serve in the reserve is punishable by a maximum of 56 days' imprisonment, a sentence that can be renewed in the event of repeated refusal.

[31] The applicants claimed that the Board failed to consider the following passage from the WRI article that it cited:

> Attempting to evade military service is punishable by up to five years' imprisonment.
>
> Refusal to perform reserve duties is punishable by up to 56 days' imprisonment, the sentence being renewable if the objector refuses repeatedly.
>
> . . .
>
> Those who disobey call-up orders are regarded as refusing to perform military service and can thus be sentenced to up to five years' imprisonment…

(Certified record at p. 188).

The applicants allege that the Board, in failing to consider this passage, acted in bad faith, because it split up the contents of a single document in order to use certain paragraphs while ignoring others (Applicants' memorandum at paras. 27 to 28).

[32] The applicants' allegations are not supported by the evidence. When read in its entirety and in context, the text of the WRI article clearly shows that the Board correctly interpreted and cited the documents submitted by the applicants. Based on the WRI article, the Board clearly distinguished between the sentence for refusal to serve in the reserve, which is punishable by a maximum of 56 days' imprisonment, and the sentence for refusal to perform initial service, which was longer. Mr. Volkovitsky has already completed his two-year initial service; therefore, the longer sentence cited by the applicants does not apply here.

[33] The applicants themselves failed to read the WRI article, to which they referred, as a whole. After the passage chosen and cited by the applicants, the WRI article commented on the sentence for refusal to serve in the reserve: "In practice sentences do not exceed more than a year's imprisonment" (Certified record at p. 188). Even though the sentence of 56 days' imprisonment can be renewed in the event of repeated refusal, after reviewing the WRI article and other sources, the Board concluded that the penalty for draft evaders, deserters and conscientious objectors in the Israeli reserve can be as high as one year in prison, depending on the facts. This factual conclusion was reasonably open to the Board on the documentary evidence before it.

[34] The Board cited a number of judgments from this Court to support its conclusion that a sentence of one year's imprisonment for refusal to serve in the reserve was not disproportionate to the penalties imposed on objectors in other countries. For example, the Board cited *Baranchook v. Canada (Minister of Citizenship and Immigration)* (1995), 105 F.T.R. 46, 60 A.C.W.S. (3d) 376 (F.C.), where the Court confirmed that, compared with international standards, "the Israeli penalty was neither excessive nor draconian" (at para. 10).

[35] In light of the documentary evidence and case law from this Court, it was not unreasonable for the Board to conclude that the cumulative sentences that might be imposed on Mr. Volkovitsky for his refusal to serve in the Israeli army did not amount to persecution.

Second exception in *Lebedev*: Israeli reserve service is fundamentally illegitimate under international law

[36] The second exception in *Lebedev* is based on paragraph 171 of the Handbook, which must be read in conjunction with paragraph 170:

170. 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.	170. 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.

171. 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 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.	171. 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, 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.

[37] Justice de Montigny provided a detailed explanation of these provisions of the Handbook in *Lebedev*, where he distinguished between conscientious objection and an objection to a specific war that the applicant feels violates international standards of law and human rights:

> [42] There is therefore some ambiguity as to the precise ground on which *Zolfagharkhani*, above, was actually decided. I would personally be inclined to think that, as a matter of principle and of precedent, conscientious objection can only be global and with respect to participation in all armed conflicts. When a claimant objects to a specific war, it is not because he rejects war on philosophical, ethical or religious grounds. Rather, he is objecting to the military's goals or strategies in a particular conflict. As we shall see, his objection is not driven by his conscience, but by an objective assessment about whether military action in a particular situation is valid. That is not the same thing as conscientious objection.
>
> . . .

> [44] In my view, the phrase "partial conscientious objection" implies a nonexistent link between two different exceptions from Hathaway and the UNHCR Handbook. As I see it, conscientious objection applies to those who are totally opposed to war because of their politics, ethics or religion. Selective objection really refers to cases in which an applicant opposes a war he feels violates international standards of law and human rights.
>
> [45] The first type of claim, conscientious objection, raises subjective issues. Decision makers must evaluate the applicant's personal beliefs and conduct to see if his claim is genuine. The second type of claim requires both a subjective and objective assessment of the facts. Along with evaluating the sincerity of an applicant's beliefs, a decision maker must look at whether the conflict objectively violates international standards. The two types of objections should be treated as distinct categories—just as they are distinguished in paragraphs 171 and 172 of the UNHCR Handbook.

(Also: *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, [2007] 1 F.C.R. 561 at paras. 108 to 110).

[38] The Board conducted an objective analysis of the facts and found that military service in the occupied territories was not condemned by the international community as contrary to basic rules of human conduct. A reading of the whole decision clearly shows that the Board did consider the possibility that certain soldiers may have committed atrocities and that the documentary evidence revealed the following:

> [29] . . . situations where soldiers have committed serious abuses tantamount to human rights violations . . .
>
> [30] . . . And if some of the army's actions engender serious human rights violations, the evidence does not state that these were intentional; the evidence speaks of the fight against terrorism. While the panel deplores the serious consequences for the Palestinian population, it cannot conclude from the evidence that the aim of the Israeli army in the occupied territories is to violate people's human rights.

(Decision at pp. 9 to 10).

[39] The applicants criticized the decision stating that, for the principal applicant to be able to claim refugee protection, the applicants would have needed to show that the Israeli army intended to violate human rights (Applicants' reply memorandum at para. 27).

[40] On the contrary, the Israeli army's objectives were considered to be relevant in *Popov v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 90, 24 Imm. L.R. (2d) 242 (F.C.). This Court stated that isolated incidents in and of themselves do not violate acceptable international standards:

> [9] What the Applicant asserts is that he objects to serving in the military because of Israeli military activity against the Palestinians which he asserts contravenes acceptable international standards. I do not think the evidence supports a conclusion that the activity of the Israeli military falls into that category.
>
> [10] It is true that the evidence contains accounts of violations from time to time, or allegations, at least, of violations from time to time. And one would not be too surprised if the allegations were substantiated. But an isolated incident or incidents of the violation of international standards is not the kind of activity which the Federal Court of Appeal was referring to in the jurisprudence which has been cited [*Zolfagharkhani*]. One is talking about military activity which is condoned in a general way by the state . . . (Emphasis added).

(In this regard, see also the recent judgment and reasons for judgment of Justice Yvon Pinard in *Irina Treskiba v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 15, [2009] F.C.J. No. 9 (QL) at paras. 5 to 9).

[41] In *Hinzman*, above, this Court upheld the notion that isolated violations would not constitute a violation condemned by the international community as contrary to basic rules of human conduct:

> [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), 75 F.T.R. 90 (F.C.T.D.).
>
> [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*).

[42] Moreover, examples from this Court show that an army's objectives play an important role in determining whether its military action is condemned by the international community as contrary to basic rules of human conduct. In *Zolfagharkhani*, above, the Federal Court of Appeal was of the opinion that the punishment for the refusal to participate in a military action in which chemical weapons were used, justified granting refugee status to a paramedic. The Federal Court of Appeal found that the use of chemical weapons violated international law (*Zolfagharkhani* at paras. 25 to 30). In *Lebedev*, above, the Court accepted evidence reporting instances of torture, disappearances, extra-judicial executions and mass dumping sites. Thus, the penalties for refusal to serve in Chechnya, where more than 100,000 Chechens were killed, were regarded as persecution.

[43] Lastly, the Board found that Mr. Volkovitsky had not demonstrated that he would have been required, had he not refused to serve in the reserve, to engage in specific acts condemned by the international community as contrary to basic rules of human conduct. The Board found that, as regards Israeli soldiers, "one cannot determine from the evidence that they were forced to do so by the authorities" (Decision at para. 31). It was open to the Board to find that Mr. Volkovitsky had not established that he would be forced to commit human rights violations during a future tour of duty

in the reserve (also, *Ielovski v. Canada (Citizenship and Immigration)*, 2008 FC 739, 169 A.C.W.S. (3d) 620 at paras. 10 to 11; *Irina Treskiba*, above, at para. 11).

Total conscientious objections

[44] Mr. Volkovitsky admitted to having completed two years of regular military service in Israel and performed three one-month periods of service as a reservist. Even though the applicants disagree with the Board's decision on the third exception in *Lebedev*, they do not dispute that Mr. Volkovitsky is not a total conscientious objector. In their reply memorandum, the applicants admitted that Mr. Volkovitsky did not need to allege total objection: [TRANSLATION] "It is solely because of the situation in 2006, and in particular after August 14, 2006, that the applicant relied on the second exception in Lebedev **because he thought that he would be forced to serve in the occupied territories in the near future** . . ." (Applicants' reply memorandum at paras. 18 and 19). It is therefore not necessary for this Court to rule on this issue.

Particular circumstances of the female applicant

[45] That Mrs. Volkovitsky was allegedly forced to work as a seamstress even though she is qualified as a bookkeeper does not constitute persecution. During the hearing before the Board, Mrs. Volkovitsky testified that she had never received a promotion at work and had been denied the opportunity to work as an accountant. The applicants claimed that the Board erred in failing to consider *He v. Canada (Minister of Employment and Immigration)* (1994), 78 F.T.R. 313, 25 Imm. L.R. (2d) 128, where this Court noted at paragraph 14 that "[t]o permanently deprive a teacher of

her profession and to forever convert an educated young woman into a farm hand and garment worker, constituted persecution".

[46] Although Mrs. Volkovitsky has a certificate in accounting, she never stated that she has experience as a bookkeeper. In fact, in her Personal Information Form (PIF), at page 146 of the certified record, Mrs. Volkovitsky indicated that she also worked as a seamstress in Ukraine. Even though she complains that she was never promoted at work, she never wrote in her PIF that she had been denied promotions because of her ethnicity (Certified record at pp. 72 to 74).

[47] Moreover, *He*, above, can be distinguished from this case. In *He*, the Chinese government had indeed fired the applicant from her teaching job and forced her to become a farmer as punishment for her pro-democratic activities in China. Here, there is no evidence that the female applicant was deprived of the opportunity to progress in her trade on the basis of a Convention ground.

VIII. Conclusion

[48] The Board did not breach its duty of procedural fairness in using the translation of the army document without giving the applicants the opportunity to comment on it; therefore, for this and all other reasons, the Board did not err in finding that the applicants had failed to demonstrate a well-founded fear of persecution for reasons of their ethnicity, religion or social group.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT

SOLICITORS OF RECORD

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