Date: 20090910

Docket: IMM-841-09

Citation: 2009 FC 898

Vancouver, British Columbia, September 10, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ALEXANDER POPOV,
IRINA DOUBROVSKAIA,
MARIA DOUBROVSKAIA (DOUBROVSKAYA),
POLINA DOUBROVSKAIA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act), of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada dated January 23, 2009 where the

RPD found that the Applicants were not Convention refugees or persons in need of protection under the Act.

Issues

[2] The following issues are raised:

a. Did the RPD err in finding that the Applicants – stateless individuals - must exhaust all avenues of state protection in the United States before seeking refugee protection in Canada?

b. Did the RPD err in finding that the Applicants had failed to exhaust all avenues of state protection in the United States before coming to Canada?

c. Did the RPD err in finding that the Applicants do not have a well founded fear of persecution and in finding that the immigration laws of the United States applied to the Applicants were laws of general application and were not persecutory or applied to them differently due to a Convention reason?

Factual Background

[3] The following facts are taken from the findings of the RPD.

[4] The Applicants, Alexander Popov and Irina Doubrovskaia, are married and were respectively the principal and associated claimants before the RPD. Both were born and lived in the former Union of Soviet Socialist Republics (U.S.S.R.), now recognized as the Russian Federation. Their children, Maria and Polina Doubrovskaia, also Applicants in this Court, are minor claimants who were born in the United States and are citizens of that country.

[5] Both Mr. Popov and Ms. Doubrovskaia are stateless individuals. They were living in the United States at the time of the breakup of the former U.S.S.R. and failed to take the steps required to obtain Russian citizenship. Consequently, Russia claims they are not Russian citizens. They are also not citizens of the United States.

[6] Mr. Popov and Ms. Doubrovskaia left the former U.S.S.R. in 1992, traveling to the United States on a business visa. A year later, Mr. Popov applied to change his visa and they both applied for permanent residency. In 1994, they were issued visas that allowed them to stay in the United States and operate their business. In 1995, they applied for an adjustment of status and were lead to believe, by Immigration and Naturalization Service (INS), that they would be granted green cards.

[7] In 1996, the Applicants' attorney learned that their adjustment of status had been delayed as the INS had misplaced their files. After a search, only Mr. Popov's file was located. Mr. Popov then renewed his application. He was again assured that he would be granted a green card.

[8] On April 5, 2003, Mr. Popov was stopped by police in the United States. He was informed that no record of his status existed and was arrested for overstaying his visa. He was denied bond and was remanded to a maximum security prison.

[9] On September 24, 2003, the INS, while admitting that Mr. Popov had alien worker status, informed him that it intended to revoke this status. Counsel for Mr. Popov neglected to take the

necessary steps to rebut the *Intent to Revoke* and Mr. Popov's status was revoked. He did not appeal the revocation.

[10] At the end of 2003, Mr. Popov's removal was ordered. The appeal of that decision was dismissed by the Bureau of Immigration Appeals. The removal order was then made final. Mr. Popov filed a further appeal in the Ninth Circuit Court of Appeals but did not move for a stay of removal. Rather, he asked to be removed to Russia.

[11] It was at this point that the Bureau of Immigration and Customs Enforcement was informed that Mr. Popov was not a citizen of the Russian Federation and that travel documents would not be issued for him.

[12] Mr. Popov was held in prison for 180 days after his removal order was finalised. This despite the fact that in the United States, aliens must be released from prison 90 days after their removal order is finalised. Mr. Popov has spent over two years in prison in total in relation to this matter.

[13] Upon his release in 2005, Mr. Popov was placed under supervision and permitted to be at large under certain conditions.

[14] In April 2006, Mr. Popov won part of his appeal at the Ninth Circuit Court of Appeals. In December, 2006, his file was remanded to the Board of Immigration Appeals and then to an immigration judge to consider the application for change of status and the cancellation application.

[15] Mr. Popov's status is undefined in law. Furthermore, he cannot work or receive unemployment benefits as his employment authorization has expired.

[16] As for Ms. Doubrovskaia, her status in the United States is unknown. Her 1996 petition for adjustment of status was never located and she lives in fear of being arrested.

[17] On August 14, 2006, the Applicants came to Canada and filed for refugee protection at the border.

[18] There have been some changes in the Mr. Popov's case since his coming to Canada. On January 2, 2008, the Ninth Circuit Court of Appeals, in light of a decision in another case, remanded Mr. Popov's case to the District Court for reconsideration of a previous *habeas corpus* petition and to reassess the revocation of his visa. Also in 2008, the Department of Homeland Security and the principal claimant proposed to the United States District Court that the revocation of the visa petition be vacated without prejudice to the Department of Homeland Security to institute a new visa revocation proceeding and to reassess Mr. Popov's status adjustment petition. No evidence was presented as to whether or not this option has been accepted.

Impugned Decision

[19] On January 23, 2009, the RPD determined that the Applicants are not Convention refugees as they do not have a well-founded fear of persecution in the United States.

[20] The RPD also found that the Applicants were not people in need of protection in that their removal to the United States would not subject them personally to a risk of their lives or to a risk of cruel and unusual treatment or punishment and in that there are no substantial grounds to believe that their removal to the United States will subject them personally to a danger of torture.

[21] The RPD found that Mr. Popov and Ms. Doubrovskaia are stateless persons as they are not citizens of the United States or of the Russian Federation. It was also found that they had a former residence in both countries.

[22] The RPD stated that stateless persons must show that they possess a well-founded fear of persecution in any country of formal residence and that they cannot return to any country of former residence. Also, as the Applicants are claiming protection against the United States, they must establish a fear of persecution in that country.

[23] The Applicants assert that they will be persecuted in the United States because they have no legal status there. They fear recurrent imprisonment even though they have not violated any criminal laws. Mr. Popov also asserts that he might be specifically targeted on the basis of his political opinion or his imputed political opinion.

[24] The RPD analysed the existence of state protection in the United States – the Applicants' country of habitual residence. It based its analysis on *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413, 63 Imm. L.R. (3d) 13 (*Hinzman*), and found that the Applicants had not rebutted the presumption of state protection with clear and concise evidence.

[25] The RPD found that the Applicants had not exhausted all domestic avenues open to them. In the case of Mr. Popov, he had not appealed the denial for adjustment of status or for cancellation of removal. As for Ms. Doubrovskaia, after her initial application was lost, she never applied to have it reinstated nor did she file a new application after the old one was lost.

[26] The RPD suggested that if the Applicants are returned to the United States and are arrested for not having status, they risk six months imprisonment at the most. Also, they could agree to the removal order and then demonstrate to American officials that they should be released as they can not be removed to Russia.

[27] Once this is done, they might receive a work authorization or supervision order. The fact that social and health services would not be available to them and their job opportunities limited is not persecutory but simply the exercise of a country's right to limit access to certain services.

[28] The RPD also found that the immigration laws in the United States are laws of general application which are not persecutory in nature. It noted that countries have the right to detain

noncitizens and that in the United States, there is a limit to the detention period. It also noted that the United States has constitutional protection against indefinite detentions through *habeas corpus* and provides for due process of law.

[29] The RPD noted that specifically in the case of alien removals, there is a limit on detention if removal is not reasonably foreseeable or effectuated even if that limit was not respected in Mr. Popov's case.

[30] In the cases of Maria and Polina Doubrovskaia, the RPD found that they are citizens of the United States and had not asserted a claim for protection against the United States. As they relied on the evidence of their parents, their claim must fail.

[31] The RPD concluded by remarking on the unfortunate circumstances that have befallen on the Applicants who have had to rely on the charity of others to meet their daily needs and lived with a fear of deportation for almost 15 years. The RPD also noted that the Minister may want to consider allowing the Applicants to remain in Canada pursuant to section 25 of the Act.

Relevant Legislation

[32] *Immigration and Refugee Protection Act*, S.C. 2001, c.27

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son

social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by

appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout

the person in every part of that country and is not faced generally by other individuals in or from that country,	lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Analysis

Preliminary question

[33] The Respondent objects to two documents filed as exhibits to Mr. Popov's affidavit in the Applicants' Record and asks that they not be considered.

[34] In support of this judicial review, Mr. Popov filed two documents pertaining to the current immigration detention system in the United States – a report by Amnesty International and a newspaper article. These were not part of the tribunal record as they were published later.

[35] It is trite law that a reviewing Court is bound by the record filed before the federal board, commission or other tribunal the decision of which is under appeal, unless there is jurisdictional issue before the court. If evidence not before the initial tribunal is introduced on judicial review, the

review application would effectively be transformed into an appeal or a trial *de novo* (*Rahi v. Minister of Employment and Immigration* (28 May 1990), 90-A-1343 (F.C.A.), per MacGuigan J.A., *Canada (Minister of Citizenship and Immigration) v. Toledo*, (1998) 143 F.T.R. 135 (F.C.T.D.) at paragraph 7 (QL)).

[36] In this case, there is not a question of jurisdictional error before the Court and I will therefore decide the matter without regard to the new evidence.

Did the RPD err in finding that the Applicants –the stateless individuals - must exhaust all avenues of state protection in the United States before seeking refugee protection in Canada?

[37] The question as to whether a stateless individual must exhaust all avenues of state protection in a country of former habitual residence is a question of law that attracts a standard of review of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*)).

[38] The Applicants argue that as they are stateless individuals, they are not subject to the presumption of state protection as set out in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (*Ward*) and further explained by the Federal Court of Appeal in *Hinzman*.

[39] In support of their argument they rely on *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21 (C.A.) (*Thabet*) and other jurisprudence where this Court has found that an error was committed when stateless individuals were made to refute the presumption of state protection in all countries of former habitual residence.

[40] The Respondent submits that the stateless Applicants must establish both that they would suffer persecution in the country of former habitual residence and that they cannot return to that country. Whereas the minor Applicants, being citizens of the United States, must make out their claim against the United States.

[41] The Respondent argues that this view is in keeping with the view set out by the Supreme Court of Canada that claimants who have national support should not be accorded the protection of the international refugee protection (*Thabet*, *Ward*).

[42] Although it is true that in *Thabet*, the Federal Court of Appeal creates a distinction between stateless individuals and those who do have a state, one must read further. The Court answered the certified question before it as follows:

> In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in <u>any</u> country of former habitual residence, and that he or she cannot return to <u>any</u> of his or her countries of former habitual residence. (*Thabet* at paragraph 30) [emphasis added]

[43] *Thabet* clearly set outs that it is not sufficient to simply be unable to return to all countries of former habitual residence - the individual must prove that they will suffer persecution in one of those countries.

[44] In this case, Mr. Popov and Ms. Doubrovskaia, being stateless individuals, must establish that they would suffer persecution in either Russia or the United States – their countries of former

habitual residence and that they cannot return to the other. Although it is clear they cannot return to Russia, they have made their claim against the United States and as such must prove that they would suffer persecution in that country.

[45] In order to do so, they must prove not only a subjective fear but also an objective fear. This requires that they rebut the presumption of state protection and are “required to prove that they exhausted all the domestic avenues available to them before without success before claiming refugee status in Canada” (*Hinzman* at paragraph 46).

[46] Consequently, the RPD was correct in finding that the stateless Applicants must have exhausted all domestic avenues in order to establish that they have a well founded fear of persecution in one of their countries of former habitual residence.

Did the RPD err in finding that the Applicants had failed to exhaust all avenues of state protection in the United States before coming to Canada?

[47] In light of *Dunsmuir*, *Cervantes v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 680, [2008] F.C.J. No. 848 (QL) at paragraph 7 and *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 337, [2009] F.C.J. No. 392 (QL) at paragraphs 22 to 26, the standard of review for the Board's assessments of the adequacy and availability of state protection is reasonableness. In applying this standard of review, the Court examines “the existence of justification, transparency and intelligibility within the decision-making process. But it is also

concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

[48] The Applicants argue that they have indeed exhausted all relevant avenues of domestic protection available to them.

[49] In the case of Ms. Dubrovskaia, she argues that she cannot seek a new visa as her first application was misplaced and her U.S.S.R. passport has expired making it impossible for her to make a new visa application. Accordingly, she contends that there are no other avenues open to her.

[50] Mr. Popov advances that pursuing any further domestic avenues will not assuage the fear that there is a risk that he will be returned to prison and, based on the ineptitude that he has already witnessed, he could be detained for an excessive period of time.

[51] Furthermore, Mr. Popov argues that the steps that he has already taken are sufficient and that he has exhausted all reasonable avenues open to him. He also underlines that the RPD recognized that due to the nature of his case, it is difficult to determine whether he would actually succeed in his appeals if returned to the United States.

[52] The Respondent alleges that while the United States do not have an obligation to provide protection to stateless individuals, this protection is in fact provided. In this case, the Applicants

have not exhausted all relevant domestic avenues available to them as demonstrated by their ongoing legal proceedings.

[53] The RPD concluded that the Applicants had not exhausted all avenues of domestic protection. In reaching that conclusion, the RPD not only identified the mechanisms of state protection open to the Applicants and that they had called upon but also identified the remaining avenues open to the Applicants.

[54] The reasons provided by the RPD are complete and provide a justification for the conclusion reached. The RPD decision is reasonable and justified based on the law and the facts of the case.

Did the RPD err in finding that the Applicants do not have a well founded fear of persecution and in finding that the immigration laws applied to the Applicants were laws of general application and were not persecutory or applied to them differently due to a Convention reason?

[55] Turning now to the question as to whether the Applicant's fear of persecution is well founded and whether the immigration laws are persecutory in nature. This is a determination that is highly factual in nature, where the questions of law and fact are intertwined and to which deference should be given. As such, it attracts a standard of review of reasonableness (*Dunsmuir* at paragraph 51).

[56] The Applicants argue that they have been persecuted by the United States, through the application of immigration laws to them. They allege that the way in which the laws have been applied to them has violated their basic human rights.

[57] The Respondent argues that the RPD findings that the Applicants had not suffered persecution in the United States and that the immigration laws are not persecutory or applied in a persecutory manner are reasonable.

[58] As pointed out by the RPD, the United States is a democratic country with a system of checks and balances. The immigration laws, along with various other laws, protect against arbitrary detention and detention for excessive periods of time.

[59] It is certainly regrettable that those laws were applied in an inept fashion and Mr. Popov's file has fallen through the cracks of the system and this has caused much pain and suffering for both him and his family.

[60] However, on the face of the evidence in front of it, the RPD's conclusion that the laws are not persecutory and that they were not applied to the Applicants in a persecutory manner is reasonable. The RPD identified the elements of the laws in question and demonstrated that they are not persecutory *per se* and then provided reasonable explanations why it concluded that the application of these laws to the Applicants were not persecutory.

[61] There are no reviewable errors in the case at bar that warrant the Court's intervention.

[62] The Applicant proposes the following questions for certification:

> 1. Is it always necessary for stateless claimant of refugee protection in Canada to carry a burden of proof that state protection in the state(s) of their former habitual residency is not available for them?
>
> 2. If the answer to question one is “yes”, then what is the meaning of the distinction between subparagraphs (a) and (b) of paragraph 96 of [the] *Immigration and Refugee Protection Act*?

[63] The Respondent submits that the Court should not certify the questions proposed by the Applicants.

[64] The Court agrees with the Respondent. The determinative issue in this case is the finding by the RPD that the Applicants’ fear is not well-founded.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**ALEXANDER POPOV, IRINA DOUBROVSKAIA, MARIA DOUBROVSKAIA (DOUBROVSKAYA), POLINA DOUBROVSKAIA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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