Federal Court  Cour fédérale

Date: 20111025

Docket: IMM-99-11

Citation: 2011 FC 1217

Ottawa, Ontario, October 25, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KIRKOYAN KAREN
KORETSKY INESSA
KIRKOYAN KARINA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Immigration and Refugee Board [Board] concluded that the principal Applicant is neither a conscientious objector, nor was he unwilling to serve in the army. Moreover, the Board found that the Applicant lacked credibility throughout his entire narrative of alleged persecution.

[2] The Board found that not only was the principal Applicant not a conscientious objector but no evidence was presented that he had ever been asked or compelled to carry out any violations of international humanitarian law [IHL]. The Court found the Board's decision reasonable. The Federal Court has said it is not persecution for a country to have compulsory military service.

[3] As sated by Justice Richard Mosley in *Sounitsky v Canada (Minister of Citizenship and Immigration)*, 2008 FC 345:

> [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.

[4] In light of the evidence, was it reasonable for the Board to conclude that the Applicant is not a conscientious objector? It certainly was reasonable. That is why the Court agrees with the position of the Respondent.

II. Facts

[5] The Applicants, a married couple and their minor daughter, are citizens of Israel. The principal Applicant, Mr. Karen Kirkoyan, refuses to serve as a reservist in the Israeli army; and alleges, thus, that he will be persecuted if he returns to Israel. Moreover, he and his wife allege having been discriminated.

[6] The principal Applicant completed his military service in 2002. Subsequently, he was called twice for reserve duty, in 2002 and 2003, respectively.

[7] During his military service, the principal Applicant was detained for two weeks because he refused to serve inside Gaza. He nonetheless completed his assignment, mainly, by driving trucks between the base in the city of Telnov and the Gaza border and did not transport any military equipment (Decision at para 12).

[8] He completed two weeks of reserve duty in 2002 but had failed to finish his second mandate in 2003, having left after a week and a half upon his unit having received a new assignment, the destruction of tunnels used by terrorists (Decision at para 15).

[9] Deserting that last assignment, the Applicant never returned to the military. He received notices to report in 2005, 2006 and 2007 but simply ignored them all.

[10] The Applicants departed from Israel with the principal Applicant having shown his passport without having been detained by the Israeli authorities.

[11] The Board specified that the National Documentary Evidence package demonstrated that, since its establishment, Israel has faced serious security threats, including suicide terrorism, external hostility and indiscriminate armed attacks against its civilian population. Israel's Supreme Court plays an active and independent role in scrutinizing the most detailed aspects of the government's anti-terrorist measures, in both Israel and beyond its territory, even amidst fierce fighting and active hostilities (Decision at para 21; in addition to reference – re *Sounitsky*, above).

III. Issues

[12] (1) Was it reasonable for the Board to conclude that the Applicant was never asked to take part in activities that would violate IHL?

(2) Did the Board err in concluding that the principal Applicant would not face persecution in Israel because of his desertion and failure to report for reserve duty?

(3) Was it reasonable to conclude that the Applicants did not face persecution on the basis of the alleged repeated discrimination?

IV. Analysis

Conscientious objector

[13] In virtue of section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], a refugee claimant must meet the following criteria:

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 social group or political opinion,	**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 appartenance à un groupe social ou de ses opinions politiques :
(*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	*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*) 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	*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.

> that country.
>
> [Emphasis added].

[14] The principal Applicant alleges fear of persecution due to a refusal to serve in the army.

[15] Politically motivated desertions have been analyzed by the Federal Court. The Federal Court concluded that three categories of desertions qualify for refugee status:

> [14] Thus, an applicant generally cannot claim refugee status under the *United Nations Convention Relating to the Status of Refugees* (the Convention) – and accordingly, under s. 96 of the IRPA, just because he does not want to serve in his country's army. According to Hathaway, however, there are three exceptions to the general rule above. First, military evasion might have a nexus to a Convention ground if conscription for a legitimate and lawful purpose is conducted in a discriminatory way, or if the punishment for desertion is biased in relation to a Convention ground. Second, evasion might lead to Convention refugee status if it reflects an implied political opinion that the military service is fundamentally illegitimate under international law. Hathaway describes this as "military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory" (Hathaway, above, at pages 180-181). The third and final exception applies to those with "principled objections" to military service, more widely known as "conscientious objectors". [Emphasis added].

(*Lebedev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 728, [2008] 2 FTR 585).

[16] Before the Board, the Applicant declared himself, a "conscientious objector", stating that he is "a peaceful person who is not able to bear any conflict situation" (Applicant's Record [AR] at p 24).

[17] To show that he is a genuine conscientious objector, a deserter bears the onus to demonstrate that his opinions in that regard are genuine**:**

> 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.
>
> 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. [Emphasis added].

(Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, United Nations High Commissioner for Refugees (see excerpts at Annex A of this Judgment).

[18] Opposition to military service is not sufficient to obtain refugee status (*Mohilov v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1292, at para 33).

[19] A serious possibility of persecution stemming from deserters must be demonstrated (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA)). Imprisonment does not constitute persecution in the case of deserters (*Ates v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322). In such a situation, the Applicant needed to demonstrate to the Board that the sentence awaiting him would amount to persecution.

[20] The Board noted many reasons that made it doubt that the principal Applicant is genuinely a "conscientious objector":

a. He completed his entire compulsory military training from December, 1998, to February, 2002;
b. He returned in 2002 for two-week reserve duty, which he completed;
c. He returned again in 2003 for two-week reserve duty, which he, nevertheless, did not complete;
d. He never met the military committees, which determine who is a conscientious objector and which assess if sufficient reasons exist to exempt these objectors from military service.

[21] The Applicant completed two entire assignments in the military. He is, therefore, certainly in a difficult position to raise objections to military service, having spent more than three years in it.

[22] Moreover, his failure to even contact the relevant military committees, which could have exempted him from military service, constituted grounds on which the Board could support its conclusions (*Goltsberg v Canada (Minister of Citizenship and Immigration)*, 2010 FC 886 at para 32).

[23] Therefore, the Board's conclusions with regard to credibility of the Applicant's "conscientious objections" were reasonable.

Violations to IHL

[24] Regarding the violations to IHL, the Board concluded that the Applicant did not demonstrate that he would participate in any such violations.

[25] To fit the second exception raised in *Lebedev*, above, the Applicant was required, on a balance of probabilities, to demonstrate that he, himself, would take part in activities that would violate IHL (*Ozunal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 560, 291 FTR 305 at para 17).

[26] The Applicant alleged that he might have been drafted to go into Lebanon in 2006, where IHL violations might have occurred.

[27] The Board emphasized that the Applicant, while alleging that he might have had to participate in the 2006 war in Lebanon, actually deserted the military in 2003 and had never returned.

[28] The Applicant stated that he received notices to appear in 2005, 2006 and 2007, but ignored them; however, nowhere in the record was it found that an order actually directed him to participate in war. This assumption is made solely by the Applicant, who believes that he might have been drafted to Lebanon, had he obeyed and returned to reserve duty.

[29] The Board also doubted the Lebanon war as a reason for desertion when he had clearly never been asked to participate in that conflict. In fact, the Applicant expressly had stated that he left the military not wanting to carry out the task of destroying terrorist tunnels in Gaza.

[30] As a result, the Board did not find it credible that the Applicant would have been forced to serve in the 2006 war with Lebanon; nor did the Board consider the Applicant to have been forced by the Israeli military to participate in violations of IHL.

[31] It is noted that during the time that the Applicant served in the Israeli army, he had worked solely driving trucks from one base to another. Apart from the two weeks he had spent in prison for not wanting to enter Gaza, he did not demonstrate having been bothered subsequently.

Punishment for desertion was not considered persecutory

[32] The Board found that the Applicant did not force persecution because he had deserted the military in 2003. The Board concluded that, while the Applicant might face imprisonment, the potential sentence does not amount to persecution.

[33] The Board found that the Applicant might have spent three to six months in prison upon return to Israel; nevertheless, the Board concluded that such a sentence would not be disproportionate or persecutory.

[34] This conclusion has been reached by the Federal Court in similar circumstances, which found that longer prison terms do not amount to persecution:

> [28] Contrary to Mr. Ozunal's submissions, the Board specifically assessed the possibility that he would be submitted to a sentence of up to three years imprisonment. Nevertheless, it concluded that the possibility of being imprisoned for up to three years is not an excessive or over-harsh sentence. This conclusion is consistent with the decision of this Court in *Moskvitchev v. Canada(Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1744 (QL), at paragraph 7, in which a sentence for draft evasion of between six months and five years was not considered to be inhuman or extreme. [Emphasis added].

(*Ozunal*, above; *Volkovitsky v Canada (Minister of Citizenship and Immigration)*, 2009 FC 893 at para 32-35; *Mohilov*, above at para 47).

[35] The Board acknowledged that the Applicant was sent to jail for two weeks after refusing to serve inside Gaza; however, no harm was discerned when he was subsequently sent to drive trucks. He did not receive any further sanction and nothing had occurred subsequent to his departure from Israel in 2007.

The Applicants did not face persecution due to their Russian origin

[36] The conclusions of the Board in respect of credibility, warrant the standard of review of reasonableness, with due deference owed the Board's expertise and ability to assess the principal witness (*Revoloria v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1404 at para 12).

[37] Deference is also owed the Board in regard to its expertise in evaluating an applicant's credibility:

> [4] There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review … [Emphasis added].

(*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL/Lexis), 160 NR 315 (FCA)).

[38] In respect of the persecution they allege to have suffered due to their origins, the Board did not find the respective testimonies of both Applicants to be credible.

[39] The Board found that:

a. The principal Applicant could not describe what happened to him on April 3, 2006, when he supposedly was pushed by a policeman while carrying a large piece of glass;

b. The Applicant could not tell whether this incident came before or after he was falsely accused of driving under the influence of alcohol; as a result of the charge he lost his license and his job as a truck driver;

c. He reported the first incident to the police but did not have any document to prove so, saying that he left the report in Israel; he also stated subsequently that no record existed of the driving incident.

d. His wife had a difficult time answering the Board's questions in respect of her experiences;

e. She stated that she began being harassed by her father's neighbour in October 2006, while, she wrote, in her Personal Information Form [PIF], that it began in September; she had also stated that she remembered that it was in October because it was her father's birthday, but had declared in her PIF that her father was born in November.

[40] Clearly, several significant discrepancies support the Board's contention that the Applicants were not credible. The Board was entitled to take into account contradictions and implausibilities (*Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 20-21; *Sbitty v Canada (Minister of Citizenship and Immigration)* (1997), 143 FTR 8 at para 16; *Toora v Canada*

(Minister of Citizenship and Immigration), 2006 FC 828, 300 FTR 7 at para 38; *Ojezele v Canada (Minister of Citizenship and Immigration)*, 2008 FC 171 at para 5).

[41] Moreover, the Board assessed the documentary evidence further in respect of obtaining State protection. The Board states, in its decision, it is not because the police would not have given them the desired protection, but rather that they did not do more or pursue further by which to receive protection.

[42] Israel is a working democracy which has control of its institutions; thus, the Board's conclusion, that the Applicants had access to necessary protection in Israel, was not unreasonable.

[43] The Applicants had to demonstrate with "clear and convincing proof" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689), that Israel could not provide them with adequate protection; the Board, however, found that they did not meet this burden. The Board's conclusion was reasonable, as the Applicants did not bring any further evidence to demonstrate that the Israeli government is unable to protect them.

Port of entry notes

[44] The Applicants pleaded that they were never confronted with the port of entry notes which contradict the declaration which they made to the Board.

[45] In fact, the principal Applicant testified having left the military, in 2003.

[46] In his PIF, he raised the 2006 war with Lebanon as a reason for objecting to Israeli military actions.

[47] The Board concluded that it was inconsistent for the Applicant to raise the issue of speculative participation in the 2006 war with Lebanon when it was clear that he was never asked to do so.

[48] Moreover, the Board noted that the Applicant expressly declared, on arrival in Canada (point of entry notes), that he did not participate in the war, thus, reinforcing the Board's conclusion.

[49] Therefore, the point of entry notes were used to support a finding that could stand on its own. Since the Applicant has been confronted with the apparent discrepancy, the Board was not obliged to put before him every piece of evidence that would further support its finding. Clearly, the Applicant had had the opportunity to answer the Board's questions and to explain why he raised the issue of the war with Lebanon when it had no rapport with his narrative.

[50] Moreover, even if the notes do contradict the testimony, they are immaterial to the decision (*Martell v Canada (Minister of Citizenship and Immigration),* 2008 FC 1029 at para 18-19). Even if the Applicant's explanation would have been accepted, it did not demonstrate that he would have had to fight in Lebanon had he not deserted the army in 2003. Also, it does not demonstrate that he would have been asked to violate IHL.

[51] In addition, the Board's conclusion in respect of the Applicants' lack of credibility is supported by numerous findings which remain undisputed (*Martell*, above, at para 41). The Board's lack of reference to the Applicant's port of entry notes do not justify this Court's intervention (*Ngongo v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 1627 (QL/Lexis)).

V. Conclusion

[52] The principal Applicant raised his desertion as a basis for refugee status; however, he finished three years of army service and returned twice for reserve duty. Had he been opposed to war, the Applicant would not have spent the time he did in the Israeli army, even if only to drive trucks.

[53] Also, he never did demonstrate having been asked to violate IHL. The Applicant raised the war with Lebanon to illustrate what might have happened if he had remained in the military; however, his potential participation in the 2006 war was speculative, since he had deserted in 2003.

[54] In addition, the Applicant's sentence for refusal to serve in the Israeli army was not considered persecutory. This Court had found such to be the case in numerous similar circumstances.

[55] The Applicants were not considered credible in respect of their alleged persecution. The Applicants did not adequately recall the incidents supporting their claim and the Board simply did not believe them. The Board was in the best position to make its finding, a position, to which

deference is given, unless it is unreasonable, which was not demonstrated to be so by the Applicants.

[56] Due to the above, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be dismissed.

No question of general importance for certification.

"Michel M.J. Shore"
Judge

Annex "A"

Excerpts from the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (United Nations High Commissioner for Refugees, HCR/IP/4/Eng/REV.1 (1992):

> 167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.
>
> 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.
>
> 169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.
>
> 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.
>
> 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.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.24 In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

FEDERAL COURT

SOLICITORS OF RECORD

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