Federal Court  Cour fédérale

Date: 20120706

Docket: IMM-6056-11

Citation: 2012 FC 860

Ottawa, Ontario, July 6, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

R.S.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of a decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated August 11, 2008, in which the Board found that the applicant was neither a Convention refugee nor a person in need of protection. The applicant is an Israeli citizen, who objects to fulfilling his required compulsory military service in Israel because he believes that Israel's occupation of the Palestinian territories is wrong, that the Israeli state commits war crimes, that it violates the human rights of its non-Jewish

citizens and that he faces discrimination in Israel due to his ethnicity as a Mizrahi (or Sephardic) Jew. Before the RPD, the applicant asserted that he would be subject to imprisonment and would face discriminatory treatment in prison by reason of the beliefs he holds and that, consequently, he was entitled to protection in Canada under both section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

[2] In the decision under review, the RPD rejected the applicant's claims for three reasons. First, it held that the applicant's objection to compulsory military service was not based on a genuine reason of conscience but, rather, was due to an aversion to serving in the military and, accordingly, does not qualify him for protection under section 96 of the IRPA. Second, it determined that the imprisonment the applicant would likely face if he returned to Israel and persisted in his refusal to complete his compulsory military service, likewise, did not violate section 96 of the Act because there was no evidence before the Board that the length of prison sentences or treatment received in prison was harsher based on an individual's ethnic background. The Board, however, failed to deal with a key aspect of the applicant's section 96 claim, namely, the assertion that, as a selective conscientious objector who disagrees with the stances taken by Israel, the applicant would be subject to harsher treatment in prison than deserters or individuals who refused to serve for other reasons. Finally, the RPD held that conditions in military prisons and detention facilities in Israel met international standards and, therefore, returning the applicant to Israel to face imprisonment would not expose him to a risk to his life, cruel and unusual treatment or punishment, or the danger of torture, and, accordingly, determined that the applicant did not qualify for protection under section 97 of the IRPA.

[3] In this application for judicial review, the applicant does not contest the Board's conclusion under section 97 of the IRPA but does argue that its determinations under section 96 of the Act should be set aside for three reasons. The applicant argues in this regard that:

1. The Board breached its duty of procedural fairness by failing to provide adequate reasons;
2. The Board erred in law in interpreting the meaning of persecution under section 96 of the IRPA:
    i. by failing to assess whether the applicant's claim falls under the exception for deserters set out in section 171 of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* [the UNHCR Handbook];
    ii. by failing to recognize the punishment for objection to military service on grounds of conscience constitutes persecution on the basis of political opinion; and
3. The Board ignored material evidence on the record and thus failed to have regard to the totality of the evidence.

[4] As is more fully discussed below, I have determined that the arguments regarding the alleged violation of the duty of procedural fairness due to the inadequacy of the Board's reasons are without merit. That said, I have also determined that this application for judicial review must be granted for reasons related to the second and third of the above grounds because the Board made essential factual conclusions that contradict the evidence that was before it. Accordingly, these factual determinations constitute a violation of paragraph 18.1(4)(d) of the *Federal Courts Act*,

RSC, 1985, c F-7 [FCA]. Finally, I have determined that this case does not raise issues which warrant certification under section 74 of the Act, despite the several issues proposed by the applicant, as this decision rests on the conclusion that the key factual findings made by the RPD were made in a perverse manner and without regard to the evidence before the Board.

No violation of the duty of procedural fairness through the issuance of inadequate reasons

[5] The applicant's argument that the RPD violated the principles of natural justice in failing to provide adequate reasons may be disposed of summarily as that the Supreme Court of Canada has recently determined that the inadequacy of reasons given by a tribunal does not give rise to breach of natural justice provided some reasons are given. In this regard, in *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, Justice Abella, writing for a unanimous Court, stated at paragraphs 20 and 22:

> Procedural fairness … can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness.
> […]
>
> It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review.
> […]
>
> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.
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> [Emphasis added]

[6] In light of this, the applicant's first argument fails.

Erroneous factual findings result in the decision being set aside

[7] Issues related to the second and third grounds raised by the applicant, on the other hand, do warrant intervention. The applicant provided consistent testimony before the RPD with respect to the reasons for his unwillingness to serve in the Israeli army, which stemmed from his profound disagreement with the policies of Israel regarding the occupation of Palestinian territories, his belief that the Israeli state commits war crimes and his view that Israel discriminates against Mizrahi Jews and other non-Jewish citizens, including, notably, Arabs. He stated that he was not a pacifist, and would fight for causes that he believed in, but could not as a matter of conscience fight in the Israeli army in light of Israel's current policies. The following excerpts from the transcript of the hearing before the RPD (Certified Tribunal Record at p 804) are reflective of the applicant's testimony throughout:

> Q: If you were in Israel and you were conscripted to serve, what would you do?
>
> A: I would refuse to serve.
>
> Q: Why?
>
> A: Because Israel is not a legitimate country in my eyes. […] I would refuse to serve in the Israeli army because I do not want to serve the Israeli government or the army in any way. I do not want to be associated with this prison state. I disagree entirely with Israel's past policies and present policies towards original inhabitants of the land, the Palestinians, and towards their own citizens -- Israeli Arabs and Mizrahi Jews, both of which groups are still today being discriminated against. […]
>
> […] I'm not going to fight for a country that came in, massacred people that were living there, and is still massacring them today. And I'm supposed to wear a uniform, representing that.

> And at the same time it's mistreating its own citizens, its own citizens because they're of the wrong colour or of the wrong background or they're speaking the wrong language. […] it would be to me the same as serving in the Gestapo or something like that.
>
> Q: If they asked you why you were refusing to serve --
>
> A: I would tell them straight. […] I would say that I disagree with what you're doing. I would say, "When you pull out of the Palestinian territories, when you apologize to the Palestinian people, when you apologize to Israeli Arabs, when you apologize to Mizrahi Jews, when you apologize for the system of discrimination, oppression and racism that you have created in Israel, and for the oppression that you're causing around Israel -- when you stop these things and stop violating human rights, that's when I'll serve that country."

[8] The applicant made several others statements of similar ilk during his testimony before the Board. Notably, contrary to what the RPD found in its reasons, he never indicated that he was not a conscientious objector. Rather, he stated that he had not made an application to be recognised as a conscientious objector in Israel because the Israeli state does not recognise selective conscientious objectors who refuse to serve in the army by reason of a principled opposition to the policy choices made by the Israeli state. He also testified that he was not a pacifist.

[9] In addition to repeatedly outlining the principled basis for his unwillingness to complete the compulsory military service that the state of Israel requires from Jewish citizens, the applicant also filed substantial documentary evidence with the RPD which indicated that he would not be granted an exemption from active military service in Israel and would likely be imprisoned if he were returned to Israel and refused to serve in its army. The evidence established that under Israeli law selective conscientious objectors who disagree with Israel's policies will not be granted an

exemption from military service (as opposed to pacifists or those who object on religious grounds, who may be entitled to such an exemption).

[10] The applicant also filed evidence which supported his argument that selective conscientious objectors in Israel are subject to repeated and harsher prison sentences than deserters and which indicated that, in some instances, jailed selective conscientious objectors have been denied sunlight, clothing, hot water, paper and reading materials, access to counsel and visits from family. Certain media reports the applicant filed indicated that this is particularly the case if the objector refuses to wear a military uniform while in prison, in which case reports indicated that the individual will often be placed in isolation and subject to further forms of mistreatment.

[11] The applicant further filed documentary evidence from non-governmental organizations, like Amnesty International and Human Rights Watch, which accused the Israeli military of engaging in human rights abuses and violations of international humanitarian law. In addition, he filed articles from several newspapers, which were critical of certain actions of the Israeli military, and fact finding mission reports of the United Nations General Assembly Human Rights Council on violations of international law by Israel. The applicant asserted that this evidence demonstrated international condemnation of certain of the activities engaged in by the Israeli army.

[12] Based on this evidence, the applicant argued that he met the definition of a Convention refugee within the meaning of section 96 of the IRPA, noting that there is nascent support in Canadian case law, and recognition in international law, of the principle that selective conscientious objectors, who oppose particular wars for reasons of principle, are entitled to refugee protection if

they would face imprisonment for refusing to engage in military service to fight in situations where the war they oppose is condemned by the international community as violating the basic rules of human conduct or violates international law. The applicant cited in this regard several Canadian cases, including *Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 540, 155 NR 311 (CA); *Al-Maisiri v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 642, 183 NR 234 (CA); *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, [2006] FCJ No 521; affd 2010 FCA 177, [2007] FCJ No 584; *Bakir v Canada (Minister of Citizenship and Immigration)*, 2004 FC 70, [2004] FCJ No 57; *Tewelde v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1103, [2007] FCJ No 1426; *Lebedev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 728, [2008] 2 FCR 585; *Key v Canada (Minister of Citizenship and Immigration)*, 2008 FC 838, [2009] 2 FCR 625; and *Vassey v Canada (Minister of Citizenship and Immigration)*, 2011 FC 899, [2011] FCJ No 1120. The applicant further argued that sections 170 and 171 of the UNHCR Handbook should be viewed as authoritative, and that these sections provide that those who are selective conscientious objectors, and who might face imprisonment for refusing to serve, are entitled to refugee protection. They provide:

> 170. There are […] 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 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 the basic rules of human conduct, punishment for desertion or draft division could, in light of all of the requirements of the definition, in itself be regarded as persecution.

[13] As noted, the first reason that the RPD rejected the applicant's claim centered on its conclusion that the applicant's objection to compulsory military service was not based on a genuine reason of conscience but, rather, was due to an aversion to serving in the military. The reasons of the Board on this issue are contained in paragraphs 12 to 14 of its decision, which provide as follows:

> … [T]he panel finds that the claimant's reasons for refusing to serve in the Israel military are not sufficient to exempt him from conscription service, which intended purpose is a law of general application [sic]. At the hearing, the claimant provided, through his oral testimony, his objections to not serving his compulsory military service in Israel: he does not want to take someone else's life; he does not want to have blood on his hands; he believes that Israel is not a legitimate country; he believes that Israel is a prison state and that he would not serve in a Military that kills its own people.
>
> As a result of his own testimony, and apart from being opposed to physical violence, the use of arms and killing people, the claimant provided no testimony that would indicate that his objections to serving in the Israeli military are sufficiently significant and are those of the person who is a genuine conscientious objector. Indeed, the claimant's oral evidence, when questioned on this matter in the hearing, was that he was not a conscientious objector.
>
> The panel finds, based on the claimant's own evidence, that the claimant's objection to completing his compulsory military service obligations in Israel is an aversion to serving in the Israeli military and not for genuine reasons of conscience. As a result, the panel finds that the claimant's aversion to beginning his compulsory military service in Israel is not by reason of any one of the five grounds enumerated in the Convention refugee definition.

[14] The RPD's decision turns on these paragraphs, which are both internally inconsistent and contradict the evidence that was before the Board. Contrary to what the Board states, the applicant

at no time testified that he was not conscientious objector. Rather, as counsel for the applicant notes, he "routinely couched his objection to service as being an objection based on grounds of conscience" (Applicant's Further Memorandum of Argument at para 19). He also clearly indicated he was not a pacifist and testified that in some circumstances he would be able to kill another person, if it were required to defend his family or his home. Thus, the RPD's findings that the applicant was "opposed to physical violence, the use of arms and killing people" and "was not conscientious objector" are directly contrary to the evidence before the Board.

[15] The above passage, moreover, is internally contradictory as one who is opposed to physical violence, the use of arms and killing people – i.e. a pacifist - would meet the definition of a conscientious objector. In addition, the RPD did cite some of the applicant's reasons for not wishing to serve in the Israeli army, notably, that "he believes that Israel is not a legitimate country", that "Israel is a prison state" and that "he would not serve in a Military that kills its own people". Each of these convictions might amount to grounds for being a selective conscientious objector, in accordance with sections 170 and 171 of the UNHCR Handbook.

[16] This Court may set aside a factual determination of the RPD only if that determination is unreasonable (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 46-47, [2009] 1 SCR 339; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 40; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35, at para 14; *Quiroa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 271 at para 6, [2005] FCJ No 338; *Gil v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1418 at para 20). Paragraph 18.1(4)(d) of the FCA provides "legislative precision to the

reasonableness standard" by which factual findings are to be measured (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46, [2009] 1 SCR 339). Paragraph 18.1(4)(d) of the FCA states that this Court may set aside a tribunal's decision if it is satisfied that the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[17] The wording of section 18.1(4)(d) requires that the impugned finding must meet three criteria for relief to be granted: first, it must be truly or palpably erroneous; second, it must be made capriciously, perversely or without regard to the evidence; and, finally, the tribunal's decision must be based on the erroneous finding (*Rohm & Haas Canada Limited v Canada (Anti-Dumping Tribunal)*, [1978] FCJ No 522, 22 NR 175, at para 5 [*Rohm & Haas*]; *Buttar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1281 at para 12, [2006] FCJ No 1607). This is a difficult thing to demonstrate, and the standard of review accordingly necessitates significant deference being accorded to a tribunal's factual findings.

[18] In the seminal case interpreting section 18(1)(d) of the FCA, *Rohm & Haas*, Chief Justice Jacket defined "perversity" as "willfully going contrary to the evidence" (at para 6). In terms of a finding being made without regard to the evidence, the case law recognizes that a finding for which there is no evidence before the tribunal will be set aside under paragraph 18.1(4)(d) of the FCA (see e.g. *Canadian Union of Postal Workers v Healy*, 2003 FCA 380 at para 25, [2003] FCJ No 1517; *Isakova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 149 at para 44, [2008] FCJ No 188; *Girgis v Canada (Minister of Citizenship and Immigration)*, 2007 FC 90 at para 24).

[19] Despite the high degree of deference to be afforded to factual findings of the RPD, the impugned findings of the Board in this case are so key to its overall decision and so wrong that its decision must be set aside. In this regard, as noted, the Board's decision turned on its erroneous determination that the applicant was not a conscientious objector and, instead, objected to military service due to "aversion". This determination flies in the face of the uncontradicted evidence from the applicant regarding his reasons for the refusal to serve. It may therefore be said to be "perverse" and "made without regard to the material" before the RPD.

[20] In light of this erroneous factual determination, the Board did not analyze the applicant's argument that his grounds for objection fall within section 96 of the IRPA. The RPD, accordingly, did not determine whether the applicant would likely face imprisonment if returned to Israel, whether the actions of the Israeli state and military are contrary to international law or are condemned by the international community nor whether being imprisoned for refusal to fight in the Israeli army amounts to "persecution" within the meaning of section 96 of the IRPA. All these inquiries were key to the applicant's refugee claim. Accordingly, the Board's erroneous factual conclusions were central to its decision. Because these conclusions were also perverse and made without regard to the evidence before the Board, they fall within the scope of paragraph 18.1(4)(d) of the FCA and lead to the RPD's decision being set aside.

Failure to consider a key argument provides an additional reason to set the decision aside

[21] There is an additional reason why the RPD's decision must be set aside. As noted, the applicant filed evidence indicating that the treatment afforded to selective conscientious objectors in Israeli military prisons was harsher than that afforded to those who were jailed because they had

refused to serve for other reasons and that selective conscientious objectors received longer sentences. The applicant argued that this differential treatment also amounted to persecution within the meaning of section 96 of the IRPA. The RPD, however, failed to address this argument. Rather, it confused the applicants' arguments and instead reviewed whether the documentary evidence established that those of different ethnicity were subject to longer sentences. It wrote in this regard at paragraph 18 of the decision:

> The claimant must establish that the harm feared is sufficiently serious to constitute persecution. The documentary evidence before the panel indicates that, upon his return to Israel, the claimant could be imprisoned. However, the panel finds that the sentences imposed on those Israeli nationals who are unwilling to serve their compulsory military obligations in Israel, are not excessively or unduly harsh. These prison sentences are legal sanctions provided for in a law of general application in Israel and, as such, are matters of judicial prosecution and not persecution in violation of international standards. The panel does not consider the jail sentence to be disproportionate to the offence committed, nor does the panel find it persecutory in nature. The punishment is the same for everyone; there is no evidence before the panel that it is harsher for immigrants from the former Soviet Union, be they Muslim, Christian or Jew. Therefore, the panel finds that the punishment is of a general application and is inherent or incidental to sanctions authorized by the laws of Israel, a democratic country with free speech, free elections and an independent judiciary. In the panel's view, the punishment does not disregard accepted international standards.

[22] This failure to consider the applicant's argument gives rise to an additional and independent basis for setting aside the decision (see *Ghirmatsion v Canada (Minister of Citizenship and Immigration*), 2011 FC 519 at paras 106-108; *Dirar v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 246 at para 19, 385 FTR 133; *Level v Canada (Minister of Citizenship and Immigration)*, 2010 FC 251 at para 64, [2011] 3 FCR 60; *Ivachtchenko v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1291, 225 FTR 168 at para 23).

Certified Question

[23] Counsel for the applicant proposed the following questions for certification under section 74 of the IRPA:

1. Considering the evolving nature of the international law on conscientious objection to military service, and considering the recognized importance of guidance on this issue of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, set out in paragraphs 167 to 174 of the Handbook,

   should the Refugee Protection Division be required to clearly analyse a refugee claim based on conscientious objection to military service, in reference to the UNHCR Handbook, and in particular to paragraphs 169 to 174 of the Handbook?

2. If the refugee claimant is found to have a sincerely held religious, political or moral belief or opinion opposed to participating in the required military service, should any punishment for refusal to serve be recognized as persecution, in accordance with the evolving international law on conscientious objection to military service?
3. Is the refusal to comply with compulsory military service because of political opinion, a political opinion which could constitute a nexus to Convention grounds upon which a person can claim refugee protection?

[24] The Federal Court of Appeal has indicated that a question should only be certified where it is a serious question of general importance and would be dispositive of an appeal (*Zazai v Canada (Minister of Citizenship and Immigration*), 2004 FCA 89 at para 11, [2004] FCJ No 368). No such question arises here as this decision turns on the factual errors made by the RPD, which render its

decision unreasonable. Thus, the questions posited by counsel for the applicant, which are doubtless interesting, simply do not arise in this case.

[25] Accordingly, for these reasons, this application will be granted, without costs, and no question is certified under section 74 of the Act.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed;
2. The applicant's claim is remitted to the RPD for re-determination by a differently constituted panel of the Board;
3. No question of general importance is certified; and
4. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	*R.S. v The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
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