IMM-4667-96

B E T W E E N:

OLGA NECHIPORENKO

Applicant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON, J.:

These reasons arise out of an application for judicial review of a decision of the Convention Refugee Determination Division (the "CRDD") of the Immigration and Refugee Board wherein the CRDD determined the applicant not to be a Convention refugee within the meaning of subsection 2(1) of the *Immigration Act*.[1] The decision of the CRDD is dated the 26th of November, 1996.

The applicant is a citizen of Ukraine. She bases her claim to Convention refugee status on an alleged well-founded fear of persecution if required to return to Ukraine by reason, by reference to her Personal Information Form, of her religion, and by reference to the reasons for decision of the CRDD, her nationality. The distinction is without a difference since, in each case, it is apparent that her claim is based upon her Jewishness.

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1 R.S.C. 1985, c.I-2

The applicant described in her Personal Information Form and in her testimony before the CRDD discrimination, harassment and violence that she had suffered in Ukraine by reason of her Jewishness. The most severe violence was when she was struck by a car and suffered a concussion and bruising with resultant hospitalization. She also attested to the failure of state protection.

The Applicant determined to escape Ukraine.

The applicant met a Canadian citizen in Ukraine. The applicant's version of how they met and what transpired differed dramatically from that of the Canadian citizen. In any event, following his return to Canada, the Canadian citizen wrote to the applicant and invited her to Canada at his expense. She took up the invitation. Very shortly after she arrived in Canada, it become apparent that the two had very different expectations of what would then transpire. The applicant quickly severed her relationship with the Canadian citizen and made her claim to Convention refugee status.

The Canadian citizen was concerned that, not only had he been taken advantage of, but the applicant was abusing the refugee claim system in Canada.

The Canadian citizen, either through the Immigration and Refugee Board or through the respondent's ministry, became aware of the applicant's refugee claim. He undertook an extensive writing campaign, both to politicians and to the Immigration and Refugee Board, in which he was highly critical of the applicant.

The CRDD determined to treat the Canadian citizen's correspondence as evidence before it in respect of the applicant's claim. In the result, counsel for the applicant requested that the CRDD compel the attendance of the Canadian citizen before it so that he could cross-examine the Canadian citizen. Before me, he argued

that he was left with no alternative but to do so. The CRDD complied with the request, the Canadian citizen attended and was cross-examined.

Before the Canadian citizen attended, counsel for the applicant sought a new hearing for his client alleging prejudice by reason of the "breach of confidentiality" that enabled the Canadian citizen to identify a specific date fixed for a hearing of the applicant's claim. His application was denied. Nonetheless, counsel continued to maintain his objection to the process and to allege prejudice to his client.

In the end result, despite the fact that, on cross-examination of the Canadian citizen, it became apparent that he lied when he denied that he ever threatened violence to the applicant, the CRDD preferred his evidence to that of the applicant. It concluded:

> The panel does not find the claimant to have been a reliable witness. It does not find that based on the evidence before it, it can come to a finding that the plaintiff is of Jewish ethnicity. A finding of Jewish ethnicity is central to the claim. Having considered all the evidence, for all the reasons outlined above, the panel finds that good grounds do not exist that the claimant would be persecuted for a Convention reason if returned to the Ukraine. The panel therefore determines that Olga Nechiporenko is not a Convention refugee.

Before me, counsel for the applicant alleged two reviewable errors on the part of the CRDD. First, he urged that the applicant was denied her right to a hearing *in camera* as provided for by subsection 69(2) of the *Immigration Act* and secondly, he urged that the CRDD erred in law in making a finding as to the credibility of the applicant without taking into account the totality of the evidence before it or, alternatively by making such a finding in an arbitrary and capricious manner.

Subsection 69(2) of the *Immigration Act* reads as follows:

> (2) subject to subsections (3) and (3.1), proceedings before the Refugee Division shall be held in the presence of the person who is the subject of the proceedings, wherever practicable, be conducted *in camera* or, if an application therefore is made, in public.

Neither subsection 69(3) or (3.1) is relevant for the purposes of this application.

Counsel urged that, by disclosing the date fixed for a hearing in respect of the applicant's claim, a hearing that did not take place on the date disclosed, the respondent or the Immigration and Refugee Board enabled the Canadian citizen to commence his letter writing campaign to influence the CRDD, to the prejudice of the applicant, with the result that applicant's counsel had no alternative but to request the attendance of the Canadian citizen at a CRDD hearing for purposes of cross-examination, thus breaching the obligation to hold the totality of the applicant's hearing *in camera* in circumstances where no application had been made for the hearing to be held in public.

I am satisfied that this argument cannot succeed. First, there is simply no evidence before me which would allow me to conclude that the Canadian citizen's letter writing campaign would not have had the same effect if he had been unaware of a specific scheduled hearing date. Second, the statutory requirement for an *in camera* hearing was simply not breached. An *in camera* hearing does not equate to a hearing at which only the CRDD members, a Refugee Claim Officer, a translator and the applicant and her counsel are present. The presence of the Canadian citizen at the request of counsel for the applicant did not make the hearing otherwise than *in camera*. In *The Queen v. C.B.*,[2] Mr. Justice Chouinard relied upon the following definition of *in camera* from *Jowitt's Dictionary of English Law*, 2nd edition,:

> ...when the judge either hears it in his private room, or causes the doors of the court to be closed and all persons, except those concerned in the case, to be excluded.

Here, although no judge was involved but rather the CRDD, it was not alleged before me that any aspect of the applicant's hearing before the CRDD was conducted under circumstances other than circumstances in which all persons, except those concerned in the case, were excluded. The Canadian citizen who was a witness had amply demonstrated that he was a person concerned in the case, and as a witness, I am satisfied that such was the case.

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[2] [1981] 2 S.C.R. 480 (not cited before me).

On the second issue, the CRDD went to some length to justify its finding against the credibility of the applicant. As indicated earlier, it preferred the evidence of the Canadian citizen over that of the applicant, notwithstanding the fact that he testified that he never threatened violence against the applicant when it was clear that he did. It noted implausibilities, inconsistencies and contradictions on which it based its conclusion.

In *Aguebor v. Ministre de L'Emploi et de l'Immigration*,[3] Mr. Justice Décary wrote:

> 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 gage 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. In **Giron,** the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, **Giron** in no way reduces the burden that rests on the appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case the appellant has not discharged this burden.

I reach the same conclusion here. In the result, this application for judicial review will be dismissed.

Counsel for the applicant recommended certification of a question as to whether the right to an *in camera* hearing provided by subsection 69(2) of the *Immigration Act* was violated on the facts of this matter. Counsel for the respondent urged that this matter turned on its particular facts and any question such as that proposed, while a serious question of law would not be a question of general importance. I am in agreement with the position of counsel for the respondent. My determination with respect to the first issue referred to above turns entirely on the particular facts of this matter. In the result, no question will be certified.

Judge

Ottawa, Ontario

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[3] (1993), 160 N.R. 315 (F.C.A.)(not cited before me).

August 18, 1997

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO:

STYLE OF CAUSE:

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

DATE OF HEARING:

PLACE OF HEARING: TORONTO, ONTARIO

REASONS FOR ORDER BY:

DATED:

APPEARANCES:

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For the Applicant

Ms.

For the Respondent

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For the Respondent

FEDERAL COURT OF CANADA

Court No.:

Between:

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER