Date: 20080314

Docket: IMM-2184-07

Citation: 2008 FC 345

Ottawa, Ontario, March 14, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALEXANDER SOUNITSKY
EKATERINA SOUNITSKY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of a pre-removal assessment (PRRA) officer, dated March 22, 2007, wherein the officer determined that the applicants would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment.

[2] The applicants are a husband and wife who are both dual Russian-Israeli citizens. They emigrated from Russia to Israel in 1993 on the strength of Mr. Sounitsky's father's Jewish

background. The couple is Christian. Mr. Sounitsky came to Canada in February 2002 to take care of his parents after they were badly hurt in a car accident. He returned to Israel briefly, then returned to Canada with his wife to continue to assist his parents. They renewed their visitor's visas for a second six-month term before claiming refugee status in January 2003.

[3] The couple initially claimed a fear of persecution and risk to their personal safety in both Russia and Israel: in Russia by reason of Mr. Sounitsky's mixed Jewish and Armenian heritage; and in Israel because of their Christian faith and Mr. Sounitsky's refusal to continue to serve in the Israeli military reserves.

[4] The Refugee Protection Division denied their claim on November 30, 2005, noting that the discrimination they face as Christians in Israel is not tantamount to persecution. The RPD also found that there was insufficient evidence before it that Mr. Sounitsky was a conscientious objector who would not serve in the reserves, finding also that the Israeli army shows flexibility towards reservists in comparison to conscripts and that conscientious objectors were permitted to serve in non-combat roles. Finally, it found that the punishment for refusing all forms of reservist service is 56 days imprisonment, which is a law of general application and not so extreme as to be cruel and unusual.

[5] Mr. Sounitsky applied for a pre-removal risk assessment (PRRA) on July 28, 2006 reiterating his fears of being returned to Russia based on his heritage and of being returned to Israeli because of his opposition to military service.

[6] In order to review the PRRA officer's decision, it is useful to begin with an overview of Mr. Sounitsky's relationship with military service.

[7] Mr. Sounitsky served a term of compulsory military service in Russia as a private in the army from 1986 to 1988. After moving from Russia to Israel in 1993, he was called up to the military reserves. After a number of deferrals, Mr. Sounitsky served as a reserve force member from September to November 1995. He did not volunteer to serve, nor has he completed his mandatory military service in Israel.

[8] Further deferrals were granted on financial grounds by the Israeli Defence Force from the call up notices received by Mr. Sounitsky four or five times per year. He was eventually given an ultimatum of military service or prison, and served 40 days with the military in the Occupied Territories in May and June of 1998. He claims that it was after this point that he became a conscientious objector, due to the situation of the Palestinian people in the Territories.

[9] While Mr. Sounitsky was serving in the Territories, his wife had a nervous breakdown. Ms. Sounitsky apparently suffers from significant anxiety when staying alone, especially at night, and has been diagnosed with a phobic psychiatric illness.

[10] Mr. Sounitsky eventually served a second term in the reserves, on pain of imprisonment, during which accommodations were made to allow him to remain close to home. He requested a further exemption from a third call-up notice, and was put on a year's probation by a military

tribunal. Mr. Sounitsky asserts that he is not willing to serve even in the non-combat roles normally offered as accommodation to conscientious observers.

Impugned decision:

[11] The PRRA officer found that Mr. Sounitsky was not a conscientious objector to military service generally, as he had served in both Russia and Israel. The officer noted that Mr. Sounitsky's concern was with the human rights abuses perpetrated by the Israeli army. While accepting that some believed human rights violations were systemic to the Israeli army, the officer found that 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.

[12] The PRRA officer also found that Israelis incarcerated for refusing military service were not subject to cruel and unusual punishment. The punishment was not disproportionate or persecutory and flowed from a law of general application, and there was insufficient information on file to prove otherwise.

[13] Finally, the PRRA officer, while accepting that Ms Sounitsky might experience a high level of anxiety if left alone, found that there was insufficient evidence to show that facing that situation would account to cruel and unusual treatment. The officer noted that the applicants did not know what her reaction would be, as she had apparently never been in the situation, and that the problem

had been solved through medication and the assistance of friends and family when her husband was absent from the home in the past.

Issues:

[14] The issues which must be decided are:

1. Did the PRRA officer err in his application of the test for admissible new evidence?
2. Did the PRRA officer apply the wrong legal test to the determination of punishment for conscientious objection to military service as persecutory?
3. Was the PRRA officer's determination that Mr. Sounitsky was not a conscientious objector a finding of credibility such that the lack of an oral hearing breached procedural fairness?
4. Did the PRRA officer ignore or misconstrue the evidence?
5. Were the PRRA officer's conclusions unreasonable?

Standard of Review

[15] This application was heard but not decided before the release of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. 9. Prior to *Dunsmuir*, the prevailing view in this Court was that the decision of a PRRA officer was to be reviewed on the standard of patent unreasonableness for questions of fact, reasonableness *simpliciter* for mixed fact and law, and correctness for questions of law. The decision as a whole was to be reviewed on a reasonableness standard: *Demirovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, [2005] F.C.J. No. 1560.

[16] In *Dunsmuir*, the Supreme Court held that the two reasonableness standards created a system which was unclear and overly difficult to apply. Thus they should be merged into a single test, producing a distinction between legal questions, which continue to be assessed on a correctness standard, and all other findings by administrative bodies, which will stand unless they can be shown to be unreasonable.

[17] In applying the reasonable standard, the question which judges must now ask themselves is whether the decision was reasonable, giving "due consideration to the determinations of decision makers": *Dunsmuir* at paragraph 49. The Supreme Court expressed its recognition that legislative supremacy drives the need for deference to be shown by the judiciary to administrative decisions made under properly delegated authority.

[18] The Supreme Court has also determined that it is no longer necessary to apply the pragmatic and functional analysis in every case where there is clear precedent as to the standard to be applied. I need not, therefore, re-evaluate the levels of deference to be shown to the decision of a PRRA officer, other than to note that questions of fact are no longer reviewable on a patent unreasonableness standard. Instead, all questions decided by a PRRA officer other than those of pure law are to be upheld unless unreasonable.

[19] In view of these conclusions, I did not deem it necessary to invite counsel to make additional submissions on the application of *Dunsmuir* to this case.

New evidence

[20] The applicants challenge the statement of the PRRA officer that the purpose of a PRRA is "to consider whether circumstances or conditions have changed in the interim period between the refusal by the RPD and [the PRRA] application". They allege that this shows that the officer incorrectly limited his consideration of evidence to that which post-dated the refugee decision, contrary to paragraph 113(a) of the IRPA.

[21] I do not read this statement by the PRRA officer as relating to which evidence he was permitted to consider, but rather as a correct statement of the purpose of the assessment. My colleague Deputy Judge Maurice Lagacé set out the law in this regard in *Leudjeu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 875, [2007] F.C.J. No. 1162, at paragraph 18:

> The only purpose of the PRRA is to assess the risks to which a person might be exposed on removal to his or her country of origin, based on new facts occurring since the decision by the RPD on his or her refugee status application. Paragraph 113(a) of the Act leaves no room for ambiguity in this regard.

[22] The applicants alleged an error of law, which attracts a standard of review of correctness. The PRRA officer was correct in his statement, and I will not set his decision aside on this point.

Objection to military service

[23] The applicants also alleged that the PRRA officer erred in his selection of the appropriate test to determine whether the punishment for Mr. Sounitsky's objection to military service amounted to persecution. In essence, their argument is that Mr. Sounitsky's motivation for refusing

to serve in the IDF should not have been a focus of the officer's reasoning, citing *Zolfagharkhani v. Canada (Minister of Employment and Immigration) (C.A.)*, [1993] 3 F.C. 540, [1993] F.C.J. No. 584 to that end.

[24] The respondent agrees that the intent of an ordinary law of general application, rather than the motivation of the claimant, is relevant to the existence of persecution. She submits, however, that prosecution or incarceration for refusing to perform military service is not persecution on a Convention ground *per se*. She notes that objections to military service are discussed in the United Nations High Commission for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Office of the United Nations High Commissioner for Refugees; Geneva, reedited January 1992.

[25] Persons claiming refugee status based on their conscientious objection to military service essentially form two specific groups: those who object to military service in general and those who object to serving in a particular conflict: *Lebedev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 728, [2007] F.C.J. No. 975; *Hinzman v. Canada (Minister of Citizenship and Immigration) (F.C.)*, 2006 FC 420, [2006] F.C.J. No. 521, aff'd 2007 FCA 171, [2007] F.C.J. No. 584.

[26] Mr. Sounitsky claims that he resisted reserve service in the IDF partly due to his wife's medical condition but also because he opposed Israel's military actions and military service itself. The PRRA officer noted that he had served in the Russian military and pointed to a letter from Ms. Sounitsky's psychiatrist which stated that he "would gladly serve" in the military if he could be

home with her at night. As such, the officer found that he is not a conscientious objector in general, but someone who objects to a particular form of service.

[27] Selective objectors are discussed in paragraph 171 of the *Handbook*, which describes them thus:

> 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.

[28] In determining whether an objector should be assessed under paragraph 171 or under the other paragraphs of the *Handbook* which relate to persons avoiding military service, the PRRA officer was correct in assessing the evidence on Mr. Sounitsky's motivation for avoiding service.

[29] Counsel drew my attention to the decision of my colleague Justice Johanne Gauthier in *Tewelde v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1103, [2007] F.C.J. No. 1426. In *Tewelde*, Justice Gauthier considered the refusal of refugee protection for an Israeli citizen who refused to serve as a reservist in the IDF.

[30] Justice Gauthier vacated the decision of the RPD on the ground that the decision incorrectly failed to refer to documentary evidence on the question of human rights abuses on the part of the

IDF. In the instant case, the PRRA officer did refer to the evidence acknowledging the existence of abuses and the allegations by some international organizations about IDF practices. The officer gave a reasoned explanation for finding that the abuses were isolated and not systemic.

Right to an oral hearing

[31] The applicants next submit that the officer erred in finding Mr. Sounitsky was not a conscientious objector without giving him the benefit of an oral hearing, as they claim this was an adverse credibility finding which entitled them to one.

[32] The PRRA officer found that Mr. Sounitsky was not a conscientious objector to military service in the larger sense of the meaning of that term, but gave thorough consideration to his claim to selective objection as discussed in paragraph 171 of the *Handbook*. This was not an adverse credibility finding, but instead a finding of which type of objector Mr. Sounitsky was for the purposes of assessing his claim. I do not agree that the officer breached his duty of providing procedural fairness to the applicants.

Treatment of evidence

[33] The applicants also allege that the PRRA officer misconstrued evidence relating to the likelihood of Mr. Sounitsky's being jailed for his refusal to serve and to the conditions faced by military objectors in Israeli jails. They also assert that the officer erred in rejecting the opinion of a qualified psychiatrist without expert medical evidence to the contrary.

[34] It is trite law that a PRRA officer is presumed to have taken all evidence into consideration, absent significant indications to the contrary. Indeed, in this instance the officer directly assessed evidence on the question of the possibility of a jail sentence and the allegation of cruel or inhumane treatment in Israeli military jails. The applicants appear to be asking for a reweighing of the evidence, which is not the role of a reviewing Court.

[35] Similarly, the officer did not reject the opinion of Dr. Feldinger and accepted that Ms. Sounitsky might experience a high level of anxiety if required to stay home alone. The officer did not, however, find that the evidence on file was sufficient to prove the allegation that her situation on return would amount to cruel and unusual treatment. This was open to the officer on the evidence, and I do not find it to be an unreasonable conclusion.

Unreasonable decision

[36] Finally, the applicants ask this Court to find that the PRRA officer's conclusion was unreasonable. Given that I have not accepted that any of the specific arguments advanced support a finding of reviewable error, I cannot agree that the PRRA officer's decision as a whole is unreasonable.

[37] This application is dismissed. No questions of general importance were submitted for certification, and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that this application is dismissed. No questions are certified.

" Richard G. Mosley "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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