Federal Court		Cour fédérale

Date: 20101104

Docket: IMM-5225-09

Citation: 2010 FC 1091

Ottawa, Ontario, November 4, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ALEKSANDR KUNIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated September 23, 2009, wherein the applicant was determined not to be a Convention refugee or a person in need of protection under sections 96 and 97 of the Act. This conclusion was based on the Board's finding that the applicant lacked a well-founded fear of persecution.

[2] The applicant requests that the decision of the Board be quashed and the claim remitted for reconsideration by a differently constituted panel of the Board.

Background

[3] The applicant is a citizen of Azerbaijan and claims a fear of persecution on the basis of his Jewish religion and nationality.

[4] The applicant's Personal Information Form (PIF) describes the death of his parents at a young age and his childhood in an orphanage where other children harassed him and called him insulting names such as derogatory terms for someone who is Jewish. At age 18, the applicant joined the military for a period of compulsory service. During his time in the military, the insults, due to his Jewish nationality, continued and he also felt he was discriminated against for a promotion. After the military, he moved to the town of Baku and began a real estate business. The discrimination escalated and the applicant's house was burnt down but the police told him they would not help. He was also beaten badly on another occasion.

[5] Eventually, the applicant paid a smuggler to help him leave the country. A ship took the applicant to the United States. He made a claim for protection in the U.S. but it was never approved as he experienced difficulty getting his documents verified. He spent a long period of time in a homeless shelter in New York City and claims that several documents including his passport, birth

certificate and the forensic report from the fire were stolen. U.S. authorities indicated a belief that his claim may be fraudulent, denied his claim, issued a deportation order and incarcerated the applicant for a brief period. The applicant sought an appeal of the asylum determination for which no final decision has been made.

[6] The applicant came to Canada in September of 2007 and made another claim for protection. His case or appeal in the U.S. appears to have been closed.

The Board's Decision

[7] The Board's reasons were short and read in relevant part:

> **Analysis:**
>
> [4] Between the time he entered the U.S. and made an asylum claim in late 2000, and his entry to Canada in September 2007, he enjoyed international protection afforded by the government of the United States of America.
>
> [5] Out of personal frustration, he relinquished that protection and entered Canada making a second refugee claim.
>
> [6] The purpose of the refugee system in Canada is not to satisfy personal frustration or to provide a more desirable place to live, but rather to give protection to those who need it.
>
> [7] Mr. Kunin, whatever fear he may have expressed regarding returning to Azerbaijan voluntarily, relinquished the protection offered by the United States and sought to relocate to Canada. The desirability of immigrating to Canada clearly outweighed any alleged fear.

> [8] If Mr. Kunin had a well-founded fear of harm should he return to Azerbaijan, he would not have given up the very protection he now asks Canada to afford him.
>
> **Conclusion:**
>
> [9] For the aforementioned reason, Aleksandr Kunin is neither a Convention refugee nor a person described in Section 97 of the *Immigration and Refugee Protection Act.*

Issues

[8] The issues are as follows:

1. What is the standard of review?
2. Did the Board err in failing to perform a separate analysis under section 97 of the Act?
3. Was the Board's ultimate conclusion unreasonable?

Applicant's Written Submissions

[9] The applicant submits that the Board was required to consider the applicant's risk upon returning to Azerbaijan under section 97 of the Act, even if it had concluded that the applicant lacked a subjective fear of returning. The nature of the evidence presented in the case warranted a separate section 97 analysis and there was no finding that the applicant's story or identity lacked credibility. The Board's failure to engage this issue is a reviewable error.

[10] In addition, the applicant submits that the Board's ultimate conclusion that the applicant lacked a subjective fear of persecution was unreasonable. The Board's determination was entirely predicated on the mistaken belief that the applicant enjoyed international protection in the U.S. but relinquished that protection. In fact, the applicant was not receiving protection in the U.S. He had been incarcerated there and had no reasonable hope of obtaining protection. This error of fact vitiates the Board's decision and constitutes a reviewable error.

Respondent's Written Submissions

[11] The respondent submits that the Board's decision was reasonable. While the applicant's claim for asylum in the U.S. took many years, there is no evidence that his claim failed. The mere fact that a claim takes many years does not explain his abandonment of the process. Therefore, the Board made no error in making a negative inference from the applicant's failure to see his U.S. claim through. A finding of no subjective fear can be determinative of a claim under section 96 and seriously damages an applicant's credibility even if the Board does not say so expressly.

[12] In response to the applicant's first allegation, the respondent submits that there was insufficient objective evidence on the record to base a section 97 analysis. The documentary evidence submitted did not establish that the applicant faces a personalized risk to his life. Therefore, the Board did not err by failing to conduct a section 97 analysis.

Analysis and Decision

[13] **Issue 1**

What is the standard of review?

Findings of fact made by the Board may only be interfered with by a reviewing court if the finding was made in a perverse or capricious manner or without regard for the material before it (see the *Federal Courts Act*, R.S.C. 1985, c. F-7s. 18.1(4)(d)).

[14] As I have stated earlier, ultimate refugee determinations of the Board are reviewable against the standard of reasonableness (see *Kaleja v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 252, at paragraph 19, *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.), [1993] F.C.J. No. 796 at paragraph 3). Questions of pure law, should one arise, must be handled correctly by the Board (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[15] The Board's implicit determination that the applicant's claim did not warrant a separate section 97 analysis was a question of mixed fact and law, reviewable on the reasonableness standard. The Board's determination that the applicant lacked a well-founded fear was the essence of the Board's ultimate determination and was a question of mixed fact and law. It is also to be reviewed against the reasonableness standard.

[16] **Issue 2**

Did the Board err in failing to perform a separate analysis under section 97 of the Act?

The well-founded fear component of a claim to be a Convention refugee under section 96 of the Act has both objective and subjective components. This is not the case for a claim for protection under subsection 97(1). This subsection only requires that the claimant establish that it is more likely than not that the claimant will be persecuted in accordance with the specific terms of paragraphs 97(1)(a) or (b).

[17] As stated in *Odetoyinbo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 501, [2009] F.C.J. No. 614:

> 7 It is well settled that an adverse credibility finding, though it may be conclusive of a refugee claim under section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), is not necessarily conclusive of a claim under subsection 97(1). The reason for this is that the evidence necessary to establish a claim under section 97 differs from that required under section 96 (*Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C. J. No. 506). When considering section 97, the Board must decide whether the claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97(1)(a) and (b) of the Act (*Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, [2003] F.C.J. No. 1540). Further, there are objective and subjective components to section 96, which is not the case for paragraph 97(1)(a): a person relying on this paragraph must show on a balance of probabilities that he or she is more likely than not to be persecuted (*Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, [1995] S.C.J. No. 78; *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] F.C.J. No. 1).

[18] In the present case, the Board focused on the applicant’s decision to relinquish the protection the Board claimed was being offered to him in the U.S. The Board then concluded:

> If Mr. Kunin had a well-founded fear of harm should he return to Azerbaijan, he would not have given up the very protection he now asks Canada to afford him.

[19] Although the Board did not analyze the required components of a refugee claim and highlight the area where the claim failed, it is evident that the Board concluded that the applicant had failed to establish the subjective component of having a well-founded fear of persecution.

[20] A finding that a claimant lacks a subjective fear of persecution necessarily impugns any claimant's credibility. However, it may only impugn one aspect of the claimant's credibility and certainly does not equate to a Board finding that the claimant is less than credible in all aspects of his claim.

[21] In *Sellan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, 76 Imm. L.R. (3d) 6, the Federal Court of Appeal held at paragraph 3 that:

> …where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[22] The Board made no such general finding in the present case and in fact expressed no concern with the applicant's credibility or the truth of his story at any point in the decision. If the Board accepted his identity as a Jewish person, which it seems the Board did, the documentary evidence alone would be enough to require an analysis of risk.

[23] The particular facts of this case lead me to the firm belief that the Board could not lawfully dispose of the applicant's claim under subsection 97(1) without some consideration of the objective evidence related to risks facing the applicant upon return to Azerbaijan. The decision to do so was unreasonable.

[24] **Issue 3**

Was the Board's ultimate conclusion unreasonable?

I am also convinced that the Board's conclusion that the applicant lacked a subjective fear of returning to Azerbaijan was deeply flawed and was unreasonable in the circumstances.

[25] I reject the respondent's explanation that the Board's determination was no different than previous cases which provide that the Board may conclude that an individual lacks subjective fear if that individual fails to seek asylum while living or transiting through another country before reaching Canada.

[26] The applicant did not merely transit through the U.S., then choose Canada because he thought his chances of a successful asylum application would be greater, as was the case in *Remedios v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 437. Nor did the applicant delay making a claim at any time. Rather, the applicant sought asylum immediately in the U.S. and it appears fought vigorously for the success of his claim.

[27] In the Board's view, Canada's refugee system is not to be used for the purpose of providing fast immigration services to a refugee already enjoying the protection of another country. I agree completely. However, that does not appear to accord with the applicant's situation. He had not been accepted as a refugee in the U.S. If the Board was under the impression he had been granted protection, this would have been a capricious error of fact. In fact, the applicant had been refused protection and was even incarcerated. Moreover, he was under a deportation order which on the face of the record, could have been enforced in short order.

[28] Abandoning the refugee process in one country in favour of another will, in many cases, properly lead the Board to draw a negative inference regarding that individual's true motives and subjective fear (see *Bains v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 536). However, the record in the present case reveals good reasons and explanations supporting the applicant's actions. There was a complete failure on the part of the Board to engage in an analysis of whether the applicant's seven year experience in the U.S. and eventual abandonment was nonetheless consistent with a continuing subjective fear of returning.

[29] Other than the abandonment itself, which appears to been more formal than substantive, I see nothing on the record to support a finding that the applicant's actions were indicative of a person without a subjective fear of returning. This is especially the case in light of the extensive and uncontradicted evidence of mistreatment the applicant suffered in Azerbaijan as a Jewish person. The Board's decision in this case was unreasonable and cannot stand.

[30] The application for judicial review is therefore allowed and the matter is referred to a different officer for redetermination.

[31] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[32] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The *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 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 that country.	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 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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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

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

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

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout 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.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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