Federal Court  Cour fédérale

Date: 20101203

Docket: IMM-493-10

Citation: 2010 FC 1223

Ottawa, Ontario, December 3, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ABD EL NASSER KADAH

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 January 7, 2010, 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 state protection was available to the applicant.

[2] The applicant requests that the decision of the Board be set aside and the claim remitted for reconsideration by a different member of the Board.

Background

[3] Abd El Nasser Kadah (the applicant) is a gay male Muslim Palestinian citizen of Israel. He claims refugee status because he fears persecution based on his membership in a particular social group, that of Arab Muslim homosexuals in Israel.

[4] The applicant grew up in a Muslim Palestinian area of Israel called Kufr Manda outside of Nazareth. He was the youngest of 14 children. The applicant was often physically abused by this father and older brothers during his childhood. He once overheard his father say that homosexual "people should be killed."

[5] At age eleven, the applicant began a sexual relationship with an older boy, Mohammed, which lasted for two months. He hid this relationship from his family and friends because he feared violent consequences if it was discovered.

[6] During his early teenage years, the applicant experienced homophobic verbal abuse as well as physical and sexual abuse. He attributes this abuse to rumours about his homosexuality. His brother was often violent with him and in one incident pushed him down a flight of stairs, resulting in two broken arms. On several occasions, men attempted to have sex with the applicant, through

force or payment. These men included his cousin, local bullies and two men from his neighbourhood. He was physically assaulted on several occasions. In high school, the applicant was isolated and considered suicide. He saw a psychologist but never disclosed his sexual orientation.

[7] In July 2003, the applicant ran away to Tel Aviv where he changed his name. When his brothers and three friends found him, they forced him to return to Kufr Manda. He was beaten when his parents realized that he had changed his name.

[8] The applicant later returned to Tel Aviv with his parents' consent as his nephew, Ibrahiem, accompanied him. He lived there for two months until he was forced to return home because his nephew was found drinking with a Russian girl. At home, his family arranged a marriage for him with a cousin.

[9] In May 2005, the applicant returned to Tel Aviv for the third and final time. There, his brother often came unexpectedly to his home to check on him. In one incident, his brother broke into and searched his apartment. The applicant moved several times attempting to avoid his brother.

[10] The applicant did not approach the police for protection against his family. Indeed, the only time he sought help from the police was after being involved in a fight. At that time, he approached the police for water and was told "to shut up and sleep." He said that he did not feel safe going to the police.

[11] The applicant decided he could not escape his family in Israel and left for Canada. He arrived in Canada on October 14, 2006 on a visitor visa. After two months, the applicant spoke to a lawyer in Toronto who assigned his case to an assistant from the same area of Israel as the applicant. Because of this, the applicant's original Personal Information Form (PIF) states that he feared persecution because he is perceived to be gay. The applicant has since amended his PIF to state that he is gay but was afraid the assistant would inform his family if he admitted his homosexuality openly.

[12] The applicant has kept in touch with his family since he came to Canada but has not given them his location or telephone number.

Board's Decision

[13] In its decision, the Board found that the applicant was neither a Convention refugee nor a person in need of protection. The Board identified the determinative issue as the availability of state protection.

[14] Overall, the Board found the applicant to be credible. He was forthright and responsive and the Board found his story to be consistent with gay males' accounts of growing up in the Occupied Territories. The Board found the applicant's explanation of the discrepancy between his original and amended PIF to be reasonable in the circumstances.

[15] The Board found that Israel was a fully functional democracy and that the presumption of state protection applied.

[16] The Board found that the applicant's one incident of mistreatment by the police was insufficient reason to refuse to seek protection from the authorities, especially since it was under different circumstances than the homophobic harassment and violence he experienced from his family and community.

[17] The Board stated that while there may be evidence of discrimination against Arabs in Israel, there was no evidence that the police were unresponsive to Arab citizens' complaints. Further, the Board found that serious efforts are being made to address discrimination in Israel. In addition, the Board found that there is no evidence of persecution based on sexual orientation in Israel.

[18] The Board found that the documentary evidence presented by the applicant did not reflect homophobic attitudes in the Israeli police. The article, *Nowhere to Run: Gay Palestinian Asylum Seekers in Israel* (Nowhere to Run), relied on by the applicant, stated that gay Palestinians claiming asylum in Israel were returned to the Occupied Territories by Israeli police, despite the risk to their lives. The Board found that this article was evidence that these men, if granted asylum, would have had access to protection by the authorities in Israel.

[19] Based on these findings, the Board concluded that the applicant was required to seek protection from the state and failed to do so.

Issues

[20] The issues are as follows:

1. What is the appropriate standard of review?

2. Did the Board err in determining that effective state protection was available to the applicant?

Applicant's Written Submissions

[21] The applicant submits that he was only required to seek state protection if it was reasonably forthcoming. He submits that democracy alone is not sufficient to find that state protection was available. There is no heightened obligation on refugee claimants from states with democratic institutions and that he only needed to present reliable evidence of a lack of state protection. The Board must consider the quality of the institutions providing the protection.

[22] The applicant submits that he provided both his own testimony and documentary evidence of similarly situated individuals which met the burden of proving that Israel is unable to provide state protection to its citizens.

[23] The applicant submits that the Board erred in finding that the incident where he was insulted and dismissed when seeking assistance from the Israeli police was not sufficient to meet the burden of proving the state's inability to protect him. This individual experience is part of a broader pattern of the state's inability to protect Arab gay men.

[24] The applicant submits that the Board erred by finding that there is no evidence of persecution on the basis of sexual orientation in Israel. Since the Board did not make any adverse credibility findings, the applicant's evidence and testimony must be accepted, including his experiences of homophobic harassment, violence and discrimination which he submits amount to persecution.

[25] The applicant submits that he also produced documentary evidence of similarly situated individuals unable to avail themselves of state protection. The Board ignored evidence of police brutality against Arab Muslims in Israel. This evidence demonstrates the broad societal discrimination faced by Arabs at the hands of law enforcement officials. The Board was required to determine how this evidence impacts on the protection the state affords gay Arab Muslim Israelis.

[26] In addition, the applicant submits that the evidence shows that gay Palestinians are returned to the Occupied Territories to known risks by Israeli police because of a combination of their ethnic background and sexual orientation. Arab Israelis face the same discrimination and mistreatment by Israeli police. This situation is analogous to the apathy of the Israeli police faced by Arab women who receive threats of honour killings and experience gender violence as discussed in *Jabbour v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 831.

[27] The failure to examine the totality of the evidence before determining what actions were reasonable for the applicant is an inappropriate state protection analysis and the Board erred by finding that adequate state protection existed for the applicant.

Respondent's Written Submissions

[28] The respondent submits that in order to rebut the presumption that the state is capable of protecting its citizens, the applicant must provide clear and convincing evidence of the state's inability to protect him. The Board's finding of a high level of democracy in Israel creates a heavy burden that the applicant needs to overcome to rebut this presumption.

[29] The Board reviewed the applicant's materials and made reference to his personal narratives and documentary evidence submitted. The respondent submits that it was open to the Board to find this evidence to be insufficient to meet the onus on the applicant.

[30] The respondent submits that a single refusal of aid by the authorities is not sufficient to rebut the presumption of state protection. Further, the respondent highlighted that the Board found that the incident where the applicant sought state assistance was under different circumstances to the harassment and violence he faced from his family.

[31] Regarding the evidence of similarly situated individuals, the respondent submits that the Board considered the evidence of discrimination against Arab Israelis, but found that it did not demonstrate that the police would not respond to complaints from the Arab community. This is distinguishable from *Jabbour* above, where specific evidence of police apathy in responding to honour killing of Arab women was before the Board and was not addressed.

[32] The respondent submits that it was open to the Board to find that evidence of security forces refusing asylum to gay Palestinians does not mean authorities would not provide protection to gay Arab citizens of Israel.

[33] The respondent submits that the Board's decision does not have to refer to all the evidence before it. In this case, the applicant is seeking to have the Court reweigh the evidence and conclude differently than the Board. The respondent submits that the conclusions reached by the Board were open to it and the Court should not interfere with them.

Analysis and Decision

[34] **Issue 1**

What is the appropriate standard of review?

The Supreme Court of Canada held in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that a standard of review analysis need not be conducted in every case. Where the standard of review applicable to a particular issue before the court is determined in a satisfactory manner by previous jurisprudence, the reviewing court may adopt that standard of review (at paragraph 57).

[35] Previous jurisprudence has determined that the adequacy of state protection raises questions of mixed fact and law and is therefore reviewable against a standard of reasonableness (see *Hinzman, Re*, 2007 FCA 171 at paragraph 38 and *James v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 546 at paragraph 16).

[36] On a standard of reasonableness, the reviewing court will be concerned with "the existence of justification, transparency and intelligibility within decision-making process." The Court should only intervene if the decision falls outside of the "range of acceptable outcomes, which are defensible in respect of the facts and law" (see *Dunsmuir* above, at paragraph 47).

[37] **Issue 2**

Did the Board err in determining that effective state protection was available to the applicant?

After reviewing the decision and the record, I have to conclude that the Board's state protection analysis contains reviewable errors.

[38] Decision-makers may presume that states are able to protect their citizens unless there is a complete breakdown of the state apparatus. Generally, the onus is on a refugee claimant to provide "clear and convincing" evidence of a state's inability to protect its citizens in order to rebut this presumption (see *Ward v. Canada (Minister of Employment and Immigration),* [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (QL) at paragraph 57).

[39] Where the state is a functioning democracy, the presence of democratic institutions will increase the burden on the applicant to prove that he exhausted all courses of action open to him (see *Kadenko v. Canada (Minister of Citizenship and Immigration)* 143 D.L.R. (4th) 532, [1996] F.C.J. No 1376 (F.C.A.) (QL) at paragraph 5). However, democracy alone does not ensure adequate state protection and the Board must consider the quality of the institutions providing that protection (see *Katwaru v. Canada (Minister of Citizenship and Immigration)* 2007 FC 612 at paragraph 21).

[40] In order to rebut the presumption of state protection, an applicant may testify regarding his or her own experiences where state protection was not forthcoming or provide testimony of similarly situated individuals who sought state protection and were let down (see *Ward* above, at paragraph 57).

[41] In the case at bar, the applicant's example of his interaction with the Israeli police is likely not sufficient, alone, to meet the standard of proof. A single incident of refusal of assistance by the authorities may be insufficient to rebut the presumption of state protection (see *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 134 at paragraph 9). If this were the only evidence upon which the applicant relied, a reasonable determination would be that the applicant did not overcome the presumption.

[42] However, the Board is also required to "address the practical adequacy of state protection when a threat to the life or safety of a refugee applicant is accepted" (see *Jabbour* above, at paragraph 42). This includes reviewing evidence of operational inadequacies of state protection and of similarly situated individuals who have been unable to access state protection (see *Zaatreh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 211 at paragraph 55).

[43] While Board members are presumed to have considered all the evidence before them, where there is important material evidence that contradicts a factual finding of the Board, it must provide reasons why the contradictory evidence was not considered relevant or trustworthy (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425(F.C.T.D.) (QL) at paragraph 17 and *Florea v. Canada (Minister of Employment and*

Immigration), [1993] F.C.J. No. 598 (C.A.) (QL).

[44] The Board appears to have made several findings of fact without regard to the relevant material before it.

Police Responses to Arab Israelis

[45] The Board concluded that "while there is some evidence of discrimination against Arab Israelis, there is no evidence to suggest that police are not responsive to or fail to investigate complaints by members of the Arab community".

[46] There was extensive documentary evidence before the Board regarding Israeli police violence and intolerance towards Arab Israelis and Palestinians. The U.S. Department of State (US DOS) report noted numerous examples of Israeli police illegally detaining and assaulting Arab Israelis or Palestinians (see certified tribunal record (CTR) at pages 79, 80, 84 and 92). There was further evidence in the US DOS report before the Board of wider "harsh and degrading treatment" by Israeli authorities towards nationals with Arab or Muslim names (see CTR at page 87). In addition, the US DOS report highlighted that a branch of the Ministry of Justice, "failed to investigate adequately complaints filed against police officers by Arab Israelis and Palestinians" (see CTR at page 81). Given the broad examples of Israeli state authorities' violent and intolerant behaviour towards Arabs and Palestinians, the Board's finding of fact appears to have been made without regard to the evidence before it.

Persecution Based on Sexual Orientation

[47] In addition to its finding that there is no evidence of unresponsiveness by the Israeli police towards Arab citizens, the Board found that "there is no evidence of persecution in Israel based on sexual orientation and, in fact, there are specific laws prohibiting discrimination on such a basis".

[48] The Board found that the applicant was credible, including his account of the homophobic violence and threats he experienced. This amounted to persecution based on sexual orientation in Israel.

[49] In addition, there was evidence before the Board of persecution of individuals, other than the applicant, based on sexual orientation. For example, the US DOS report noted that "societal violence and discrimination based on sexual orientation or against persons with HIV/AIDS existed in isolated cases".

[50] The respondent submits that it was open to the Board to find that the report, *Nowhere to Run*, was evidence of state protection in Israel for Palestinian gay men. However, there is testimony in *Nowhere to Run* in direct contrast to the Board's finding. In one account, an Arab Israeli at the Bat-Yam police station in Tel Aviv suffered degrading treatment. The individual recounts at page 220 of the certified tribunal record:

> One of the interrogators, called K, started insulting me when he saw the gay association membership card. He said: "So, you take it up your ____? You _____ men?" He started cursing me and said: "You are coming here and ruining our country. Don't move, you maniac, I'll kill you, I'll _____ you."… When I told him I would be killed in the Territories he said: "So what, a dog is dead."

[51] The personal and documentary evidence suggest that the Board overlooked relevant evidence when making its finding of fact that there is no evidence of persecution based on sexual orientation in Israel.

[52] The Board made several findings of fact without consideration of the relevant material before it. The Board found that adequate state protection was available to the applicant based on these findings. This amounted to a reviewable error.

[53] Consequently, the application for judicial review will be allowed and the matter is referred to a different panel of the Board for redetermination.

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

JUDGMENT

[55] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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,	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

would subject them personally

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.

FEDERAL COURT

SOLICITORS OF RECORD

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