**Docket: IMM-5542-05**

**Citation: 2006 FC 670**

**OTTAWA, ONTARIO, June 1, 2006**

**PRESENT: THE HONOURABLE MR. JUSTICE STRAYER**

**BETWEEN:**

**ALEXEY LOSHKARIEV**
**EMILIA LOSHKARIEV**
**ALFRED LOSHKAREV**
**SOFIA LOSHKAREV**
**BERENIKA LOSHKAREV**
**SILIGIZ LOSHKAREV**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (IRB) of August 29, 2005 wherein the IRB determined that the applicants were not convention refugees and were not persons in need of protection.

Facts

[2] The claimant family are Israeli citizens who moved to Israel from the former Soviet Union (FSU) in 1990. In 1999 the male claimant, the husband and father of the family, Alexey Loshkariev opened a small construction business which did construction, improvements, and maintenance on streets and roads. To carry out this work he employed Palestinian Arabs including Palestinian Arab subcontractors who themselves employed Arab labourers. This work was carried on in a Jewish settlement, Karney Shomron, as well as in the city of Netanya. Alexey says that after terrorist attacks committed by Palestinians in December, 2003 and February, 2004 in these two places, respectively, his Palestinian Arab workmen employed on projects there were attacked by "Orthodox Jewish extremists". In both cases he tried to protect his workers and he too was beaten. Then and afterward he received follow-up threats by telephone and by night visits to his house by "Orthodox Jewish extremists". As a result he, his mother and his son Alfred and daughter Sofia came to Canada and claimed refugee status on April 23, 2004. Subsequently his daughter Berenika came to Toronto and claimed refugee status on September 3, 2004. His wife Emilia similarly came to Toronto in October, 2004 and claimed refugee status on November, 15, 2004. According to Alexey in both cases where he and his workmen were attacked he called the police, the police came and did nothing. Later when he and his wife received telephone threats this was reported to the police who again took no action. After Alexey and some of the family had come to Canada and Emilia remained in Israel she continued to receive threats on the phone from "extremist Orthodox Jews" asking where her husband was and they knocked on the door at night. She reported this to the police but they did nothing.

[3] It is the view of the claimants that the Israeli police did nothing because the persons they were complaining against were Jewish settlers or extremists.

[4] The family therefore claimed refugee status or to be persons in need of protection in effect because as persons associated with providing employment to Palestinian Arabs they would be subject to persecution by Jewish extremists. The daughters Berenika and Sofia also claim such status because they are conscientious objectors to military service and will be faced with compulsory service upon their return to Israel or with punishment possibly including imprisonment for refusing to serve in Israel's Armed Forces.

[5] The Panel concluded that the claimants have not proven that Israel would not or could not provide them with state protection upon their return. It of course took note of general information that Israel is a democracy with free elections and an independent judiciary. However it particularly stressed that the claimants as immigrants from the FSU could count on at least two parties who represent the interests of FSU immigrants. It made specific reference concerning organizations and institutions which look after or cater to the interests of FSU immigrants including, for example, "non-kosher butchers, and Russian-language bookstore's [sic]". Noting that the burden of proof was on the claimants to rebut the presumption of state protection, it held that the claimants had not provided "clear and convincing proof" of Israel's inability to protect them.

[6] With respect to the daughters' claims based on alleged conscientious objection to military service, the Panel rejected these for two reasons. First it was not satisfied that these alleged beliefs were genuine. Second it concluded that possible subjection to reasonable punishment for refusal to

serve in a country's armed forces on grounds of conscience should not be regarded as amounting to cruel and unusual treatment or punishment.

Issues

[7] It appears to me that there are two issues: (1) did the IRB err in fact in concluding that the claimants had failed to prove the inability of Israel to protect them; (2) did the IRB err in fact or law in concluding that Sofia and Berenika Loshkarev were not conscientious objectors or would not be subject to cruel and unusual treatment or punishment, should they return to Israel, for refusing to perform military service?

Analysis

[8] With respect to the standard of review, I believe the question of whether the claimants can be regarded as refugees or persons in need of protection, by virtue of Israel's inability or unwillingness to protect them, is essentially a question of fact. I believe the proper standard of review is that specified in paragraph 18.1(4)(d) of the *Federal Courts Act*, namely whether the IRB "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it". That is the standard specified by Parliament, one which it commonly equated to the standard of "patent unreasonability", the standard commonly defined by the courts for review of other tribunals where a standard is not prescribed by legislation.

[9] Similarly with respect to the issue of conscientious objectors, I believe the conclusion of the tribunal as to whether Berenika and Sofia genuinely held such views is one of fact reviewable again by the standards specified in paragraph 18.1(4)(d) of the *Federal Courts Act*. As to whether

punishment by imprisonment is so extreme or inhumane as to amount to unusual treatment or punishment, I believe this is a mixed question of law and fact to which I would apply the standard of reasonableness *simpliciter*. I note however that the Federal Court of Appeal in *Ates v. Canada* [2005], F.C.J. No. 1661, para. 1 appears to have treated such a question as one of law and may have regarded the proper standard as that of correctness. I will deal with this in more detail later.

[10] With respect to the findings of fact that the claimants had not established an unwillingness or inability on the part of Israel to protect them from the actions of "extremists or Orthodox Jews", I have concluded that the Tribunal reached its decision without regard to important evidence. The evidence specifically cited by the Panel essentially relates to the availability of political and institutional support for FSU immigrants and for women and girls. This kind of support and protection, valuable as it may be to some, is not really related to the form of discrimination alleged by the claimants: namely that they have been attacked and threatened because the head of the family employs Palestinian Arabs in Jewish settlements, thus are subject to alleged persecution ancillary to that practiced against Palestinian Arabs.

[11] On the other hand there was considerable material before the Panel indicating that there is growing tension between ultra-orthodox and secular Jews in Israel, and frequent aggression by the former against Palestinian Arabs and their sympathizers. For example Amnesty International in a report covering 2004 in its opening paragraph states that "Israeli settlers increased their attacks against Palestinians and their property and against international human rights workers." (Applicants' Record page 142). This report went on to say

> Most members of the Israeli army and security forces continued to enjoy impunity. Investigations, prosecutions and convictions for human rights violations were rare. In the overwhelming majority of the thousands of cases of unlawful killings and other grave human rights violations committed by Israeli soldiers in the previous four years, no investigations were known to have been carried out.
>
> Israeli settlers also enjoyed impunity for attacks on Palestinians and their property and international human rights workers. The Israeli army and police failed to take steps to stop and prevent such attacks…. (*Ibid* at 144).

An Amnesty International press release of October 24, 2004 stated:

> Israeli settlers in the Occupied Territories have stepped up attacks against Palestinians and are waging a campaign of intimidation against international and Israeli human rights activists. Their aim is to eliminate the presence of witnesses to their attacks, thereby depriving the local Palestinian population of this only form of limited protection. (*Ibid* at 146).
>
> Israeli settlers responsible for attacks on Palestinians and their properties have not been brought to justice in the vast majority of cases. Such impunity encourages settlers to commit further attacks and abuses. In the rare cases when Israeli settlers have been brought to justice, they have been treated with a degree of leniency uncommon in other cases. . . . (*Ibid* at 147)

In an article in the Washington Post of July 11, 2004 it is stated:

> With all the focus on Israel's struggle with Palestinian terrorism, foreign political analysts and media have paid little attention to the simmering internal divide between the country's secular and Orthodox worlds. Yet this conflict, which has festered for decades, has the potential to be deeply destabilizing to Israel as a nation. Its resolution will determine what kind of state Israel, born to be a haven for Jews, will be in the years to come. (*Ibid* at 151).

[12] It may well be that a tribunal might weigh these and similar statements in the evidence against the presumption of such protection and still conclude that the claimants had not met the

burden of proof on them to show a lack of safe protection. But no mention is made of this kind of evidence in the reasons when it was clearly germane to the precise issue before the Tribunal; more germane than the availability of support for FSU immigrants or women and girls as such. While it is of course not necessary to mention every piece of evidence that is presented to a tribunal, when the evidence is directly relevant to the claim in question and important to a determination as to the validity of the claim, the fact that it is not mentioned and analyzed suggests to a court that the agency made a finding without regard to the evidence: see *Bains v. Canada (MEI)* (1993), 63 F.T.R. 312 (F.C.T.D.); *Cepeda-Gutierrez v. MCI*, [1990] F.C.J. No. 1425 at para. 17; *Toro v. MEI*, [1981] 1 F.C. 652 at para. 1 (F.C.A.).

[13] I will therefore set aside the decision of the IRB on the issue of state protection and send the matter back for reconsideration of that question.

[14] With respect to the claims by Berenika and Sofia to refugee status or status of persons needing protection because of their alleged conscientious objection to military service, I find no basis for setting aside the decision of the IRB. With respect to the finding of fact that these young women had not proven that they really held such views I believe this was a matter of fact and there was evidence before the Tribunal upon which it could have decided as it did. I do not find this conclusion patently unreasonable. With respect to their possible subjection to imprisonment for refusal to do military service on the grounds of conscience, I believe that the Tribunal reached a reasonable conclusion in finding that this would not entitle them to be regarded as persons potentially subject to cruel and unusual treatment or punishment. If indeed the matter is one purely

of law I would still find the decision to be a correct one as being fully consistent with the decision of the Federal Court of Appeal in *Ates v. Canada (MCI) supra.*

Disposition

[15] The decision of the IRB denying the claimants the status of refugees or of persons of need of protection based on their failure to rebut the presumption of state protection by Israel will be set aside and the matter referred back for reconsideration by a different panel consistently with these reasons.

[16] The application for judicial review of the decision of the IRB that Sofia and Berenika Loshkarev are not refugees or persons in need of protection because of their alleged conscientious objection to military service will be dismissed.

**JUDGMENT**

IT IS HEREBY ORDERED AND ADJUDGED THAT:

(1) The decision of the IRB of August 29, 2005 to the effect that the applicants are not convention refugees nor persons in need of protection because they had not met the burden of proof against the presumption of state protection by Israel is set aside and the matter referred back to another panel for reconsideration consistently with these reasons; and

(2) The application for judicial review of that decision in respect of the claims of Sofia and Berenika Loshkarev to be convention refugees or persons in need of protection by reasons of their conscientious objection to military service is dismissed.

(s) "B.L. Strayer"
Deputy Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-5542-05 |
| **STYLE OF CAUSE:** | ALEXEY LOSHKARIEV, EMILIA LOSHKARIEV, ALFRED LOSHKAREV, SOFIA LOSHKAREV, BERENIKA LOSHKAREV, SILIGIZ LOSHKAREV v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | April 27, 2006 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Strayer D.J. |
| **DATED:** | June 1, 2006 |

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