Federal Court Cour fédérale

**Date: 20220401**

**Docket: IMM-6383-20**

**Citation: 2022 FC 457**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, April 1, 2022**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**DMYTRO SHALAIEV**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Background

[1] The applicant, Dmytro Shalaiev, is seeking judicial review of a decision by the Refugee Appeal Division [RAD] dated November 30, 2020. In its decision, the RAD dismissed the

applicant's appeal and confirmed the decision by the Refugee Protection Division [RPD] that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant is a citizen of Israel, of Ukrainian descent and of Christian Orthodox faith. His claim for refugee protection is based on a fear of persecution in Israel on the basis of his religion, ethnic origin, and his refusal to perform compulsory military service in Israel.

[3] In support of his claim for refugee protection, the applicant alleges that because of the war in Ukraine, he decided in September 2014 to travel to Israel to study. Since he is of Jewish descent, he obtained Israeli citizenship in June 2015.

[4] He quickly felt discriminated against in Israel because he is an Orthodox Christian. He was not hired when his assignment ended and had to fall back on a job below his skill level. In March 2016, a Jewish neighbour assigned to manage the building where he resided spat on him because he was going to church to celebrate Easter. After this incident, the applicant was insulted by his neighbours, his rent was increased, and he was threatened with eviction.

[5] In February 2015, the applicant visited the Nafah military base during his immigrant integration program. He was greatly disturbed by the training ground, which was a mock-up of a Palestinian village. In June 2016, the applicant was summoned to complete a military service assignment of two (2) months at the same military base. Once this assignment was completed, he received an additional summons on August 25, 2016, to begin his reserve military service, which took place in the Gaza area. His military service was scheduled to begin on September 26, 2016,

and to last four (4) weeks. The applicant consulted with a government agency that supports individuals who oppose compulsory military service. He was told that it was virtually impossible to legally avoid military service and that he would be imprisoned if he refused to do so. Fearing for his life and freedom, he left Israel and arrived in Canada on September 9, 2016. He then filed a claim for refugee protection in August 2017.

[6] On February 19, 2019, the RPD rejected the claim for refugee protection. It stated at the outset that Israel is the country of reference, as documentary evidence shows that Ukraine does not recognize dual citizenship. It then considered the discrimination suffered by the applicant and found that it was not a case of persecution. The RPD also considered the applicant’s argument that he was a conscientious objector. It determined that the applicant was not an genuine conscientious objector, but rather a deserter and that he had not demonstrated that military service in Israel constituted persecution under international law, or that the penalties provided for in the event of desertion amounted to persecution. Finally, the RPD found that the applicant was unable to demonstrate through clear and convincing evidence that he could not have obtained adequate protection from the state.

[7] The applicant appealed this decision to the RAD. On November 30, 2020, the RAD dismissed the appeal. First, it determined that the cumulative nature of the treatment suffered by the applicant did not reach the threshold for being considered persecution, i.e., “a sustained or systemic violation of basic human rights.” It then found that the RPD erred in determining that the applicant’s political convictions were not genuine.

[8] The RAD also reviewed Israeli laws on conscription and punishments for refusing compulsory military service, as well as the evidence submitted by the applicant. It concluded that Israel was a democratic state that had enacted general military service laws and that the applicant had not been treated differently on the basis of one of the grounds set out in the *Convention Relating to the Status of Refugees*. It also determined that the distinction between conscientious objectors and selective objectors, such as the applicant, was not discriminatory and that in its view, the evidence did not establish that individuals with political objections based on the treatment of Palestinians were treated differently from other deserters. It added that incarcerating a conscientious objector who refuses to perform military service does not constitute persecution *per se* and that the RPD correctly concluded that the punishments were not excessively severe.

[9] The RAD then addressed whether the Israeli reserve service was illegitimate under international law, in accordance with section 171 of *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [Handbook]. It reviewed the documents submitted by the applicant concerning the failure to comply with several United Nations resolutions for the occupied Palestinian Territories, as well as allegations that Israel had committed war crimes during incursions into Gaza in 2008 and 2014. It also noted that isolated violations did not constitute a violation condemned by the international community. It noted that the notice to appear required the applicant to report to a military base for service in Gaza and that isolated crimes were not necessarily condemned by the international community. The RAD added that although some soldiers stationed near the fence may have, in violation of international law, shot people inside

Gaza during protests, it was unlikely that the applicant would be forced to commit an act that would be condemned by the international community.

[10] Finally, the RAD confirmed that the RPD did not err in finding that the applicant had failed to rebut the presumption of state protection in Israel. The RAD was of the view that the applicant would probably not have been granted an exemption for his objection to serving in the Palestinian Territories. However, the evidence showed that he had non-political grounds for requesting an exemption from serving in the reserve service and, unless this was unnecessary or would endanger him, the applicant was therefore required to exhaust internal remedies before claiming international protection. Consequently, the RAD concluded that the applicant was not a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

## II. Analysis

[11] The parties agreed that the standard of reasonableness applies. The Court agrees.

[12] When the reasonableness standard applies, the Court must develop an understanding of the decision maker's reasoning process to determine whether the decision as a whole is reasonable. It must consider whether the decision bears the hallmarks of reasonableness—i.e., justification, transparency, and intelligibility—and whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision *(Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[13] The applicant first submitted that the RAD decision on the lack of persecution was not sufficiently justified and intelligible because of the cumulative discrimination he claimed to have suffered in Israel because he is of Ukrainian descent and of Christian Orthodox faith.

[14] The Court cannot agree with this argument.

[15] The RAD decision must be considered in the context in which the applicant has set out his grounds of appeal. In this case, the applicant did not challenge the finding that the incidents of discrimination were insufficient to establish persecution. The applicant's arguments in his appeal memorandum to the RAD focused mainly on the RPD's assessment of his credibility and testimony. He could not reasonably fault the RAD for failing to go beyond the grounds of appeal or for failing to provide in-depth grounds of appeal that he did not previously challenge (*Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at paras 23–24; *Broni v Canada (Citizenship and Immigration)*, 2019 FC 365 at para 15; *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 18–20).

[16] The RAD nevertheless considered all the evidence in the case. Like the RPD, it found that the cumulative nature of the treatment suffered by the applicant did not reach the level required to constitute persecution, i.e., a "sustained or systemic violation of basic human rights." Although he acknowledged at the hearing that this finding was more of a factual assessment, the applicant argued that the RAD improperly assessed the evidence.

[17] This argument is unfounded for two (2) reasons. First, the applicant failed to demonstrate how the evidence was improperly assessed. Second, it is well established that it is not up to this Court to reassess and weigh the evidence to achieve a result that would be favourable to the applicant (*Vavilov* at para 125).

[18] The next branch of the applicant's arguments related to the RAD analysis regarding his military service.

[19] The applicant first faulted the RAD for finding that his objection to military service constituted a partial conscientious objection. He argued that this finding was not based on the evidence and that the RAD should have been satisfied with his testimony.

[20] To justify this finding, the RAD relied on *Lebedev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 728 [*Lebedev*], in which the Court compared conscientious objection with selective objection. These two concepts were defined as follows:

> [44] …As I see it, conscientious objection applies to those who are totally opposed to war because of their politics, ethics or religion. Selective objection really refers to cases in which an applicant opposes a war he feels violates international standards of law and human rights.
>
> [Emphasis in original.]

[21] Although the RAD described the applicant's objection as "selective", it is clear that it was referring to the selective conscientious objection because it used it elsewhere in its reasons.

[22] In explaining his objection to military service, the applicant stated that he had become aware of the situation concerning the Israeli army when he visited the military base and was shocked to see that it had created a mock-up of a Palestinian village. He also testified that his meeting with a Palestinian in Tel Aviv only reinforced his conscientious objection.

[23] Given the applicant's testimony, the RAD could reasonably find that the applicant's objections were based on the treatment of the Palestinians, not against military service in all circumstances.

[24] The applicant then challenged the RAD's finding that he had not exhausted his remedies to avail himself of state protection. He submitted that this finding was unreasonable as he could not have taken the risk of applying for an exemption, knowing that it would most likely have been denied.

[25] The RAD acknowledged that, based on the evidence on file, the applicant would probably not have been granted an exemption for the sole reason that he objected to serving in the Palestinian Territories. However, it pointed out that the evidence in the record demonstrated that he could have raised an objection based on a specific non-political ground that arose following his military training and that one of the members of the committee tasked with assessing the exemption request had the authority to assess the applicant's situation. Like the RPD, the RAD found that the applicant was required to exhaust the remedies in Israel before claiming protection from Canada.

[26] To rebut the presumption of state protection, the applicant had to prove that he had exhausted all available remedies in vain (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 46 [*Hinzman*]). The applicant's sole attempt to exhaust his remedies in Israel was limited to consulting with an organization that supports those who do not wish to perform military service. According to the applicant, the members of this organization apparently told him that he had no choice but to perform his military service, otherwise he would risk imprisonment. However, the evidence does not show that he had inquired of other people, such as a counsel, about the other legal options available to him. The evidence in the record indicates that there were various reasons for which a person could be legally exempted from military service and that many objectors had succeeded in obtaining a release on the same grounds the applicant could have raised. The same evidence also referred to the possibility of requesting to be assigned to non-combatant positions or to be exempted from carrying weapons to perform military service without going against his beliefs. In this case, the applicant left Israel for Canada, even before availing himself of such remedies. However, an applicant cannot be granted refugee protection if they have not properly attempted to obtain the protection offered by their country of origin *(Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p 724; *Hinzman* at paras 52, 56). The applicant failed to convincingly demonstrate that it was objectively reasonable for him not to have claimed such protection.

[27] The applicant also faulted the RAD for its analysis of his fear of returning to Israel. In particular, he alleged that the RAD should have considered that he would be considered a traitor and that he would be at risk of being unjustly imprisoned and persecuted. He argued that the RAD underestimated the seriousness of his situation by stating that incarcerating a conscientious

objector who refused to perform military service did not constitute persecution *per se* and that there was no persecution if the punishments given were not severe. In this regard, he relied on section 169 of the Handbook, which reads as follows:

> A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

[28] The RAD's reasons show that it considered the risk that the applicant would be imprisoned for his refusal to perform his military service.

[29] The RAD reviewed the Israeli law on conscription and the applicable punishment for refusing to perform compulsory military service to determine whether it is a general law that would be applied fairly and impartially in terms of prosecution and punishment. It noted that desertion of the army is punishable by imprisonment of up to fifteen (15) years and that a soldier who is absent without authorization may be imprisoned for a maximum of two (2) years.

[30] The RAD then addressed the issue of exemptions from the obligation to perform military service and examples of prison sentences for conscientious objectors who were denied their request for exemption. It noted that this evidence shows that these types of sentences could recur several times and that there was no indication that those who had political objections based on the treatment of Palestinians were treated differently from other deserters.

[31] The RAD added that incarcerating a conscientious objector who refused to perform military service did not in itself constitute persecution and that there was no persecution where the punishment inflicted was not severe. It found that the RPD had correctly determined that the punishments were not excessively severe. The RPD determined, after considering the objective evidence, that it did not support the finding that punishments for deserters amounted to persecution.

[32] The Court reiterates that punishments for conscientious objectors generally do not amount to persecution or risk under section 97 of the IRPA (*Ates v Canada (Minister of Citizenship and Immigration*), 2005 FCA 322; *Aytac v Canada (Minister of Citizenship and Immigration)*, 2006 FC 560 at paras 31–32 [*Aytac*]). The applicant had the onus of proving the contrary (*Storozhuk v Canada (Citizenship and Immigration),* 2017 FC 74 at para 24; *Karen v Canada (Citizenship and Immigration)*, 2011 FC 1217 at para 19 [*Karen*]). In the absence of evidence to this effect and in the absence of better arguments on appeal on the risk of return, the RAD analysis was reasonable.

[33] Finally, the applicant argued that the RAD failed to consider all the evidence that Israel [TRANSLATION] "does not comply with international humanitarian law and the rights of children and that it is likely that he will be obligated to violate these rights by agreeing to serve in the Israeli army." In general, the applicant argued that, as a result of these violations of international humanitarian law, any punishment that could be imposed on him for refusing to participate in such acts would in itself constitute persecution.

[34] In its reasons, the RAD considered whether the Israeli reserve service was illegitimate under international law in accordance with section 171 of the Handbook, which reads as follows:

> 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.

[35] This is the second exception to the rule that an applicant cannot generally claim refugee protection solely because they do not want to serve in their country's army. According to James Hathaway (*The Law of Refugee Status*, Markham: Butterworths, 1991), cited in *Lebedev*, insubordination can result in refugee status recognition if it reflects the implicit political opinion that the military service in question is fundamentally illegitimate under international law (*Lebedev*, para 14).

[36] The Court agrees that isolated incidents do not in themselves constitute a violation condemned by the international community (*Volkovitsky v Canada (Citizenship and Immigration)*, 2009 FC 893 at paras 40–41 [*Volkovitsky*]; *Treskiba v Canada (Citizenship and Immigration),* 2009 FC 15 at para 7).

[37] In this case, the RAD considered the evidence filed by the applicant of Israel's failure to comply with several United Nations resolutions concerning the occupied Palestinian Territories and allegations that Israel committed war crimes during incursions into Gaza in 2008 and 2014.

It also referred to the Amnesty International report on protests in 2018 in which some soldiers stationed near the fence shot people inside Gaza, in violation of international law. The RAD found that the applicant would "probably not have been obligated to act in this manner" or obligated to commit an act that would be condemned by the international community.

[38] The applicant had the onus of demonstrating, on a balance of probabilities, that there was a reasonable possibility of being called upon to participate in actions contrary to international law (*Volkovitsky* at para 43); *Karen* at para 25; *Aytac* at para 17).

[39] In this case, the RAD acknowledged that the applicant was required to report for his military service in Gaza. However, it relied on the fact that his service was only for a period of four (4) weeks, whereas the alleged acts took place at specific points in time (in 2008, 2014, and 2018). In light of this evidence, it could reasonably find that the applicant had not demonstrated that he would be forced to participate in acts that could be condemned by the international community.

[40] In conclusion, the Court reiterates that deference is due to RAD decisions and that it is not up to the Court to reassess the evidence to reach a different conclusion (*Vavilov* at para 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). The Court is of the view that when they are read holistically and contextually, the RAD's reasons meet the standard of reasonableness set out in *Vavilov*. The decision was based on internally coherent reasoning and is justified in light of the relevant factual and legal constraints (*Vavilov* at para 85).

[41] For these reasons, the application for judicial review is dismissed. No question of general importance was submitted for certification, and the Court is of the opinion that this case does not raise any.

**JUDGMENT in IMM-6383-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Sylvie E. Roussel"

Judge

Certified true translation
Sebastian Desbarats

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6383-20 |
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| Suzanne Trudel | FOR THE RESPONDENT |

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