Date: 20071024

Docket: IMM-81-06

Citation: 2007 FC 1103

Ottawa, Ontario, October 24, 2007

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

BARUCH TEWELDE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Tewelde is a citizen of Israel who seeks judicial review of the decision of the Refugee Protection Division (RPD) rejecting his claim under section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. (the Act)

[2] Mr. Tewelde alleges that he fears persecution because he objects, on grounds of conscience, to serving as a reservist in the Israeli Defence Forces (IDF) in either Gaza or the West Bank, given his belief that the IDF has repeatedly committed human rights violations in those areas, including the reckless shooting and shelling of civilians, the use of civilians as human shields, and the wide scale destruction of civilians' houses without due regard to their security.

[3] In its fourteen page decision, the RPD focuses on the punishment imposed on conscientious objectors in Israel, for instance how he might be treated if incarcerated, and concludes that the imposition of such penalties would not amount to persecution. It also reviews whether the applicant would be subject to discrimination at large because of his refusal to serve in the Occupied Territories of Gaza and the West Bank. On that issue, the RPD also concludes that there is no reasonable possibility of persecution. These findings are not contested by the applicant.

[4] The RPD also considered that following the decision of the Federal Court of Appeal in *Zolfagharkhani* v. *Canada (Minister of Employment and Immigration) (F.C.A.),* [1993] F.C.J. No. 584[1], Mr. Tewelde could have a valid claim under section 96 of the Act as a selective conscientious

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[1] Although the RPD does not expressively mention paragraph 171 of the UNHCR handbook, it evidently had it in mind. Such provision 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.

objector, provided that the military actions objected to "are judged by the international community to be contrary to basic rules of conduct". The RPD essentially concludes in two paragraphs, however, that there is no objective basis for such a finding in Mr. Tewelde's case.[2]

[5] It is in respect of this last finding that the applicant argues the RPD erred, either by ignoring important documentary evidence that clearly contradicts its conclusions, or by failing to give adequate reasons, thereby breaching its duty of fairness.

[6] There is no dispute that whether or not the IDF's actions in Gaza and the West Bank, in which the applicant might be liable to participate, involve human rights abuses or other reprehensible conduct of the type referred to in paragraph 171 of the UNHCR handbook is a question of fact. The issue is therefore reviewable on the most deferential standard of review (*Lebedev v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 975, at par.55; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 521, at par.168; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at par.38).

[7] In respect of the alleged failure to give adequate reasons, the Court will normally intervene if there was a breach of procedural fairness. (*Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817; *Sketchley v. Canada*, [2005] F.C.J. No. 2056).

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[2] The RPD raises a few issues related to the claimant's subjective fear but it makes no conclusions in that respect.

[8] It is trite law that the decision-maker is presumed to have considered all the evidence on record, and there is no doubt in this matter that all of the passages referred to by the applicant were indeed part of the record before the RPD. However, the applicant relies on the principle set out in *Cepada-Gutierrez,* [1998] F.C.J. No. 1425 to argue that in the particular circumstances of this case, the Court should infer from the absence of any reference to certain evidence that the RPD simply ignored it.

[9] As a first step, the Court must therefore consider the evidence in question and determine its importance relative to the issue that was before the RPD.

[10] First, as noted in his PIF and his testimony before the RPD, the applicant had referred to specific types of human rights violations and abuses committed by the IDF. In support of his contentions and to corroborate his testimony, the applicant filed, among other materials, Human Rights Watch reports dated 2004 and 2005 (pages 1- 75 of exhibit C-3, at pages 264 to 338 of certified record) as well as three documents (pages 75-90 of exhibit C-3, at pages 339-354 of the certified record) dealing more specifically with the treatment of conscientious objectors in Israel.

[11] In its decision, the RPD refers to some portions of exhibit C-3 which address the treatment of conscientious objectors (particularly pages 75, 84 and 85). The Court notes that such passages were expressly referred to by the applicant during the oral submissions made at the hearing. The

RPD makes no reference to any documentation whatsoever when it examines the issue that the applicant challenges here.

[12] A review of the documentation produced in support of the applicant's allegations of house destruction and of the use of civilians as human shields, etc…, indicates that Human Rights Watch's observations and comments are based on years of investigation. For example, the report states:

p. 324 … This report documents these and other illegal demolitions. Based on extensive research in Rafah, Israel and Egypt, it places many of the IDF's justifications for the destruction, including smugglers' tunnels and threats to its forces on the border, in serious doubt. The pattern of destruction, it concludes, is consistent with the goal of having a wide and empty border area to facilitate long term control over the Gaza Strip. Such a goal would entail the wholesale destruction of neighborhoods, regardless of whether the homes in them pose a specific threat to the IDF, and would greatly exceed the IDF's security needs. It is based on the assumption that every Palestinian is a potential suicide bomber and every home a potential base for attack. Such a mindset is incompatible with two of the most fundamental principles of international humanitarian law (IHL): the duty to distinguish combatants from civilians and the responsibility of an Occupying Power to protect the civilian population under its control.

This report also documents – through witness testimony, satellite images and photographs – the extensive destruction from IDF incursions deep into Rafah this past May.

[13] It is also worth noting certain extracts of the report relied upon by the applicant:

p. 328 In May 2004, Rafah witnessed a level of destruction unprecedented in the current uprising, resulting in 298 demolished homes…

> In investigating the events of May 2004 and other demolitions, Human Rights Watch documented systematic violations of international humanitarian law and gross human rights abuses by the Israeli military…
>
> p. 326 IDF positions fire with large caliber machine guns and tanks at civilians areas. Based on multiple visits to the area by Human Rights Watch since 2001 and interviews with local residents and foreign diplomats, aid workers, and journalists, this shooting appears to be largely indiscriminate and in some cases unprovoked. In July 2004, nearly every house on Rafah's southern edge was pockmarked by heavy machine gun, tank, and rocket fire on the side facing the border. Bullet holes were not only clustered around windows or other possible sniper positions, but sprayed over entire sides of buildings. Human Rights Watch researchers also witnessed indiscriminate use of heavy machine gun fire against Palestinian civilian areas in nearby-Khan Yunis, without apparent shooting by Palestinians from that area at the time…
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> Both the IDF and Palestinian armed groups use tactics that place civilians at risk. Under customary international law, civilians must be kept outside hostilities as far as possible, and they enjoy general protection against danger arising from hostilities. Human Rights Watch documented multiple cases where the IDF converted civilian buildings into sniper positions during incursions and forced residents to remain with them inside. In some cases, the IDF coerced civilians to serve as "human shields, while searching Palestinian homes, a practice strictly prohibited by international humanitarian law…
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> p. 325 In the case of Rafah, it is difficult to reconcile the IDF's stated rationales with the widespread destruction that has taken place. On the contrary, the manner and pattern of destruction appears to be consistent with the plan to clear Palestinians from the border area, irrespective of specific threats.

[14] Faced with this evidence among other things, the RPD simply says in its decision at p.8:

> "While the record is not complete on this war there is **little in the country documentation or the claimant's observations to suggest** that persecution of the particular claimant for military evasion in this conflict would in and of itself mean that the persecution for avoiding service would constitute persecution because the conflict involves action abhorrent by international standards and internationally condemned.
>
> The panel has no serious reasons to believe that the state of Israel deliberately targets civilians in its campaign to identify and deal with terrorists. While the army may over react in certain circumstances in an attempt to maintain order and protect borders even in circumstances when deliberately provoked by stone throwers or suicide bombers, **there is no persuasive evidence** that the army is actively engaged in systemic killings or systemic abuse that violates fundamental human rights of civilians in a war".
>
> (my emphasis)

[15] With respect to actions considered abhorrent by international standards and which have attracted international condemnation, the respondent cannot point to any documentation in the certified record that could support the RPD's specific reference to a campaign to identify and deal with terrorists or to the army overreaction in certain circumstances.

[16] In *Lebedev v. Canda* (*Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 975, a recent decision on the subject of selective conscientious objectors, my colleague Justice Yves de Montigny examined what section 171 of the UNHCR handbook means by "actions… condemned by international communities as contrary to basic rules of human conduct…", at paragraphs 57 and following. Justice de Montigny adopts most of the findings of Justice Ann MacTavish in *Hinzman, supra*, in that respect.

[17] It appears that international condemnation is not limited to an assessment by a state or inter-state body. As noted at paragraph 70 of *Lebedev*, "There will also be instances where political expediency will prevent the U.N or its member states from condemning the violation of international humanitarian law. This is why reports from credible non-governmental organizations, especially when they are converging and hinge on ground staff, should be accorded credit. Such reports may be sufficient evidence of unacceptable and illegal practices".

[18] In this regard, the decision of Justice Bud Cullen in *Ciric* v. *Canada (Minister of Citizenship and Immigration)*, [1994] 2 F.C.J. 65, is on point. In that decision, observations and comments of Helsinki Watch, Amnesty International and the International Committee of the Red Cross were considered sufficient to constitute international condemnation.

[19] It is evident from the above that in the instant case, the various reports of Human Rights Watch (of which only one was commented on by the Court in these reasons) constituted highly relevant evidence that not only corroborated the applicant's testimony, but indeed went to a central element of the claim.

[20] Although *Lebedev* dealt with the actions of the Russian army in Chechnya and a very different record then the one presently before the Court, it is nonetheless of assistance in the present case to note Justice de Montigny's finding that the PRRA officer

was, at the very least, under an obligation to substantiate her conclusion that the evidence on record, which included U.S. Department of State reports and a War Resisters International report, did not establish a breach of international standards by the Russian army.

[21] The Court is satisfied that the RPD's use of the words "there is little…to suggest" cannot be meant to refer to the HRW report referred to above which expressly alleges that the IDF engaged in "systemic violations of international humanitarian law and gross human rights abuses". Having reviewed all the evidence, the Court is convinced that this is indeed a case where it should infer that the RPD ignored the evidence.

[22] In any event, if contrary to my belief, the RPD indeed considered the evidence at issue, its reasons are inadequate to enable the Court or the applicant to review their validity, or to appreciate why some evidence was discarded. A simple statement that the evidence is not persuasive, without further comment, does not meet the duty of fairness incumbent on the RPD. As Justice Sexton observed in *Via Rail Canada Inc. v. National Transportation Agency*, [2000] F.C.J. No. 1685, at paragraph 22, "(t)he obligation to provide adequate reasons is not satisfied by merely reciting the submissions of the parties and stating a conclusion (…) (t)he reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors."

[23] The parties have not sought certification of any question and the Court finds that this case turns on its own facts.

ORDER

THIS COURT ORDERS that

1. The application is granted.
2. The decision is set aside and the matter shall be sent to a new panel for re determination.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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