

Date: 20080625

Docket: IMM-2110-07

Citation: 2008 FC 799

Ottawa, Ontario, June 25, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

DOLMA TSERING

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION; THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2007, Ms. Dolma Tsering tried to come to Canada from the United States to join her boyfriend, Mr. Karma Tashi, who is a permanent resident of Canada. Ms. Tsering had been living and working in the United States since 2000.

[2] She was stopped at the border by an immigration officer who found that she was ineligible to make a refugee claim in Canada. Normally, a person entering Canada from the United States is ineligible because Canada recognizes the United States as a “safe third country” in which to make a refugee claim. However, stateless persons who are former habitual residents of the United States are

exempted from the safe third country rule. Similarly, persons who are family members of permanent residents of Canada are exempted from the policy.

[3] The immigration officer who reviewed Ms. Tsering's circumstances found that, while she was stateless, she was neither a former habitual resident of United States nor a family member of a permanent resident of Canada. Only the former finding is at issue here. Ms. Tsering argues that the officer's reasons for concluding that she was not a former habitual resident of the United States were either inadequate or unreasonable. She asks to have another officer reconsider her circumstances.

[4] I agree that the officer's reasons were inadequate and must, therefore, allow this application for judicial review.

I. Issue

[5] Were the officer's reasons for finding that Ms. Tsering was ineligible for refugee protection adequate?

II. Analysis

(1) The Legislative Framework

[6] As mentioned, persons who come to Canada from the United States are, generally speaking, ineligible to make refugee claims here. However, there is an exception for stateless persons who are former habitual residents of the United States. (*Immigration and Refugee Protection Act (IRPA)*, S.C. 2001, c. 27, s. 101(1)(e); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 159.2, see Annex “A” attached). In this case, the immigration officer had to decide whether Ms. Tsering fell within that exception.

(2) The Adequacy of Reasons

[7] In general, a decision-maker must provide reasons that serve the purposes for which reasons are required by law – to inform the parties of the basis for the decision and provide a foundation for a meaningful review of it on appeal or judicial review: *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25, [2000] F.C.J. No. 1685 (F.C.A.) (QL); *R. v. Braich*, [2002] 1 S.C.R. 903; *R. v. Sheppard*, [2002] 1 S.C.R. 869. A failure to give adequate reasons is a breach of natural justice.

(3) The Officers’ Decision

[8] In fact, two officers were involved in Ms. Tsering’s case. One officer reviewed her circumstances and recommended that Ms. Tsering be found ineligible. A second officer, after reviewing the first officer’s notes, concluded that Ms. Tsering was, in fact, ineligible because she was not a former habitual residence of the United States.

[9] In these circumstances, both officers' findings constitute the actual reasons for the decision. On the question whether Ms. Tsering was a former habitual resident of the United States, the first officer noted the following:

- Subject did not obtain a driver's license, attempt to obtain any legal status or open a bank account while in the United States.
- She did not have a fixed address, she moved frequently.

[10] The second officer, after reviewing the first officer's notes, simply stated that "subject does not meet the definition of Habitual Resident". Both officers concentrated on the question whether Ms. Tsering was eligible as Mr. Tashi's common-law spouse and gave little attention to the issue of habitual residence.

[11] The meaning of "former habitual residence" was discussed in *Maarouf v. Minister of Employment and Immigration*, [1993] F.C.J. No. 1329 (FCTD) (QL). There, Justice Cullen described "former habitual residence" as being "broadly comparable" to the relationship between a citizen and his or her country of nationality. The term "implies a situation where a stateless person was admitted to a given country with a view to a continuing residence of some duration, without necessitating a minimum period of residence" (at para. 38). Justice Cullen concluded that the Immigration and Refugee Board had erred when it found the claimant was not a former habitual resident of Lebanon. The claimant had lived in Lebanon for five years as a child and spent a few months there as a teenager.

[12] Admittedly, the context in which the term “habitual residence” was used was somewhat different in *Maarouf* than the case before me. That case dealt with the definition of a Convention refugee in what is now s. 96 of IRPA. Similarly, Justice Luc Martineau considered the meaning of “habitual residence” in relation to sections 96 and 97 in *Kadoura v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1057, [2003] F.C.J. No. 1328 (F.C.) (QL). Justice Martineau applied the reasoning in *Maarouf* and found that the refugee claimant could not be considered a former habitual resident of Lebanon as he had never actually lived there (although his parents had).

[13] While these decisions involved considerations not relevant here (such as the claimant’s right of return and the presence or absence of persecution), both of them included a discussion of “habitual residence” that I believe can be applied to this case. In essence, to be considered a “former habitual resident”, a claimant must show that he or she had “established a significant period of *de facto* residence in the country in question” (*Maarouf*, above, at para. 44). Given that the same term is used in s. 96 and s. 101(1)(e) of IRPA, it should be given the same meaning.

[14] In my view, the officers’ findings here do not constitute adequate reasons for deciding that Ms. Tsering was not a former habitual resident of the United States. The first officer’s notes mention only a few of the many factors that might have been relevant to an assessment whether Ms. Tsering had formed any significant attachment to the United States, but which do not, in themselves, suggest that she had not been a habitual resident there. The fact is that she lived and worked in the United States for seven years. In my view, the reasons do not serve to explain why Ms. Tsering was found not to be a habitual resident of the United States during that lengthy period

of time. Further, it is not clear what test the officers were actually applying, if any. Therefore, the reasons do not permit a meaningful review of the merits of the officers' conclusion. As discussed, the proper test is whether the claimant has established a significant period of actual residence in the country in question.

[15] Accordingly, I must allow this application for judicial review and order a reconsideration of Ms. Tsering's eligibility to make a refugee claim by another officer. The parties requested an opportunity to make submissions regarding a question of general importance. I will entertain any submissions received within ten days of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The Court will consider any submissions regarding a certified question that are filed within ten (10) days of the issuance of these reasons.

“James W. O’Reilly”

Judge

Annex "A"

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

Loi sur l'immigration et la protection des réfugiés, L.R. 2001, ch. 27

Convention refugee

Définition de « réfugié »

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 themselves 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.

Person in need of protection

Personne à protéger

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 themselves 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

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes

in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(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.

Ineligibility

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

...

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence;

Immigration and Refugee Protection Regulations, SOR/2002-227

Non-application — former habitual residence

159.2 .Paragraph 101(1)(e) of the Act does not apply to a claimant who is a stateless person who comes directly or indirectly to Canada from a designated country that is their country of former habitual residence.

originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(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.

Irrecevabilité

101. (1) La demande est irrecevable dans les cas suivants :

[...]

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Non-application : résidence habituelle

159.2 L'alinéa 101(1)e) de la Loi ne s'applique pas au demandeur apatride qui arrive directement ou indirectement au Canada d'un pays désigné dans lequel il avait sa résidence habituelle.

FEDERAL COURT
SOLICITORS OF RECORD

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