Federal Court  Cour fédérale

Date: 20101001

Docket: IMM-5787-09

Citation: 2010 FC 979

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 1, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ALEXANDR PIKULIN
YELENA PIKULIN
VALENTIN PIKULIN
MAKSIM PIKULIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are citizens of Israel; their refugee claim was rejected on June 15, 2009, by the Refugee Protection Division of the Immigration and Refugee Board (the panel) on the ground that the principal applicant's fear of being persecuted for his political opinion was unjustified and that he had other options in his country. Hence this application for judicial review.

[2] The reasonableness of a panel decision that a claimant is neither a refugee nor a person in need of protection is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47). As regards the possibility of obtaining state protection, provided that the panel's reasons can stand up to a somewhat probing examination, the Court will not interfere (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, at paragraph 55; *Capitaine v. Canada (Citizenship and Immigration)*, 2008 FC 98, at paragraphs 23 and 28 (*Capitaine*); *Jabbour v. Canada (Citizenship and Immigration)*, 2009 FC 831, at paragraph 19 (*Jabbour*).

[3] In the case at bar, the claim of the principal applicant, Alexandr Pikulin, turns on a single incident that occurred in Israel, but he also cites his participation in political activities in Canada. The other applicants are basing their claim on that of the principal applicant.

[4] It must be noted that the principal applicant moved from Uzbekistan to Israel in 1999 with his wife. Their two children were born in Israel. He claims that on November 22, 2006, in the territories occupied by Israel, he participated in a peaceful demonstration against the erection of the separation wall. The demonstration was organized by the group Peace Now.

[5] Some thirty people demonstrated their disapproval, including the principal applicant, who was near some construction equipment. On that occasion, ten demonstrators were allegedly arrested

by security forces. At times the principal applicant refers to [TRANSLATION] “border security soldiers” and at times to the police. It is also unclear specifically why the applicant was arrested, other than that he was allegedly told that he was being placed in administrative detention under the Emergency Law.

[6] The principal applicant was allegedly taken by Jeep to a prison called Abu-Kabir, possibly under the army’s control. In any event, the principal applicant was apparently confined with Arabs or Palestinians in a cell that had no light. According to the principal applicant, he was held for three days. He was not allowed to call a lawyer or his wife. He was also deprived of food, and was interrogated and psychologically harassed. He also claims that he was treated unfavourably because he is of Russian or Soviet origin, and that he was made to sign an undertaking that he would not demonstrate against the wall again. The details of the signature and the content of the undertaking are unknown.

[7] In the days that followed, the principal applicant allegedly tried to file a complaint with the local police. His testimony on this point seems vague. In any case, the police apparently did not take him seriously because of the poor quality of his Hebrew. Elsewhere in his testimony, the principal applicant claims that he was threatened that he would be returned to Uzbekistan if he continued to complain about the officers responsible for his arrest. He also states that he consulted a lawyer to undertake other proceedings, but found that the fees were too high. Once again, the details concerning this consultation and the legal advice he was given are very vague.

[8] In May 2007, the applicants arrived in Canada and claimed refugee protection on the grounds of their membership in a particular social group and the principal applicant's political opinion. During the hearing on June 15, 2009, it was also argued that the principal applicant is a "refugee sur place" because of his participation in political demonstrations in Canada despite the fact that he had signed an undertaking that he would no longer participate in demonstrations. The principal applicant participated in two demonstrations in Montréal for peace in Israel. He fears being persecuted by the authorities if he were to be returned to his country because, according to him, he was filmed by an employee of the Israeli consulate. He can also be seen in photos taken in April 2009, proudly posing with a Peace Now placard (Exhibit P-7). The circumstances surrounding the taking of these various photos produced by the applicant were not explained at the hearing.

[9] Having had the benefit of reviewing all of the evidence in the record, the Court finds it surprising, to say the least, that the credibility of the principal applicant's account was not seriously examined by the panel. His entire account is based on several gratuitous and unverifiable statements, while documents that could corroborate the principal applicant's statements were not produced. The plausibility of certain statements was not raised in the decision. The panel seems to have been satisfied with explanations that appear somewhat questionable to us.

[10] In short, was the applicant arrested and detained for three days as he claimed loud and clear before the panel, and are we also to believe him when he states that he appealed to the police and consulted a lawyer there?

[11] In any case, given that the fear of persecution must continue to exist at the time the panel hears a refugee claimant's claim, we can wonder why these applicants waited seven months before leaving Israel. We can probably also question the principal applicant's sudden and periodic militancy. He himself admits that he did not become a member of Peace Now before his departure from Israel in 2007, supposedly because of the dues that he would have had to pay and that were too high. Claiming that he has always been a Peace Now sympathizer, he was supposedly informed by e-mail that he could not be a member in Canada because it is an Israeli association.

[12] The fact of the matter is that the credibility of the principal applicant's account and the applicants' subjective fear of persecution are at the core of this refugee claim. However, in the decision under review, the panel refrained from examining these essential aspects of the claim, except to note in passing that the principal applicant "did not produce any document regarding his arrest". The panel also noted that the principal applicant "[a]t the hearing…corrected a detail in his PIF: while he was being detained, he was able to speak to his spouse and to a lawyer". However, if we refer to the hearing transcript, we can see that this alleged correction to the Personal Information Form (PIF) was never made.

[13] In this case, the refugee claimant's personal history became mere decoration. In the absence of a true analysis of the claimant's subjective fear of persecution, the panel's finding that the claimant could avail himself of state protection becomes highly suspect and is reviewable by the Court (*Flores v. Canada (Minister of Citizenship and Immigration)* 2010 FC 503; *Jimenez v. Canada (Minister of Citizenship and Immigration)* 2010 FC 727). In the case at bar, if the panel had

truly addressed the issues of the claimants' credibility and subjective fear, clearly and articulately setting out in the decision under review its findings of fact in that regard, this could perhaps have prevented the truncated analysis of the objective basis of the refugee claim and of the availability of state protection, and the Court would probably not have found any reason to intervene today.

[14] First, the question of whether treatment may be considered to be persecution is a question of fact within the panel's exclusive purview (*Sagharichi v. Canada*, 182 N.R. 398, 1993 CarswellNat 316). In the case at bar, the panel's general finding that "the [principal] claimant's fears of being persecuted by reason of his opinions are unjustified" is not based on any analysis of the evidence in the record and seems capricious to us.

[15] Often there is an element of repetition and relentlessness at the heart of persecution (*Rajudeen v. Canada*, 55 N.R. 129, 1984 CarswellNat 675; *Valentin v. Canada*, [1991] 3 F.C. 390, 167 N.R. 1), and consequently we may wonder if the principal applicant's experience following the November 22, 2006 incident can satisfy the objective element of the fear of persecution. Nevertheless, rather than tackling this issue head on, the panel resorted to the expedient that "it is completely legal in Israel to express one's opinion against erecting the wall", even though the principal applicant did not establish that his arrest and detention were illegal.

[16] It must be recalled that the panel must first characterize the actions taken by the authorities on the basis of the definition of the word "persecution" and of one of the five Convention grounds.

In so doing, the panel cannot arbitrarily exclude from the analysis any state infringement of fundamental rights, which must of course be demonstrable from an objective standpoint.

[17] Unfortunately, the panel limited its analysis to the question of whether the principal claimant could have been physically mistreated during his detention, without examining all of the documentary evidence concerning the situation prevailing in the occupied territories. The panel's analysis in the few paragraphs that touched on the issues of persecution and state protection is convoluted, to say the least.

[18] In the decision under review, the panel mentioned the case of Shaul Arieli, a figurehead in the Peace Now movement, who gives talks around the world and is apparently not harassed because of his political opinion: "This proves that it is completely legal in Israel to express one's opinion against erecting the wall, and that legal proceedings to that effect are authorized." This conclusion is purely rhetorical and speculative. Mr. Arieli is Jewish and is a former army colonel.

[19] In this regard, the Russian or Soviet origin of the principal applicant and his wife seems to have been completely brushed aside by the panel. The principal applicant comes from a multicultural family: his mother was half-Russian and half-German; his father was half-Jewish and half-Russian. The principal applicant's wife was born in Tajikistan; she is not Jewish. Through his paternal grandfather who was Jewish, the principal applicant was authorized to immigrate to Israel. They emigrated from Uzbekistan in 1998. In the decision under review, the panel did not examine

the issue of their membership in a particular social group and the treatment of similarly situated persons.

[20] Once again, the issue is rather to determine whether in fact the refugee claimant or similarly situated persons are persecuted or have serious reasons to fear that they will be persecuted (where applicable, further to the enforcement of the law in question by representatives of the state).

[21] Moreover, in terms of the objective basis for the fear of persecution, the panel must consider, based on credible evidence in the record, whether it would be objectively unreasonable for the claimant not to have sought state protection before seeking protection in Canada (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at paragraph 49 (*Ward)*; *Capitaine*, above, at paragraphs 20 to 22).

[22] Of course, at this stage of the panel's analysis, the refugee claimant was believed; otherwise, the entire exercise loses its meaning and purpose (*Flores*, above, at paragraphs 29 to 32).

[23] That being said, in a case where a refugee claimant claims that the agent of persecution is the state itself or one of its agents, can the democratic nature of the state serve as a universal screen, allowing the panel to reject a refugee claim without a serious analysis of the specific reasons for the fear of persecution and the personal situation of that individual?

[24] To ask the question is to answer it: in assessing the possibility for a claimant to obtain state protection, the panel must take into account the claimant's personal situation and the various means at his or her disposal, including the claimant's own testimony about personal incidents during which state protection was not provided, without disregarding the documentary evidence in the record and the testimony of similarly situated persons (*Ward*, above, at paragraph 50; *Jabbour*, above, at paragraphs 22, 23 and 31; *Zaatreh v. Canada (Citizenship and Immigration)*, 2010 FC 211, at paragraphs 38 and 55).

[25] It should be recalled that the principal applicant is complaining of being arrested and detained without a warrant for three days in the occupied territories after his participation in a peaceful demonstration against the erection of the separation wall. The panel concluded point blank that "options were available to him and that he did not avail himself of them", such as the police, the ombudsman and the courts. Let us now see whether this conclusion is consistent with the credible evidence in the record.

[26] In the case at bar, the general documentation in the record shows that in the occupied territories, Israel Military Order 1507 allows persons suspected of having committed a security-related offence to be arrested without a warrant. These persons may be held for ten days without seeing a lawyer or appearing in court. In practice, Israeli law seems to exclude the possibility of obtaining from the courts a writ of habeas corpus in such cases. In light of the documentary evidence, the Court wonders how the police can investigate in cases where the army is involved,

and consequently considers that the reference in the decision under review to the possibility of contacting the police or even the ombudsman to be equally superfluous.

[27] In the final analysis, it is not up to this Court to tell the panel how it must dispose of this refugee claim. Specifically, this Court does not rule on the merits of the applicants' allegations of persecution or on the existence of state protection in such cases. It would be not only presumptuous but also contrary to the nature of a judicial review for the Court to allow itself to rewrite the decision under review and find additional grounds that would allow the panel to reject the refugee claim but that were not referred to by the panel in its decision.

[28] It may well be that the applicants' fear has no subjective and objective basis. The reasonableness of the panel's current reasoning for rejecting the refugee claim is, however, hindered by the laconic nature and the lack of clarity of the panel's reasons. This created the imbroglio in which the parties now find themselves, and they must, for better or worse, challenge or defend the legality of the impugned decision.

[29] Nevertheless, so that this judicial review does not become a mug's game, the Court cannot ignore the absence of any serious analysis of the principal applicant's credibility and the applicants' subjective fear. As Justice Létourneau mentioned in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636, [2008] F.C.J. No. 399 (QL), at paragraphs 14 and 15, the determination of questions of credibility prior to an analysis of the availability of state

protection makes it possible to spare scarce judicial resources. It is for that reason that the judgment that follows includes an instruction in that regard.

[30] This application for judicial review will therefore be allowed. The matter will be referred for reconsideration and review by a different panel, which will need, among other things, to analyze the principal applicant's subjective fear, including an assessment of the credibility and plausibility of his account, before proceeding with an analysis of the question of persecution and the availability of state protection. The parties did not propose any question of general importance for certification, and no such question will be certified by the Court.

JUDGMENT

THE COURT ORDERS AND ADJUGES that:

1. The application for judicial review is allowed;
2. The matter will be referred for reconsideration and review by a different panel, which will need, among other things, to analyze the principal applicant's subjective fear, including an assessment of the credibility and plausibility of his account, before proceeding with an analysis of the question of persecution and the availability of state protection;
3. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5787-09
STYLE OF CAUSE:	**ALEXANDR PIKULIN** **YELENA PIKULIN** **VALENTIN PIKULIN** **MAKSIM PIKULIN** **v.** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 21, 2010
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	October 1, 2010

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