A-388-95

CORAM: HUGESSEN J.A.
DÉCARY J.A.
CHEVALIER D.J.A.

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION,

Appellant,

AND:

NINAL KADENKO, BORIS FEDOSOV, ALEXANDER FEDOSOV AND MILA FEDOSOV,

Respondents.

Hearing held at Montréal
on Tuesday, October 15, 1996

Judgment delivered at Montréal
on Tuesday, October 15, 1996

REASONS FOR JUDGMENT OF THE COURT BY: **DÉCARY J.A.**

A-388-95

CORAM: HUGESSEN J.A.
DÉCARY J.A.
CHEVALIER D.J.A.

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION,

Appellant,

AND:

NINAL KADENKO, BORIS FEDOSOV, ALEXANDER FEDOSOV AND MILA FEDOSOV,

Respondents.

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Montréal, Quebec
on Tuesday, October 15, 1996)

DÉCARY J.A.

The motions judge, sitting on judicial review of a decision by the Convention Refugee Determination Division ("the Refugee Division"), certified the following question under subsection 83(1) of the *Immigration Act*:

> Where there has not been a complete breakdown of the governmental apparatus and where a State has political and judicial institutions capable of protecting its citizens, does the refusal by certain police officers to take action suffice to establish that the State in question is unable or unwilling to protect its nationals?

In her reasons, the motions judge herself suggested that this question should be answered in the affirmative and that once certain police officers in a democratic state refuse to take action, there is automatically incapacity on the part of the state.

In our view, the question as worded must be answered in the negative. Once it is assumed that the state (Israel in this case) has political and judicial institutions

capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. The answer might have been different if the question had related, for example, to the refusal by the police as an institution or to a more or less general refusal by the police force to provide the protection conferred by the country's political and judicial institutions.

In short, the situation implied by the question under consideration recalls the following comments by Hugessen J.A. in *Minister of Employment and Immigration v. Villafranca*:[1]

> No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. . . .

When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.[2]

In the case at bar, the Refugee Division made the following findings of fact and law:[3]

> [TRANSLATION] The claimants testified that they always complained to the same police station but that no action was ever taken.
>
> The fact that their complaint to one police station did not bear fruit is not a sufficient basis for concluding that the state of Israel cannot protect them.
>
> The documentation that was filed indicates that since 1990 almost four hundred and fifty thousand Russian-speaking persons have been repatriated to Israel pursuant to the Law of Return. More than one hundred and fifty thousand of them (more than 30%) are not Jewish. All the returnees, whether Jewish or not, receive very adequate financial assistance and special provision is made for them with respect to such things as housing and language courses to help them adjust.

---

1 (1992), 150 N.R. 232, at p. 233 (F.C.A.).

2 See *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171, at p. 176 (F.C.A.), approved by *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at p. 725.

3 A.B., at pp. 90-92.

> It is true that the documentation shows problems of discrimination, integration, intolerance and high unemployment, but nowhere could we find any problems of persecution within the meaning of the definition. Very often, these immigrants are specialists in their area of expertise and they usually have to occupy lower-level positions that do not pay very well. To deal with this situation, the state attempts to retrain them in a new area of expertise better suited to the economic situation. In this regard, the female claimant herself said that since she could not find work, she went to one of the agencies that assist returnees, which suggested that she take occupational retraining courses.
>
> In light of this evidence, we have a great deal of difficulty seeing how there can be an objective basis for the claimants' claims of persecution or how the government cannot protect them. It is hard for us to believe that after providing such considerable assistance to people who had fled their country of origin, a country would then want to persecute them and refuse to protect them.
>
> In this regard, we are following the principle concerning protection that was established by the Supreme Court of Canada in Ward, namely that the claimants must provide clear and convincing evidence that their country cannot protect them.

This finding of fact is amply supported by the evidence and the legal conclusion is amply supported by the case law. In point of fact, the motions judge simply substituted her opinion on the evidence for that of the Refugee Division, which is not her role on an application for judicial review.

The appeal will be allowed, the certified question will be answered in the negative, the Trial Division's judgment will be set aside and the application for judicial review will be dismissed.

Robert Décary
J.A.

Certified true translation

A. Poirier

A-388-95

MONTRÉAL, QUEBEC, THE 15TH DAY OF OCTOBER 1996.

CORAM: **THE HONOURABLE MR. JUSTICE HUGESSEN**
THE HONOURABLE MR. JUSTICE DÉCARY
THE HONOURABLE DEPUTY JUSTICE CHEVALIER

BETWEEN: MINISTER OF CITIZENSHIP AND IMMIGRATION,

Appellant,

AND:

NINAL KADENKO,
BORIS FEDOSOV,
ALEXANDER FEDOSOV,
MILA FEDOSOV,

Respondents.

J U D G M E N T

The appeal is allowed, the certified question in answered in the negative, the Trial Division's judgment is set aside and the application for judicial review is dismissed.

James K. Hugessen
J.A.

Certified true translation

A. Poirier

FEDERAL COURT OF APPEAL

A-388-95

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION,

Appellant,

AND:

**NINAL KADENKO, BORIS FEDOSOV,
ALEXANDER FEDOSOV AND MILA FEDOSOV**,

Respondents.

REASONS FOR JUDGMENT OF THE COURT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	A-388-95
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION, Appellant, **AND:** NINAL KADENKO, BORIS FEDOSOV, ALEXANDER FEDOSOV AND MILA FEDOSOV, Respondents.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 15, 1996

REASONS FOR JUDGMENT OF THE COURT (THE HONOURABLE MR. JUSTICE HUGESSEN, THE HONOURABLE MR. JUSTICE DÉCARY AND THE HONOURABLE DEPUTY JUSTICE CHEVALIER)

DELIVERED FROM THE BENCH BY: The Honourable Mr. Justice Décary

Dated: October 15, 1996

APPEARANCES:

Michèle Joubert	for the Appellant
Jacques Beauchemin	for the Respondents

SOLICITORS OF RECORD:

George Thomson Deputy Attorney General of Canada Ottawa, Ontario	for the Appellant
Alarie, Legault, Beauchemin Paquin, Jobin & Brisson Montréal, Quebec	for the Respondents