Date: 20081121

Docket: IMM-1044-08

Citation: 2008 FC 1292

Ottawa, Ontario, November 21, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

DAVID MOHILOV
LEILA MOHILOV
SHIMON MOHILOV
ARIEL MOHILOV

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision dated February 8, 2008, by member Pierre Duquette of the Refugee Protection Division of the Immigration and Refugee Board (the panel), that the applicants are neither Convention refugees nor persons in need of protection.

I. Issue

[2] The Court considers the following issues relevant:

a. Did the panel err by finding that the principal applicant would not necessarily be called upon to commit violations of international humanitarian law?

b. Did the panel err regarding the punishment for desertion by relying on the punishment that was imposed on the principal applicant in the past?

[3] The application for judicial review will be dismissed for the following reasons.

II. Facts

[4] The applicants are Israeli citizens. The principal applicant, David Mohilov, is 34 years old and is the spouse of Leila Mohilov, who is 31, and the father of Shimon and Ariel, who are both minors.

[5] The principal applicant emigrated from the former USSR (Russia) to Israel in June 1994. In May 1996, he was called up for his military service, which continued until September 1996. At the end of his training, he was told that he would be called for active duty in 1997.

[6] In September 1997, he went to Canada to escape the army and stayed as a visitor for one year, until September 1998.

[7] Although he should have been called up every year to perform one month of military service, the principal applicant heard nothing about military service until June 2003 when the authorities discovered, during an identity check, that he was wanted by the army. He was detained for two days and then sent to patrol for a month.

[8] The principal applicant married Leila, a Muslim, in August 2003. Leila had emigrated from Russia to Israel in February 2001. The applicant received an exemption from the army in 2004 because his wife was pregnant. On June 5, 2005, he served for one month as a patroller. In June 2006, he was called up for his annual month of service from July 5 to August 5 at a military base near the Lebanese border.

[9] The principal applicant left for Canada on June 27, 2006, to avoid being on active duty and claimed refugee protection on December 15, 2006. His wife and children arrived in Canada on December 8, 2006, and also claimed refugee protection at the same time as the applicant. The applicants say that they fear persecution on the ground of their religion, nationality and political opinion. They also believe that they are persons in need of protection because they will be subjected to a risk to their lives or to a risk of cruel and unusual punishment as well as to a risk of torture.

[10] Leila Mohilov bases her application on her husband's and adds that she has a Muslim name and was discriminated against.

III. Impugned decision

[11] First, the panel noted that the principal applicant served a month in the military in 2005 without problems or protests. When he came to Canada the second time, the applicant was trying to avoid the 2006 military service. The applicant explained that he was to report to the Zir Filadelfi base near the Lebanese border, and he concluded that he would have seen action. He stated that he would not have left Israel if he had not been sent to a combat unit. He said that he had no objection to serving in the army as long as he was not placed in a combat unit because then he would have to attack civilians and destroy their homes.

[12] The panel stated that the principal applicant could not have foreseen the 34-day war between Lebanon and Israel that began on July 12, 2006, when he decided to go to Canada and that he cannot justify his departure on the basis of a war that started afterwards. However, the panel believed the applicant when he said that he did not want to kill civilians, although such action was not necessarily a foregone conclusion in June 2006.

[13] The panel noted that the principal applicant was never a member of a political organization or party and never publicly expressed his opposition to attacking civilians. The only evidence that the panel received on this point was his own statement.

[14] The panel acknowledged that there was evidence in the record (Amnesty International and Human Rights Watch reports about Lebanon) indicating that war crimes were committed during the war between Israel and Lebanon in July and August 2006. On the other hand, that war is over, and

the principal applicant would not have to participate in that war if he were to return to Israel. To date, he has served three times, for periods of one to four months and has never been asked to commit crimes against humanity. The panel stated that a very low percentage of the half-million Israeli soldiers shot at civilians during the 34-day war.

[15] Furthermore, the applicant was not an officer and did not have to make decisions about the conduct of the war. As in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, [2007] 1 F.C.R. No. 561, he was merely a foot soldier. Although it is true that crimes were committed, there is nothing to indicate that the applicant would have been called upon to commit any crimes. There is no evidence that he would be unable to explain his refusal to act on an illegal order or that his punishment would be unreasonable if he refused to comply.

[16] The panel was of the view that the principal applicant did not have to engage in objectionable conduct at any time. There was no evidence to indicate that the applicant would have been forced to take part in war crimes or crimes against humanity, notwithstanding that he was called up to serve at the Lebanese border.

[17] The panel acknowledged that the evidence in the record showed that military service is compulsory in Israel and that there is no alternative or civil service. Men must complete one month of military service per year until they turn 45. Every government has the recognized right to require its citizens to perform military service and to punish those who refuse to serve or who desert. The

penalties may vary and are not regarded as persecution. However, the panel noted that, in certain circumstances, a deserter or draft dodger may be considered a refugee.

[18] The panel cites Professor James Hathaway, who notes that a claimant cannot claim refugee status merely because he does not want to serve in the army. On the other hand, there are three exceptions to this principle, which the Court referred to in *Lebedev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 728, 314 F.T.R. 286:

1. Military evasion might have a nexus to a Convention ground if conscription for a legitimate and lawful purpose is conducted in a discriminatory way, or if the punishment for desertion is biased in relation to a Convention ground;
2. Evasion might lead to Convention refugee status if it reflects an implied political opinion that the military service is fundamentally illegitimate under international law;
3. The final exception applies to those with “principled objections” to military service, more widely known as “conscientious objectors”.

[19] The applicant did not claim that his being called up for military service was discriminatory or that the punishment that he could receive would be biased on a Convention ground. He argued his claim on the second exception because he believed that the last time he was called up in July 2006, he would have been associated with illegitimate military actions.

[20] This exception is referred to in paragraphs 170 and 171 of the *Handbook on Procedures and Criteria for Determining Refugee Status* issued by the United Nations High Commissioner for Refugees (the UNHCR Handbook). To come within paragraph 170 of the Handbook, the applicant's refusal to serve in the army must be based on genuine political, religious or moral convictions or valid reasons of conscience. Paragraph 171 states that not every genuine moral or political conviction constitutes a sufficient reason for claiming refugee status. This paragraph also requires objective evidence that "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". The applicant did not provide any specific evidence of human rights violations in Israel's military actions in the occupied territories or in Lebanon. He did not prove that serious and numerous violations were committed or that he would be unable to escape them if he were conscripted. The second exception therefore does not apply to the applicant.

[21] If he were to return to Israel, the applicant would probably have to suffer the consequences of his desertion. The panel relied on the minor punishment that was imposed on him: two days' imprisonment for evading service from 1997 to 2003. Moreover, the applicant failed to show that his punishment would be excessive or biased in relation to a Convention ground.

[22] The panel also decided that the refugee claim of the female applicant and her children, who based their claims on that of the principal applicant, could not be allowed.

[23] The female applicant also alleged that she had been discriminated against because she has a Muslim name. The few examples that she provided at the hearing did not resemble persecution. According to the panel, the female applicant did not prove that she had a reasonable fear of persecution if she were to return to Israel.

[24] Last, there is no evidence that the applicants are persons in need of protection under section 97 of the Act.

IV. Relevant legislation

[25] The relevant legislation can be found in Schedule A at the end of these reasons.

V. Analysis

1. Did the panel err by finding that the principal applicant would not necessarily be called upon to commit violations of international humanitarian law?

[26] According to the applicant, the issue of whether he was called upon to commit violations of international law is a question of law, reviewable on the standard of correctness (*Lebedev*, above at paragraph 54 and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paragraph 37).

[27] He states that, in reviewing participation in violations of international humanitarian law, the panel considered the total number of soldiers in Israel and the fact that a very low percentage of these soldiers had to shoot at civilians during the war in Lebanon. The panel should have considered that Israeli soldiers committed other serious violations of human rights in other places where they

were mobilized. The percentage of soldiers who committed these violations is therefore higher than what the panel believed.

[28] The panel criticized the principal applicant for leaving Israel before the hostilities with Lebanon broke out and says that if the applicant were to return to Israel now, his participation in violating international humanitarian law would not be in the context of the war between Israel and Lebanon because it ended in August 2006. The applicant submits that his objection is not restricted to a territory or to the war with Lebanon, but applies to any place where Israeli soldiers violated international humanitarian law. The panel should therefore have considered other places where Israeli armed forces committed serious human rights violations.

[29] The principal applicant alleges that the punishment for refusing to serve or to carry out an illegal order may be regarded as persecution where the military action is condemned by the international community.

[30] He also submits that the standard of proof to be applied to facts that underlie a refugee claim is the balance of probabilities (*Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 F.C.R. 239). Thus, the principal applicant does not have to prove 100% that he will personally be called upon to commit crimes.

[31] In the respondent's view, the panel considered all the applicants' allegations and explanations. The principal applicant does not object to serving in the army, as long as he is not

placed in a combat unit, and the panel correctly found that he had not established that he had been asked to commit crimes against civilians in the past or that he would be called upon to commit them if he were to continue to perform his duties as a reservist.

[32] Likewise, the documentary evidence cited by the panel indicates that, notwithstanding that war crimes were committed during the recent war with Lebanon, there were no systematic violations of human rights by Israeli military forces.

[33] The respondent notes that it is settled law that a dislike of military service is not sufficient, in itself, to establish a well-founded fear of persecution (*Musial v. Canada (Minister of Employment and Immigration)*, [1982] 1 F.C. 290; 38 N.R. 55 (F.C.A.); *Popov v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 90, 24 Imm. L.R. (2d) 242 (F.C.T.D.)). On the other hand, the respondent notes that the applicant knew, before immigrating to Israel, that he would have to serve in the military while there (*Talman v. Canada (Solicitor General)*, (1995) 93 F.T.R. 266, 54 A.C.W.S. (3d) 741 (F.C.T.D.) and *Kogan v. Canada (Minister of Citizenship and Immigration)* (1995), 57 A.C.W.S. (3d) 87, [1995] F.C.J. No. 865 (F.C.T.D.) (QL)).

[34] According to the respondent, the panel correctly indicated that the Israeli law is a law of general application and that no discrimination was established (*Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (F.C.A.); *Budaghyan v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 20, 112 A.C.W.S. (3d) 934). Furthermore, it is recognized that compulsory military service is not a ground for protection (*Ozunal v. Canada (Minister of*

Citizenship and Immigration), 2006 FC 560, 291 F.T.R. 305; *Usta v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1525, 134 A.C.W.S. (3d) 1070).

[35] Moreover, considering that the principal applicant would only be a simple soldier, participation by a foot soldier in a unlawful war is not sufficient to justify granting refugee status, and a claimant's mere participation does not bring him within the ambit of paragraph 171 of the UNHCR Handbook (*Hinzman*, above).

[36] Although the panel acknowledged that war crimes were committed during the 34-day war, there were no systematic violations of personal rights by the military. The panel correctly determined that the evidence regarding condemnation by the international community was insufficient.

[37] In addition, the applicant failed to provide evidence showing recent situations, other than the 34-day war, where he would be called upon to commit international human rights violations.

[38] After analyzing the reasons for this decision based on the evidence adduced, the Court cannot find that its intervention is necessary here. The panel's finding is supported by the facts and the documentary evidence that it had to consider.

2. Did the panel err regarding the punishment for desertion by relying on the punishment that was imposed on the principal applicant in the past?

[39] Considering the punishment that could be imposed on the principal applicant is a question of fact, reviewable on the new standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[40] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at paragraph 47). The Court must not intervene if the panel's decision is reasonable, and the Court cannot substitute its own opinion on the sole ground that it would have come to a different conclusion.

[41] According to the applicant, the panel relied on the minor punishment that had been imposed on him in the past to assume that the punishment he will face in the future will not be severe. The applicant notes that the situation with respect to punishment has evolved over the years based on certain aggravating factors, and that, therefore, it is not appropriate to consider the minor punishment in this case.

[42] With respect to the punishment imposed for refusing to serve in the military, the respondent submits that the Court recently recognized that the possibility of imprisonment for a period of up

to 56 days does not constitute excessive or draconian punishment or persecution (*Sounitsky v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 345, 166 A.C.W.S. (3d) 310).

[43] The respondent adds that the applicants' own evidence reveals that the consequences of the applicant's non-compliance with his military duties were not serious and that he benefited from exemptions, since he was imprisoned for only two days for evading military service between 1997 and 2003.

[44] The respondent notes that the punishment applicable to deserters is a law of general application. The respondent cites *Musial*, above, and submits that when a person is punished for violating a law of general application, the offence committed must be considered, not the political motivation. Punishment arising from a law of general application is not sufficient to constitute persecution, since such punishment involves prosecution, not persecution (*Lebedev*, above, at paragraph 26).

[45] The principal applicant alleges, in particular, that he fears returning to Israel because he will be punished for deserting the army.

[46] In Israel, a law of general application imposes military service on its citizens, and the applicant did not demonstrate that this law is inherently persecutory in relation to a Convention ground (*Zolfaghkarkhani*, above). It is well established that compulsory military service does not amount to persecution and that dislike of conflict or fear of serving in the army will not justify a fear

of persecution based on a law (*Garcia v. Canada (Secretary of State)* (1994), 47 A.C.W.S. (3d) 603, [1994] F.C.J. No. 147 (F.C.T.D.) (QL)).

[47] The applicant failed to demonstrate that the punishment pursuant to the law of general application for refusing to serve in the army could be regarded as persecution or that it would be excessive or biased in relation to a Convention ground. The punishment that the panel mentioned is an example of a sanction that was already inflicted on the principal applicant for violating the law.

[48] The Court does not consider it unreasonable that the panel mentioned the previous punishment when analyzing all the evidence before making a determination on this issue. The Court is of the view that the panel did not commit a reviewable error.

[49] No question for certification was proposed and there is none in the record.

JUDGMENT

THE COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Mary Jo Egan, LLB

Schedule A

Relevant legislation

Handbook on Procedures and Criteria for Determining Refugee Status issued by the United Nations High Commissioner for Refugees (the UNHCR Handbook):

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

167. Dans les pays où le service militaire est obligatoire, le fait de se soustraire à cette obligation ou insoumission est souvent une infraction punie par la loi. Quant à la désertion, elle est toujours dans tous les pays – que le service militaire soit obligatoire ou non – considérée comme une infraction. Les peines varient selon les pays et normalement leur imposition n'est pas considérée comme une forme de persécution. La crainte des poursuites et du châtiment pour désertion ou insoumission ne constitue pas pour autant une crainte justifiée d'être victime de persécutions au sens de la définition. En revanche, la désertion ou l'insoumission n'empêchent pas d'acquérir le statut de réfugié et une personne peut être à la fois un déserteur, ou un insoumis, et un réfugié.

168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

168. Il va de soi qu'une personne n'est pas un réfugié si la seule raison pour laquelle elle a déserté ou n'a pas rejoint son corps comme elle en avait reçu l'ordre est son aversion du service militaire ou sa peur du combat. Elle peut, cependant, être un réfugié si sa désertion ou son insoumission s'accompagnent de motifs valables de quitter son pays ou de demeurer hors de son pays ou si elle a de quelque autre manière, au sens de la définition, des raisons de craindre d'être persécutée.

169. 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

169. Un déserteur ou un insoumis peut donc être considéré comme un réfugié s'il peut démontrer qu'il se verrait infliger pour l'infraction militaire commise une peine d'une sévérité disproportionnée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à

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.

un certain groupe social ou de ses opinions politiques. Il en irait de même si l'intéressé peut démontrer qu'il craint avec raison d'être persécuté pour ces motifs, indépendamment de la peine encourue pour désertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

170. Cependant, dans certains cas, la nécessité d'accomplir un service militaire peut être la seule raison invoquée à l'appui d'une demande du statut de réfugié, par exemple lorsqu'une personne peut démontrer que l'accomplissement du service militaire requiert sa participation à une action militaire contraire à ses convictions politiques, religieuses ou morales ou à des raisons de conscience valables.

171. 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.

171. N'importe quelle conviction, aussi sincère soit-elle, ne peut justifier une demande de reconnaissance du statut de réfugié après désertion ou après insoumission. Il ne suffit pas qu'une personne soit en désaccord avec son gouvernement quant à la justification politique d'une action militaire particulière. Toutefois, lorsque le type d'action militaire auquel l'individu en question ne veut pas s'associer est condamné par la communauté internationale comme étant contraire aux règles de conduite les plus élémentaires, la peine prévue pour la désertion ou l'insoumission peut, compte tenu de toutes les autres exigences de la définition, être considérée en soi comme une persécution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

172. Le refus d'accomplir le service militaire peut également être fondé sur des convictions religieuses. Si un demandeur est à même de démontrer que ses convictions religieuses sont sincères et qu'elles ne sont pas prises en considération par les autorités de son pays lorsqu'elles exigent de lui qu'il accomplisse son service militaire, il peut faire admettre son droit au statut de réfugié. Toutes indications supplémentaires selon lesquelles the applicant ou sa famille auraient rencontré des difficultés du fait de leurs convictions religieuses peuvent

évidemment donner plus de poids à cette demande.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.24 In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

173. La question de savoir si l'objection à l'accomplissement du service militaire pour des raisons de conscience peut motiver une demande de reconnaissance du statut de réfugié doit également être considérée en tenant compte de l'évolution récente des idées sur ce point. Les États sont de plus en plus nombreux à avoir introduit dans leur législation ou leur réglementation administrative des dispositions selon lesquelles les personnes qui peuvent invoquer d'authentiques raisons de conscience sont exemptées du service militaire, soit totalement, soit sous réserve d'accomplir un service de remplacement (c'est-à-dire un service civil). L'introduction de semblables dispositions législatives ou administratives a également fait l'objet de recommandations de la part des institutions internationales.24 Compte tenu de cette évolution, les États contractants sont libres, s'ils le désirent, d'accorder le statut de réfugié aux personnes qui ont des objections à l'égard du service militaire pour d'authentiques raisons de conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

174. L'authenticité des convictions politiques, religieuses ou morales d'une personne ou la validité des raisons de conscience qu'elle oppose à l'accomplissement du service militaire doit, bien entendu, être établie par un examen approfondi de sa personnalité et de son passé. Le fait que cette personne a exprimé ses opinions avant l'appel sous les drapeaux ou qu'elle a déjà eu des difficultés avec les autorités en raison de ses convictions est un élément d'appréciation pertinent. De même, selon qu'elle a reçu l'ordre d'accomplir un service militaire obligatoire ou qu'au contraire elle s'est enrôlée dans l'armée comme volontaire, la sincérité de ses convictions pourra être appréciée différemment.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1044-08
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