

Badoeva v. Canada (Minister of Citizenship and Immigration)

Between
Manana Badoeva, Levan Badoev, Khatia Badoeva and Roman
Badoev, plaintiffs, and
The Minister of Citizenship and Immigration, defendant

[2000] F.C.J. No. 1973
Court No. IMM-4925-99

Federal Court of Canada - Trial Division
Montréal, Quebec
Rouleau J.

Heard: November 8, 2000.
Judgment: November 29, 2000.
(32 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution.

Application by the Badoevas for judicial review of a decision that they were not Convention refugees. The principal Manana and her three minor children were citizens of Georgia. They claimed refugee status on the basis of a well-founded fear of persecution in their country for their Kurdish nationality and their Ezid religion. Manana alleged that she received threats from the parents of children at the school where she worked in May 1996 because she was teaching facts about the Ezid religion. She thought in another school from September 1996 onwards. In 1997 she had to transfer her son to another school because the children beat him. The teachers supported the children who had beaten him. Manana later distributed Kurdish newspapers and was questioned and insulted by police officers. She filed a complaint with the Ministry. Nothing was done. Later the Ezid centre was ransacked and nothing was done. Manana said that in February 1998, three persons threatened her with death. She was dismissed soon after. Later her son was allegedly beaten by Georgian children. She was later attacked by a group of Georgians. She feared for her life and her children's and came to Canada. The Division concluded that her fear of persecution on religious grounds did not amount to persecution. The Division examined the circumstances surrounding the threats and attacks. It noted that Manana said that she did not know her attackers. Documents dealing with the status of protection for human rights in Georgia indicated that notable progress had been made in recent years. The documentation nowhere suggested that persons practicing the Ezid faith were more subject to repression than other religious minorities.

HELD: Application dismissed. Where there was no clear and persuasive evidence that the authorities of a country were unable to protect its nationals, the government was presumed to be capable of protecting them and a claim was necessarily doomed to failure. The Division rendered a reasonable decision based on the evidence presented.

Counsel:

Alain Joffe, for the applicant.

Patricia Deslauriers, for the respondent.

1 **ROULEAU J.** (Reasons for Order):— This application for judicial review was filed from a decision by the Refugee Division of the Immigration and Refugee Board (hereinafter "the Refugee Division") on August 27, 1999 that the plaintiffs are not Convention refugees.

2 The principal plaintiff Manana Badoeva (hereinafter "the plaintiff") and her three minor children are citizens of Georgia and claimed refugee status in Canada, alleging a well-founded fear or persecution in their country for their Kurdish nationality and their Ezid religion.

3 The plaintiff alleged that she had received threats from parents of children at the school where she worked in May 1996 on account of the fact that she was teaching the children certain facts about the Ezid religion. The plaintiff taught in another school from September 1996 onwards.

4 In February 1997 she had to transfer her son from one school to another because the children beat him. The teachers supported the children who had beaten her son.

5 In October 1997 the plaintiff was distributing Kurdish newspapers and was questioned and insulted by police officers. She filed a complaint with the Ministry of the Interior, which subsequently replied that the police officers' activities were unexceptionable.

6 In December of the same year, the Ezid centre was ransacked and the police did nothing to find the guilty parties.

7 The plaintiff also alleged that in February 1998 she was stopped by three individuals who threatened her with death. The police did not investigate seriously. The plaintiff was dismissed soon afterwards.

8 In September 1998 the plaintiff's son was allegedly again beaten by Georgian children.

9 On October 15, 1998 the plaintiff and three other persons who were at the Ezid centre were attacked by a group of Georgians. As she feared for her life and that of her children, the plaintiff left Georgia to come to Canada.

10 Did the Refugee Division take an irrelevant document into account? Did the Refugee Division fail to consider points in the evidence? Was the Refugee Division's decision based on speculation?

11 The plaintiffs argued that the Refugee Division erred in law by dismissing the plaintiff's uncontradicted testimony regarding the persecution of Kurds in Georgia because they belonged to the Ezid religion. In the plaintiffs' submission, the Refugee Division considered an irrelevant document which did not deal with the Ezid religion, a pagan faith, but actually concerned the Orthodox Church, foreign Christian missionaries and anti-Semitism.

12 In the plaintiffs' submission, the Refugee Division erred in law by not correctly applying the presumption of government protection in Ward. They argued that the Refugee Division failed to rule on the fact that the incidents in which the plaintiff was involved could constitute persecution, in view of the absence of protection by the forces of law and order. In the plaintiffs' submission, the Refugee Division should have determined whether there was a possibility of future persecution and whether the Georgian government was incapable of protecting them, or did not wish to do so. The Refugee Division did not take into account the fact that the plaintiff was persecuted by the police and by Georgian nationalists, and not just by strangers, which distinguishes the situation from that in *Smirnov v. Canada (Secretary of State)*, [1995] 1 F.C. 780 (T.D.). Further, *Smirnov* is inapplicable in the case at bar since in that case there was no proof that the attacks suffered by the claimants were based on ethnic and religious grounds, whereas in the case at bar the evidence showed that the police refused to intervene because of their prejudice against Kurds of the Ezid religion. The Refugee Division allegedly failed to consider the incidents involving Georgian police, which explained why she could not obtain protection from the authorities.

13 The plaintiffs argued that with respect to the treatment of the Kurdish minority of the Ezid religion in Georgia, the Refugee Division rendered a decision based on speculation without giving them an opportunity to respond to these assumptions. They noted that testimony on oath is presumed to be correct if there is no evidence to the contrary. In the plaintiffs' submission, the Refugee Division failed to take vital aspects of the evidence submitted into account.

14 In the defendant's submission, the Refugee Division made a general analysis of the facts submitted by the plaintiff in support of her fear of persecution on religious grounds and concluded that they did not amount to persecution. In the defendant's opinion, this conclusion was reasonably based on relevant points in the plaintiff's testimony, in particular the fact that contrary to the wishes of management she was teaching the principles of the Ezid faith in a kindergarten where there was no specific educational program or agreement with the children's parents that the subject of religion would be

covered. Further, the Refugee Division noted that the documentary evidence was silent regarding religious persecution and even mentioned the permissive attitude of the Georgian authorities in this regard. The presumption that the plaintiff's testimony made under oath was true is always rebuttable, in particular when the documentary evidence does not contain the information that should ordinarily be in it.

15 As to the incident that occurred in the summer of 1998, when allegedly the plaintiff openly criticized the government, and following which she was summoned to police headquarters, the Refugee Division analysed the actions by the plaintiff and the authorities in their context and concluded, with supporting documentary evidence, that the authorities were concerned with the ordinary criminal aspect of her conduct and that their actions were not prompted by any of the stated aspects of the definition of a refugee. The fear of prosecution for contravention of generally applicable legislation does not as such constitute a reasonable fear of persecution. The Refugee Division was in no way bound by the inferences the plaintiff suggested could be drawn from the incidents that occurred in her country, and in particular the reasons which prompted the incidents of which she was allegedly a victim. In the defendant's submission, the plaintiffs did not establish how the Refugee Division's conclusion was in error or unreasonable or that it was arrived at in a perverse or capricious manner or without regard to the evidence.

16 The defendant noted that it is well settled that the mere fact that the authorities are not in a position to provide completely effective protection for their citizens does not suffice as a basis for a refugee status claim. The plaintiff did not show that the Georgian government had collapsed completely. As regards the threats and attacks suffered from nationalists in February 1998, the plaintiff did not know the attackers and could not give an accurate description of them. It was accordingly impossible for the police to act because information essential to the investigation was lacking. On the incident of October 1997, the Refugee Division correctly considered that it was impossible to draw conclusions from that incident, since the plaintiff could not provide details about the reason why the police confiscated Kurdish newspapers. Finally, with regard to the incident of October 15, 1998, which the plaintiff said was horrible, the latter filed no complaint with the police even though there were witnesses and she had a hospitalization certificate which could corroborate the incident. The defendant considered that the plaintiff did not try to exhaust the remedies available to her. He considered that the plaintiff's failure to discharge her burden of proving that the Georgian government was unable to provide her with protection itself meant that her application should be dismissed.

17 The Refugee Division's decision dealt with three aspects of the plaintiffs' claim.

18 First, the Refugee Division dealt at length with the fear of persecution because of the plaintiffs' membership in the Ezid religion. It indicated that with regard to the threats received because the plaintiff was teaching aspects of the Ezid faith at the school, this could not be persecution as there was no prior agreement between the parents and the plaintiff about the feasibility of teaching the religion at the school.

19 The Refugee Division also accepted the document "Georgia: Profiles of Asylum Claims and Country Conditions for 1995/6, The Most Common Asylum Claims, Claims Based on Religion, UNHCR Centre for Documentation and Research, March 2, 1998", as a basis for concluding that the plaintiffs were not likely to be victims of persecution for their religion. The following passage was found relevant:

The religious practices of Armenians, Azerbaijanis and Jews generally follow ethnic lines. They are unrestricted.

20 Similarly, the following passages from the document titled "Georgia Country Report on Human Rights Practices for 1998, Discrimination Based on Race, Sex, Religion, Disability, Language, or Social Status, Religious Minorities, Bureau of Democracy, Human Rights, and Labor, February 26, 1999" were accepted:

The Georgian Orthodox Church has argued that foreign Christian missionaries should confine their activities to non-Christian areas. Foreign missionaries continued to report some incidents of harassment in rural areas and small towns on the part of Orthodox priests and their supporters, local police, and security officials. Jehovah's Witnesses indicate that they have experienced no problems in Tbilisi and only occasional problems in rural areas.

There is no pattern of anti-Semitism ...

The Georgian Orthodox Church has lobbied Parliament and the Government for laws that would grant it special status and restrict the activities of missionaries from "nontraditional religions". Various draft laws, some modeled on the Russian law on religion, have been rejected by Parliament.

21 As there was no documentation relating specifically to the particular situation of persons practising the Ezid religion, the Refugee Division had to proceed by analogy and look at the treatment given to other religions in Georgia so as to determine the objective likelihood of any persecution on religious grounds. The plaintiffs argued essentially that the comparison was not justified, as persons practising the Ezid religion are especially vulnerable.

22 Nevertheless, it is well established that the Refugee Division, as a specialized tribunal, has complete jurisdiction to assess the content of documentary evidence so that only a perverse, capricious or unreasonable conclusion could justify intervention by this Court. In the case at bar, the documents said nothing about persecution which the Ezid group might suffer in Georgia. In my opinion, the Refugee Division was entirely justified in considering the existence of repression of persons practising other religions in order to determine whether the plaintiffs had reasonable chances of being persecuted if they returned to Georgia.

23 The Refugee Division then examined the circumstances surrounding the threats and attacks suffered from nationalists in February 1998. It noted that the plaintiff had testified that she did not know the attackers and, in the circumstances, it was difficult to give a detailed description. The plaintiff allegedly received no help from the police.

24 In my opinion, the basis of the attacks, whether religious, ethnic or political in nature, is prima facie absolutely irrelevant to determining whether the police were able to investigate the incidents. It is still necessary for a victim to provide police officers with the information essential for the conduct of an investigation.

25 The second aspect of the Refugee Division's decision concerns protection by the government.

26 I would note that it is well established that where there is no clear and persuasive evidence that the authorities of a country are unable to protect its nationals, the government is presumed to be capable of protecting them and a claim is necessarily doomed to failure (*Ward v. Canada (Attorney General of Canada)*, [1993] 2 S.C.R. 689).

27 The Refugee Division first considered the behaviour of the police officers following the incident of October 1997. It concluded that it was unable to properly assess the evidentiary weight of this incident in view of the fact that the plaintiff could give no details and was unable to explain what prompted the police officers to confiscate these newspapers in particular, especially when more than 200 independent limited-circulation newspapers are also distributed in Georgia. The Refugee Division nevertheless noted that the authorities had responded to her complaint, explaining in writing that the actions of the police were unexceptionable. I find it difficult to see how this Court could question that conclusion, which is based directly on the evidence in the record. The Refugee Division was completely justified in considering the event as inconclusive.

28 The incident which the plaintiff described as [TRANSLATION] "most horrible", the attack of October 15, 1998, was also reviewed by the Refugee Division. The latter emphasized the fact that the plaintiff had not filed a complaint with the police although there were witnesses and she had a medical certificate which corroborated her story. At the same time, it was well aware that the plaintiff did not think her complaint would have the desired result. In these circumstances, the plaintiff was wrong to say that the Refugee Division did not take the latter fact into account. The Refugee Division mentioned, without quoting a particular passage, the Federal Court of Appeal's judgment in *M.E.I. v. Villafranca*, (F.C.A. No. A-69-90), per Marceau, Hugessen and Décary J.J.A., December 18, 1992. In my opinion, it is worth reproducing the following passage, which applies exactly to the case at bar:

The burden of showing that one is not able to avail oneself of the protection of one's own state is not easily satisfied. The test is an objective one and involves the claimant showing either that he is physically prevented from seeking his government's aid (clearly not the case here) or that the government itself is in some way prevented from giving it.

No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of 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.

29 In the case at bar, the documents dealing with the status of protection for human rights in Georgia indicated that notable progress had been made in recent years. Further, the documentation nowhere suggested that persons practising the Ezid faith were more subject to repression than other religious minorities. In these circumstances, this Court is hardly in a position to intervene in this conclusion, which in any case is entirely reasonable.

30 The final aspect of the disputed decision concerns the allegation of a fear of persecution on account of Kurdish nationality.

31 Contrary to what was argued by counsel for the plaintiff, the Refugee Division made no assumptions on treatment of the Kurd-Ezid minority in Georgia, but in fact rendered a reasonable decision based on the evidence presented.

32 This application for judicial review is dismissed.

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.

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ORDER

[1] The application for judicial review is dismissed.

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.