

Pachkov v. Canada (Minister of Citizenship and Immigration)

Between
Stanislav Pachkov, applicant, and
The Minister [of Citizenship and Immigration], respondent

[1999] F.C.J. No. 29
Court File No. IMM-2340-98

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

Heard: December 8, 1998
Judgment: January 8, 1999
(12 pp.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Persecution, protection of country of nationality — Credible basis for claim.

Application by Pachkov for judicial review of the Immigration and Refugee Board's decision that he was not a Convention refugee. Pachkov was born in Latvia, but he was a Russian national. He claimed that he and his wife had received death threats after he refused to distribute nationalist political pamphlets. However, he failed to mention this incident in his personal information form. He also claimed that he was abducted and beaten by four men, including a police officer. The Board found that his story was not credible. The Board also found that he did not demonstrate a well-founded fear of persecution in Latvia. The Board apparently assumed that Pachkov was a citizen of Latvia, and imposed on him the burden of rebutting the presumption of state protection.

HELD: Application allowed. The matter was referred to another hearing before a different panel. The Board did not err in finding that Pachkov lacked credibility, based on the lack of corroboration, and the fact that he did not mention the threats on the personal information form. However, by incorrectly assuming that Pachkov was a citizen of Latvia, the Board made an unreasonable error. Under section 2(1)(a)(i) of the Immigration Act, persons who had a nationality were required to demonstrate a lack of state protection in the country of their nationality. This obligation was not imposed on stateless persons, who only had to demonstrate that they were unable, or unwilling due to fear, to return to the country.

Statutes, Regulations and Rules Cited:

Immigration Act, s. 2, 2(1)(a)(i), 2(1)(a)(ii), 2(1)(b).

Counsel:

Michel Lebrun, for the applicant.
Caroline Doyon, for the respondent.

TEITELBAUM J. (Reasons for Order):—

INTRODUCTION

1 This is an application for judicial review of a decision of the Immigration and Refugee Board (IRB) dated April 15, 1998, which determined that Mr. Pachkov is not a Convention refugee. The applicant is seeking an order quashing the decision of April 15, 1998, and referring the matter back to the Board for rehearing by a different panel.

FACTS

2 The applicant, born in Latvia on August 5, 1952, is of Russian nationality. The following facts are taken from the Immigration and Refugee Board's decision of April 15, 1998. The applicant alleges that after turning down a proposal by one of his customers to distribute a nationalist political party's pamphlets while he was working as a mechanic in a garage, he and his wife received written death threats in which he was told to quit his job and leave Latvia. He also alleges that he was abducted and beaten by four men, including a police officer. After being treated at a clinic, he says he decided to quit his job and go to visit New York. When he returned, new threats purportedly forced him to move to new apartments four times before going back to the United States. He stayed in the United States for 11 months before claiming refugee status in Canada one month before his United States visa expired. On April 15, 1998, the Board denied the applicant Convention refugee status.

Decision of the Immigration and Refugee Board

3 The Board determined that the applicant was not a "Convention refugee" because neither his story about his refusal to propagandize for a nationalist party, nor the allegation that this incident was mainly due to his Russian nationality, was credible. The Board based its finding, inter alia, on the fact that the applicant did not mention this significant incident in the Personal Information Form (PIF) and did not submit any corroborative evidence that he was a mechanic. With respect to his abduction, the Board was of the opinion that it was not a direct result of the refusal to propagandize, and that by not reporting it to the police, the applicant had not rebutted the presumption of State protection. Furthermore, the Board was of the view that the return to Latvia and delay in claiming refugee status, as well as the explanations given by the applicant in that regard, did not demonstrate a well-founded fear of persecution in Latvia. The Board found that

the applicant did not establish a nexus between the incidents and the grounds listed in the Convention.

SUBMISSIONS OF THE PARTIES

4 The parties' submissions relate to three main issues raised in the Board's decision: (1) the applicant's credibility, (2) the presumption of State protection and (3) the lack of a well-founded fear of persecution.

5 The applicant argues that the Board made glaring errors in the analysis of the evidence, which led it to question his credibility and warrants this Court's intervention. First, the Board was of the opinion that the applicant's story was not credible because he had not mentioned his refusal to propagandize in the PIF, and had not accounted for failing to do so, whereas that incident is not the basis for his claim. According to the applicant, his testimony indicates that the abduction and threats are the basis for his claim. In addition, the applicant argues that the Board erred in the assessment of the facts by finding that he was a Latvian citizen and imposing on him the burden of rebutting the presumption of State protection under subparagraph 2(1)(a)(i) of the Immigration Act. Furthermore, the applicant contends that the Board erred in finding that based on the return trip he freely made between Latvia and the United States and his delay in claiming refugee status, he did not have a well-founded fear of persecution in Latvia. The applicant argues that the Board disregarded some of the evidence accounting for the return trip and delay. At the hearing, the applicant confined himself somewhat to the argument that the Board clearly erred in stating that he was a Latvian citizen when it is clear that he is not.

6 The respondent argues that the Board did not err in the assessment of the applicant's credibility, considering the fact that the applicant had failed to disclose a significant incident in his narrative in the PIF, and did not err in the assessment of the evidence, since the garage incident and the abduction are related. The applicant's testimony indicates that one of the applicant's attackers also allegedly tried to make him distribute pamphlets, and the Board's finding is not unreasonable. With respect to the presumption of State protection, the respondent argues that the applicant's argument is clearly insufficient to establish the State's inability to protect him, and points out that the State's duty is to make efforts to protect, not to guarantee protection. The respondent submits that the Board made no error in the assessment of the fear of persecution by having regard to an unrestricted return trip between Latvia and the United States and the applicant's delay in claiming refugee status. The Board is presumed to have had regard to all the evidence, and the applicant did not explain why he had not claimed refugee status at the earliest opportunity.

ISSUE

7 Did the Board err in fact or in law such as to warrant this Court's intervention?

ANALYSIS

Credibility of the applicant

8 In his written representations, the applicant argues that the Board made an unreasonable error in the assessment of the facts, thereby undermining his credibility. By basing its finding on the fact that the applicant failed to mention the garage incident in the PIF, and by taking that incident to be the basis for his claim when in fact the attacks and threats are the basis for his claim, the Board erred such as to warrant this Court's intervention.

9 As appears from its decision, the Board was of the opinion that the garage incident—the persecution-triggering event—was uncorroborated. The PIF does not mention it, and the applicant submitted no corroborative evidence that he was a mechanic. Furthermore, the applicant did not put in evidence the threatening notes he allegedly received in his mailbox.

10 The respondent points out that in assessing the facts and the applicant's credibility, the Board was justified in having regard to an omission on an essential element that should have appeared in the PIF. After all, the garage incident was a significant element in the applicant's story, since the applicant himself made a connection between those two incidents by testifying that one of his attackers had also tried to make him distribute pamphlets.

11 In my view, the Court has to determine whether, in assessing the facts and finding that the applicant's story was not credible, the Board erred in having regard to the applicant's failure to disclose the garage incident in the PIF and the lack of corroborative evidence that the applicant was a mechanic. The Court should also consider whether the Board had regard to the incidents that, according to the applicant, underlie his refugee claim.

12 As the respondent said, the applicant established in his testimony that there was a direct connection between the pamphlet incident at the garage and the events that followed. In particular, at page 12 of the transcript of the Board's hearing held on March 23, 1998, the applicant said that one of the three people who attacked him had tried about two weeks earlier to make him distribute pamphlets. In light of his testimony, it seems that the incidents followed one another closely and that there was a connection between them.

13 Despite the applicant's submission, in his written representations, that his claim was not based on the garage incident but rather on the threats and abduction, in my view, the Board did not err in having regard to that incident and to the applicant's failure to mention it in his PIF. The facts in the record and the applicant's testimony do not suggest that this incident was insignificant. On the contrary, the applicant's testimony underscores its significance and the connection between that incident and the incidents that followed. Furthermore, the Board's decision also indicates that in assessing the evidence and the applicant's credibility, regard was had to the threats the applicant allegedly received in his mailbox. It also appears that the Board viewed the threats and abduction as forms of

persecution. I therefore find that the Board considered all the elements of the applicant's story. Having said this, in light of the evidence in the record, I am not satisfied that the Board drew an unreasonable inference or conclusion with respect to the applicant's credibility.

14 The Board's finding on the applicant's lack of credibility is not unreasonable or capricious and does not warrant this Court's intervention.

State protection

15 The applicant argues that the Board erred in finding that the applicant had not rebutted the presumption of State protection owed to all citizens. The applicant submits that it appears from both the PIF and his testimony that he is not a Latvian citizen, and that the Board erred in applying subparagraph 2(1)(a)(i) instead of subparagraph (ii) of the Immigration Act.

16 The passage to which the applicant refers in the Board's decision reads:

[TRANSLATION] By not going to the police to complain about his alleged abduction, the claimant did not rebut the presumption of State protection owed to all citizens. And in the case at bar, the panel does not believe that the Latvian State would not have protected the claimant. Nor does it believe that the claimant's Russian nationality was his customer's main motive in allegedly suggesting that he distribute pamphlets.

17 The respondent submits that whether the applicant is stateless or a citizen of Latvia is irrelevant, since the Board found that the applicant did not meet the test for Convention refugee recognition, that is, having a well-founded fear of persecution.

18 The refugee definition to which the Board has to refer in order to determine whether a person is a "Convention refugee" appears in section 2 of the Immigration Act, and reads:

. . . any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b) has not ceased to be a Convention refugee by virtue of subsection (2), but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

* * *

Toute personne :

- a) 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 :
 - (i) soit se trouve hors du pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays, (ii) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ou, en raison de cette crainte, ne veut y retourner;
- b) qui n'a pas perdu son statut de réfugié au sens de la Convention en application du paragraphe (2).

Sont exclues de la présente définition les personnes soustraites à l'application de la Convention par les sections E ou F de l'article premier de celle-ci dont le texte est reproduit à l'annexe de la présente loi.

19 On the facts in the case at bar, the applicant's PIF states that he is not a Latvian citizen, and his testimony shows that he is not a citizen of Latvia. Furthermore, the applicant put in evidence a document issued by the Latvian authorities certifying that Mr. Pachkov is not a Latvian citizen (applicant's record, page 98).

20 The main difference in the application of subparagraphs 2(1)(a)(i) and (ii) is that people who have a nationality are required to demonstrate a lack of State protection in the country of their nationality. This obligation is not imposed on stateless persons, who have to demonstrate that they are unable or, by reason of their fear, unwilling to return to that country: *Thabet v. Canada (Minister of Citizenship and Immigration)*, A-20-96, May 11, 1998 (F.C.A.); *Tarakhan v. Canada (Minister of Citizenship and Immigration)*, IMM-1506-95, November 10, 1995. In *Tarakhan*, supra, Mr. Justice Denault said:

In my view the statement reproduced above also contains an error of law. The panel incorrectly criticized the applicant for not "show[ing] that the Jordanian authorities were unable or unwilling to protect him against any persecutor if the need arose." In my opinion, by requiring such evidence from the applicant the panel failed to consider that it was dealing with a stateless person. In the definition of "Convention refugee" a person

who is "outside the country of the person's nationality . . ." is required to prove that he or she "is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country" (2(1)(a)(i)). This obligation does not exist for persons not having a nationality-stateless persons-who are outside the country: they need only show that they are unable or, by reason of that fear, are unwilling to return to that country (2(1)(a)(ii)). The panel committed an error by imposing on the applicant the burden of proving that the Jordanian authorities were unable or unwilling to protect him.

For these reasons the application for judicial review should be allowed and the Refugee Division's decision of May 9, 1995 set aside in part.

21 In the case at bar, it appears from the decision that the Board assumed the applicant was a Latvian citizen and imposed on him the burden of rebutting the presumption of State protection.

22 In my view, the Board made an unreasonable error in the assessment of the facts in the case at bar, which led it to impose an obligation on the applicant to rebut the presumption of State protection under subparagraph 2(1)(a)(i) of the Immigration Act. As Denault J. pointed out in *Tarakhan*, supra, that is an error of law that warrants this Court's intervention.

23 During the hearing, the respondent admitted that there was an error in the decision and that the applicant was not a Latvian citizen. Nevertheless, the respondent argued that the error had no real impact on the final decision because, on the one hand, the decision was based on two other grounds-the applicant's lack of credibility and inconsistent behaviour-and on the other hand, even if he had been considered stateless by the Refugee Division, the same findings would have been made.

24 In my view, that argument is not sound. As Denault J. pointed out in *Tarakhan*, supra, the error is an error of law with respect to the interpretation of the Act that defines the term "Convention refugee", an error that appears on the face of the record in the case at bar. Nevertheless, whether it is termed an error of law or an error of fact, in my view the error on which the Board's decision is based is a significant error warranting the Court's intervention. As the applicant pointed out during the hearing, the decision is based on that error, albeit in part, according to the respondent.

25 In *Peng v. Canada (Minister of Employment and Immigration)*, A-1054-90, February 1, 1993 (F.C.A.), Madame Justice Desjardins said in her decision from the bench for the Federal Court of Appeal:

The question is therefore whether this error of fact, which had an impact on the tribunal's conclusions at the appellant's credibility, is sufficiently important to justify the intervention of this Court.

It is true, as the respondent contended, that the tribunal found other material in the claimant's testimony on which it based its rejection of her

credibility.

However, the Court is not certain that if it had not been for this error as to the town where the claimant lived the Refugee would necessarily have come to the same conclusion.

26 Furthermore, I am not satisfied that this error had no impact on the assessment of the record and particularly the applicant's credibility, and that, were it not for this error, the Board's decision would have been the same.

27 Given this conclusion, it is not necessary to consider the applicant's last submission, on the lack of a well-founded fear of persecution.

CONCLUSION

28 By finding that the applicant was a Latvian citizen, the Board made an unreasonable error in the assessment of the facts, which cannot be justified in light of the evidence in the record and which led it to impose on the applicant the burden of rebutting a presumption of Latvian State protection although he is not a citizen of that country. In my view, that error, whether it is termed an error of fact or of law, warrants the Court's intervention. On one hand, the decision is based on that premise and, on the other hand, that error may have influenced the assessment of the record and the applicant's credibility. I am therefore not satisfied that were it not for that error, the decision would have been the same.

29 Accordingly, I allow the application for judicial review and order that the applicant be given another hearing before a different panel.

30 The parties did not file any questions to be certified within the time allotted by the Court.

Certified true translation: Peter Douglas

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ORDER

For the reasons set out in the Reasons for Order, I allow the application for judicial review and order that the applicant be given another hearing before a different panel.

Certified true translation: Peter Douglas