Ivachtchenko v. Canada (Minister of Citizenship and Immigration)

Between
Artem Ivachtchenko, applicant, and
The Minister of Citizenship and Immigration, respondent

[2002] F.C.J. No. 1761
2002 FCT 1291
Court file No. IMM-4964-01

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

Heard: July 31, 2002.
Judgment: December 12, 2002.
(27 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Grounds, political activity — Credible basis for claim — Persecution, protection of country of nationality — Evidence — Appeals or judicial review, whether claim reasonable.

Application by Ivachtchenko for judicial review of a decision by the Immigration and Refugee Board that he was not a Convention refugee. Ivachtchenko was a Russian citizen who was Jewish. He objected to military training because of anti-Semitism in the army and its human rights abuses. Members of a nationalist organization repeatedly harassed, beat and threatened Ivachtchenko, and tried to poison his family. Ivachtchenko complained to the police on each occasion. However, he claimed that the police investigations were lax, and failed to identify the perpetrators. The police refused to lay charges against those whom Ivachtchenko identified. Ivachtchenko provided medical records of his injuries. The Board misread the medical records, resulting in its rejection of his evidence as inconsistent and lacking credibility. The Board found that Ivachtchenko should have taken civil action against the perpetrators, and that he failed to show that state protection was unavailable. Ivachtchenko argued that the Board erred in misreading the medical reports, in finding that he lacked credibility, and in finding that state protection was available.

HELD: Application allowed. The matter was referred to the Board for redetermination. The Board's misreading of the medical evidence leading to its finding that Ivachtchenko lacked credibility was patently unreasonable. It undermined all of its conclusions regarding Ivachtchenko's fear of persecution and availability of state

protection. Its finding that state protection was available through civil action was patently unreasonable.

Counsel:

Mitchel Goldberg, for the applicant.
Annie Van der Meerschen, for the respondent.

REASONS FOR ORDER

LEMIEUX J.:—

A. BACKGROUND

1 Artem Ivachtchenko (the "applicant") is a young Russian male citizen who was 17 years old when he came to this country in late October 2000 on a six-month visa to visit his aunt and three months later, on January 10, 2001, made a refugee claim. He was denied recognition by the October 9, 2001 decision of the Refugee Division of the Immigration and Refugee Board (the "tribunal"). On grounds of being Jewish, he expressed a well-founded fear of persecution at the hands of a Russian nationalist organization, the Russian National Unity ("RNU"), and, in particular, one of its members, Anatoliy Shlyakhov, who taught military training at the applicant's high school and was an instructor in a youth sports centre tied to the RNU where he organized a paramilitary club for youths. The applicant also fears persecution for what the tribunal labelled as his being a conscientious objector.

2 He writes in his Personal Information Form ("PIF") that his refusal to participate in his high school's field training program where students took target practice spurned the ire of Mr. Shlyakhov and led him, by looking at the applicant's personnel file, to discover his nationality through his Jewish father, a police major with the Ministry of the Interior engaged in special investigations such as drugs and arms smuggling. That is when his troubles started, so the applicant tells us.

3 As a first incident, he says his schoolmates started to abuse him both verbally and physically by hitting him and pushing him around in the school halls and calling him names. Then, anti-Semitic literature was stuffed in the family's mail box and anti-Semitic messages were glued to the wall next to their apartment. A complaint was made to the police but they answered (Exhibit P-6) that these were the actions of unidentified hooligans and no criminal investigation was needed.

4 On August 16, 2000, his PIF describes a night attack by three teenagers from Shlyakhov's club. He knew them. They started beating him up and hit him in the head, face and chest then threw him on the ground and kicked him. He was slashed on the cheekbone with a knife and then again on his arm when he raised it to protect himself.

The next day, a police complaint was made, a forensic expertise taken, followed by a visit to the medical clinic. He states the following in his PIF:

> 11. My father talked to the chief of the local police department. He told them about the club and its activities. The police chief said they knew everything about the club and they would talk to the guys and their instructor. My father realized that he was brushed aside and tried to reach higher authorities. He could not reach anyone, and suddenly he was sent on some urgent assignment out of town. We realized that my father's power to help me was very limited.

5 Exhibit P-7 was produced. It is a letter dated August 28, 2000, from the Sotchi police and responds to the complaint made on August 17, 2000 concerning the August 16th incident. Basically, it states an investigation was carried out on named individuals alleged to have harassed the applicant and menaced him. It reports his complaint and their actions causing him "la douleur physique et morale sont sans fondement". That police report advised, since there were no signs of criminal intention in the actions of the named individuals his request they be prosecuted was not accepted. It closed by saying he had the right to bring to the Court a complaint for the bodily harm "qui vous ont été infligées".

6 He writes that on August 27, 2000, his mother noticed mercury balls in their food. They lived in a communal apartment and their kitchen was communal. A complaint was made to the police who investigated but refused to open a criminal investigation (Exhibit P-8). The police reported "[T]aking into consideration free access to the dwelling, possibility of a prank ... and small quantities of mercury precluding serious poisoning after consumption ...".

7 In the middle of September 2000, his PIF tells us he was attacked by a group of youngsters who kicked him in his stomach and legs with their steel-toe boots. They told him to prepare to serve his country well or they would kill him. They warned him not to go to the police or his brother would pay for it. He writes no complaint was made to the police "because we were afraid for my little brother, especially in my father's absence".

8 It was after his father came back from his trip the decision was made he should leave the country because the family had lost confidence in "my father's work as a warranty against persecution" hoping, with him out of the country, the RNU would leave them alone.

B. CONCLUSIONS

9 I am of the view this judicial review application must succeed because, after analysing the applicant's PIF, reading his testimony and the documentary evidence in the certified record, and considering the tribunal's reasons, I can only conclude the tribunal did not really come to grips with the applicant's story, both past and future.

10 In terms of the applicant's past persecution, it erred in law by misreading or ignoring the evidence and, as to being conscripted in the military, by failing to appreciate why he really objected, all of which led to its overall finding:

> The credibility of the claimant is put into doubt by the inconsistencies in the testimony and also the contradictory corroborative evidence. The Tribunal is of the opinion that the claimant was unable to establish a well-founded fear of persecution and a "reasonable chance" of being persecuted in the words of Adjei, [Adjei v. Canada (Minister of Employment of Immigration), [1989] 2 F.C. 680 (C.A.)] for one of the "Convention grounds". [emphasis mine]

11 First, and this is admitted by counsel for the respondent, it is here the tribunal misread the medical evidence by inverting that which related to the September 2000 attack with that of the August 16, 2000 attack which led the tribunal to conclude the September medical report (Exhibit P-10) did not corroborate and indeed contradicted what the applicant testified about the injuries he suffered during those attacks and what was written in the medical report (Exhibit P-5) about the injuries suffered on August 16, 2000.

12 This caused the tribunal to conclude "the credibility of the claimant is seriously put in doubt" and "[N]ot only do these findings [in the medical reports] contradict the allegations of the claimant, but they also put in serious doubt the events described by the claimant" concluding:

> In addition, even if we were to believe that such an event took place, the police report indicates that the allegations of the claimant vis-à-vis the perpetrators, were found to be unfounded and there was the possibility of taking Court action as the same document indicates. The claimant did not take this possibility of redress. It cannot be said from such an evidence that the state would be unwilling to protect the claimant. [emphasis mine]

13 Without saying so directly, the tribunal is finding it does not believe the applicant's story or, at the very least, is determining the evidence presented is not sufficient to enable the applicant to meet his burden of establishing a well-founded fear of persecution.

14 These findings which are, in my view, central to the applicant's claim simply cannot stand and must be set aside on the basis of paragraph 18.1(4)(d) of the Federal Court Act because the tribunal "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

15 Counsel for the respondent made a valiant effort to shield the tribunal's decision by arguing the applicant had not provided, as required by the Supreme Court of Canada in Ward v. Attorney General for Canada, [1993] 2 S.C.R. 689, clear and convincing confirmation of the State's inability to protect its citizens. She referred to the police

reports on the mercury food contamination attempt (P-8) to the one on the anti-Semitic messages but mainly to Exhibit P-7, previously referred to, which is the police report flowing from the August 17th 2000 complaint. She argued P-7 was evidence the police did investigate the complaint but found the activities complained of without foundation.

16 I do not consider it appropriate for me to rule on the issue of the availability of State protection on the basis of the record before me for a number of reasons. First, the issue of State protection was not one which was identified by the tribunal as a concern in the pre-screening session and was not canvassed either by the tribunal or by the RCO during the hearing. Second, and more importantly, I agree with counsel for the applicant the tribunal's credibility findings which have now been set aside, affected the level of the tribunal's inquiry on this issue. This is evident by the one line comment made on State protection by the tribunal when discussing the August 16, 2000 event and, while it referred to other police reports, it did so not as evidence of the availability of State protection but as evidence the events complained of were not tied to the RNU.

17 My view is, but for the credibility finding, the tribunal would have had to canvass the issue of state protection in depth, entertained full argument and, in particular, considered whether P-7, on its face, was internally consistent.

18 In any event, the tribunal erred when it held the availability of civil suit was an alternative to criminal prosecution in a case involving criminal assault (see Risak v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 1581, where Justice Dubé stated:

> [11] There is nothing in our jurisprudence to the effect that in such situations the applicant has the further burden to seek assistance from human rights organizations or, ultimately, to launch an action in court against the government.

19 Justice Dubé's comment is particularly apt in the light of the efforts made by the applicant's father to trigger State protection, an effort which was rebuffed, a fact ignored by the tribunal.

20 The applicant advanced, as a second ground, his call-up for compulsory military service and testified what his fears were.

21 It is generally accepted compulsory military service is not to be considered as persecutory in itself and an aversion to military service or fear of combat is not sufficient in itself to support a well-founded fear of persecution.

22 The applicant did not place his fear of military service on this footing. Quite to the contrary, he stated at page 169 of the certified record he was not against doing military service. His fears were rooted to two concerns: the anti-Semitism which permeated the army and the human rights abuses committed by the army against civilians in Chechnya, both of which could form the basis for a well-founded fear of persecution.

23 The problem, once again, is the tribunal failed to consider both aspects of what the applicant advanced.

24 It did mention this:

> He is basically afraid of going to Chechnya. Nevertheless, this is a hypothetical fear since the claimant, when he left Russia, had no objective indication that he was going to be serving in Chechnya. [emphasis mine]

25 The tribunal erred again, in my view. It is fundamental in refugee law that fear of persecution is forward looking, an approach which was not taken by it when it looked only to the past.

26 In view of the foregoing, I need not deal with the other errors the applicant alleged the tribunal made.

27 For all of these reasons, this judicial review application is allowed, the decision of the tribunal is quashed and the applicant's refugee claim is remitted for consideration by a differently constituted panel. No certified question arises.

LEMIEUX J.