

Pavlov v. Canada (Minister of Citizenship and Immigration)

Between
Igor Pavlov and Svetlana Geltonozko Pavlova, applicants,
and
The Minister of Citizenship and Immigration, respondent

[2001] F.C.J. No. 923
2001 FCT 602
Court No. IMM-4401-00

Federal Court of Canada - Trial Division
Ottawa, Ontario
Heneghan J.

Heard: April 9, 2001.
Judgment: June 7, 2001.
(20 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Grounds, religion — Administrative law — Boards and tribunals — Judicial review — Question of law — Review of decision based on irrelevant evidence.

Application by Igor Pavlov and his wife, Svetlana Pavlova, for judicial review of a determination by the Immigration and Refugee Board that they were not Convention refugees. Igor and Svetlana claimed to have been beaten, threatened, and victimized by arson in Russia, because Igor was Jewish and Svetlana was married to him. The Board found that they failed to prove a well-founded fear of persecution. After having reviewed the documentary evidence, the Board concluded that anti-Semitism in Russia did result in some discrimination, but not persecution. The Board ruled that Igor's and Svetlana's credibility about having had a real subjective fear of persecution was undermined, because they had not tried to get asylum in Israel under the Israeli Law of Return before they sought refugee status in Canada. Igor and Svetlana claimed not seeking asylum in Israel was an irrelevant consideration. The Board claimed that credibility had been the central issue in the refugee claim. The Board claimed that Igor and Svetlana were ineligible to claim refugee status in Canada, because they had a right to qualify for citizenship in Israel under the Israeli Law of Return. Svetlana and Igor had clearly indicated they did not wish to go to Israel.

HELD: Application allowed. The Board erred in law when it linked a negative credibility finding regarding Igor and Svetlana's real fear to their failure to seek asylum in Israel. They would only have had to apply in Israel first if they had a right to qualify for

citizenship in that country. Under the Israeli Law of Return, Igor had the right to seek protection, but only if he had the desire to settle there, which he did not. The Board had no basis for making a negative credibility ruling on that basis. The Board was incorrect as to the applicable law and as to whether Igor and Svetlana fell within the definition of Convention refugees. The standard of review for a question of law was that of correctness only.

Statutes, Regulations and Rules Cited:

Immigration Act, R.S.C. 1985, c. I-12, s. 2(1).

Israeli Law of Return.

Counsel:

Byron Pfeiffer, for the applicants.

P. Johnston, for the respondent.

HENEGHAN J. (Reasons for Order and Order):—

INTRODUCTION

1 Igor Pavlov and Svetlana Geltonozko Pavlova (the "Applicants") seek judicial review of a decision of the Immigration and Refugee Board, Convention Refugee Determination Division (the "Board") dated August 4, 2000. In its decision, the Board determined that the Applicants are not Convention refugees.

FACTS

2 The Applicants are citizens of Russia. Mr. Pavlov claimed Convention refugee status based on a fear of persecution due to his Jewish nationality. His wife, Svetlana Geltonozko Pavlova, based her claim on membership in a particular social group, that is being the non-Jewish spouse of a Jewish person. The Applicants alleged before the Board that between 1996 and 1998, they were subject to eight physical attacks, death threats, arson threats and arson upon the door to their apartment.

3 The Board found that the Applicants had not established a well-founded fear of persecution. Upon its review of the documentary evidence, the Board found that while there is evidence of anti-semitism in Russia, most instances are discriminatory in nature and do not amount to persecution. The Board also concluded that the failure of the Applicants to first seek asylum in Israel, pursuant to the Israeli Law of Return, undermined the credibility of their claim for Convention refugees.

APPLICANTS' ARGUMENTS

4 The Applicants raise several issues, both of law and fact. They allege that the Board erred in law by failing to consider whether the male Applicant held a well-founded fear of persecution on the basis of being Jewish and being perceived as Jewish. They say that the Board also erred in concluding that the failure of the Applicants to first seek asylum in Israel undermined the well-foundedness of their fear of persecution. Third, they submit that the failure of the Board to give adequate notice of its intention to rely on its "specialized knowledge" respecting the situation of Russian Jews and its use of such knowledge constitute an error of law.

5 Additionally, the Applicants argue that the Board failed to assess the evidence in its entirety and considered irrelevant matters, while ignoring relevant facts in making credibility findings in relation to the documentary evidence.

RESPONDENT'S SUBMISSIONS

6 The Respondent takes the position that the decision is sound in law and reflects proper consideration of all the evidence, including the documentary evidence. The Respondent argues that the Board's conclusions were reasonably open to it on the evidence. The Respondent submits that in order for any alleged error of fact to be open for judicial review, the finding of fact must be truly erroneous, the finding must have been made capriciously or without regard to the evidence, and such factual finding must be the basis of the decision.

7 As well, the Respondent argues that the Board concluded that credibility was a central issue of the Applicants' claim and pointed out several instances where the Board specifically found the story of the Applicants to be implausible, non-credible or based on insufficient evidence. Assessment of credibility is the primary role of the Board and according to the Respondent, the Applicants have not shown errors by the Board in assessing their evidence.

8 Finally, the Respondent argues that the Applicants are ineligible to obtain Convention refugee status in Canada because they have a right to qualify for citizenship in Israel, as provided by the Israeli Law of Return. Canadian courts have determined that a claimant for Convention refugee status must first seek protection of the countries in which he or she can assert nationality as a basis for citizenship before making a refugee claim in Canada: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Canada (Minister of Employment and Immigration) v. Akl* (1990), 140 N.R. 323 (F.C.A.) and *Grygorian v. Canada (Minister of Citizenship and Immigration)* (1995), 111 F.T.R. 316 (T.D.).

9 In closing, the Respondent says that the Board was correct in finding that the failure of the Applicants to seek asylum in Israel indicates the general absence of a fear of persecution.

ISSUE

10 Did the Board commit a reviewable error of law in its determination that the Applicants are not Convention refugees?

ANALYSIS

11 The disposition of this application depends upon the applicable standard of review. In *Conkova v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 300, at paragraph 5, Justice Pelletier of this Court said:

The standard of review of decisions of the CRDD is generally patent unreasonableness except for questions involving the interpretation of a statute when the standard becomes correctness.

12 In my opinion, the applicable standard here is that of correctness because the Board was faced with the determination of a question of law, that is whether the Applicants fell within the definition of "Convention refugee" provided by the Immigration Act, R.S.C. 1985, c. I-12, as amended, section 2(1). That definition reads as follows:

"Convention refugee" means 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;

* * *

"réfugié au sens de la Convention" 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.

13 In this case, although the Board noted a number of implausibilities in the Applicants' account of alleged persecution, its ultimate conclusion about the lack of credibility respecting the Applicants' claim was related to a misapprehension of the law. The Board made the following statement about the subjective element of the Applicants' fear of persecution:

...that while there can indeed be instances of discrimination in Israel for those in mixed marriages, they would not be subject to beatings and death threats. They could have gone to Israel as full citizens, with a generous absorption package, and avoided the alleged repeated beatings and death threats in Russia. In the panel's view, their failure to take advantage of this option is indicative of a lack of subjective fear¹.

14 This statement by the Board suggests that the Board mistakenly assumed that the Applicants were required to seek protection in Israel before applying for Convention refugee status in Canada. The Board specifically linked the failure to seek asylum in Israel to a negative credibility finding against the Applicants. In *Basmenji v. Canada* (Minister of Citizenship and Immigration), [1998] F.C.J. No. 39, the Court rejected such an approach and said, at paragraph 12:

There does not appear to be any authority for the proposition that the applicant must have first pursued a claim for some form of status in Japan

¹ Tribunal Record, p. 6.

(presumably either as a refugee, or a spouse of a Japanese national), before he could claim refugee status in Canada. It is only clear that a claimant must seek the protection of countries in which the claimant can assert nationality as a basis of citizenship, prior to making a refugee claim in Canada: *Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689; *M.E.I. v. Akl* (1990), 140 N.R. 323 (F.C.A.); *Grygorian v. M.E.I.* (IMM-5158, 23 November 1995, F.C.T.D.)

15 The Court went on in that case to find that the Board erred in concluding that the failure to seek protection in a country where the applicant had no right to qualify for citizenship.

16 In the present case, the Applicants had no right to qualify for citizenship in Israel. The male Applicant had the option to seek protection pursuant to the Israeli Law of Return but he did not wish to go to Israel². In *Katkova v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 549, this Court found that the Israeli Law of Return depends upon a desire to settle in Israel and in that case, the applicant had clearly stated that she did not want to go to Israel.

17 In my opinion, the Board in the present case erred in law in the manner in which it purported to rely on the Israeli Law of Return to reach a negative credibility finding on the subjective element of the Applicants' fear of persecution.

18 Accordingly, the application is granted and the matter is remitted to a differently constituted panel of the Board for rehearing and reconsideration.

19 Although Counsel for the parties jointly submitted a question for certification, I am of the opinion that no question shall be certified.

ORDER

20 The application for judicial review is allowed and the matter is remitted to a differently constituted panel of the Board for rehearing and reconsideration.

HENEGHAN J.

² Tribunal Record, page 695