

Nepete v. Canada (Minister of Citizenship and Immigration)

Between
Firmino Domingos Nepete, applicant, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 1640
Court File No. IMM-4471-99

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

Heard: August 30, 2000.
Judgment: October 11, 2000.
(23 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Disqualifications — Where claimant has rights of nationals of country other than homeland (art. 1E).

Application by Nepete for judicial review of a decision of the Immigration and Refugee Board that he was excluded from seeking convention refugee status and that he also failed to establish a well-founded fear of persecution. Nepete was a citizen of Angola who fled to the Czech Republic where he had resided for the previous several years. He based his claim on alleged persecution against him in the Czech Republic as a member of a particular race. He claimed that he was discriminated against in employment, and that he was subjected to harassment and beatings. The Board found that he was a permanent resident of the Czech Republic despite the fact that his visa expired in October 1999 and he took no steps to reinstate it. It relied upon a letter from the Consulate General of the Czech Republic confirming Nepete's status and indicating that he was now required to apply for a visa in order to re-enter. He failed to show why he could not obtain a re-entry visa. Accordingly, the Board found that he was excluded from claiming convention refugee status in Canada. It also found that the incidents complained of amounted to discrimination and did not amount to persecution in any event.

HELD: Application dismissed. For exclusion purposes, it was sufficient that an applicant had a recognized right of re-entry to a country such as the Czech Republic. Nepete failed to discharge the onus upon him to demonstrate that he would be denied his right of re-entry upon application. There was also no basis to interfere with the Board's conclusion as to the lack of a well-founded fear of persecution, as this was a question of weighing evidence.

Statutes, Regulations and Rules Cited:

Immigration Act, R.S.C. s. 2(1).

Counsel:

Jack Martin, for the applicant.
Susan Nucci, for the respondent.

1 **HENEGHAN J.** (Reasons for Order):— Mr. Firmino Domingos Nepete (the "Applicant") seeks judicial review of a decision of the Immigration and Refugee Board, Convention Refugee Determination Division ("Board) made on August 17, 1999. In its decision, the Board found that the Applicant is excluded from seeking convention refugee status and furthermore, that he had failed to demonstrate that he had a well-founded fear of persecution.

2 The Applicant is a citizen of Angola. On October 25, 1994 he obtained a permanent residence permit in the Czech Republic. On November 26, 1997, he applied for admission into Canada as a convention refugee.

3 In his Personal Information Form ("PIF") the Applicant referred to the events which led him to leave Angola. He also referred to incidents upon which he relied to ground his fear of persecution in the Czech Republic and described those events, including discrimination in his efforts to find employment, harassment and two beatings, one of which required hospitalization.

4 In its decision, the Board concluded that the Applicant has a well-founded fear of persecution in Angola, based on his membership in a particular social group. In consequence, the Board found that the only country of reference for considering a convention refugee claim was the Czech Republic.

5 The Board found that the evidence established that the Applicant is a permanent resident of the Czech Republic, holding a permanent residence permit valid until October 1999. The Board then went on to consider whether the Applicant falls within the ambit of Article 1E and consequently is precluded from obtaining convention refugee status in Canada.

6 The Immigration Act, R.S.C. s. 2(1) defines "convention refugee" as follows:

s. 2(1) In this Act,

"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;

* * *

- 2(1) Les définitions qui suivent s'appliquent à la présente loi. "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 don't 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 don't le texte est reproduit à l'annexe de la présente loi.

7 Article 1E, referenced in this definition, is included as part of the schedule to the Immigration Act, supra, and provides as follows:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the position of the nationality of that country.

* * *

Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

8 In its decision, the Board addressed the issue whether the Applicant was entitled to some of the basic rights which attach to nationals of the Czech Republic, the country in which he has permanent resident status. The Board found that the Applicant was entitled to some of the basic rights which attach to nationals of that country. The Board concluded that the Applicant was excluded from obtaining convention refugee status in Canada, following application of Article 1E.

9 In reaching its conclusion, the Board relied upon a letter received from the Consulate General of the Czech Republic in Montreal. This letter, dated July 13, 1999, was entered as exhibit R4 at the hearing before the Board¹. This letter, addressed to the Board, confirms that the Applicant had been granted a permanent residence permit in the Czech Republic on October 29, 1994 for family reunion purposes, following his marriage with a Czech citizen on June 20, 1987. His status as a permanent resident was unaffected by his subsequent divorce on October 7, 1997.

10 The letter advises that the Applicant's permanent residence is still registered at a street address in the Czech Republic. Furthermore, this letter advises that due to the expiry of his re-entry visa, the Applicant cannot automatically re-enter the Czech Republic but must apply for a visa from that country.

11 The Board found that the onus lies upon the Applicant to officially advise the authorities in the Czech Republic that he wishes to retain his permanent resident status and to apply for a re-entry visa in order to return to that country. The Board applied the decision of this Court in *Shahpari v. M.C.I.*, [1998] F.C.J. No. 429, (IMM-2327-97, April 3, 1998). The Board relied on this decision as authority for the proposition that once prima facie evidence is adduced with respect to the status of permanent residence, the onus shifts to the claimant to demonstrate why he cannot obtain a re-entry visa. In the

¹ Tribunal Record, page 629.

present case, the Board said it was not satisfied that the Applicant had discharged his onus in this regard.

12 In addition to considering the fact that the Applicant holds permanent resident status in the Czech Republic, at least according to the officials of that country, the Board considered that the Applicant had the right to work without restrictions in the Czech Republic. It appears that the Board relied upon this factor as well, in reaching its conclusion that the Applicant is excluded pursuant to Article 1E.

13 The Board then went on to consider whether the Applicant has a well-founded fear of persecution in the Czech Republic which would displace the exclusionary effect of Article 1E. The Board found, after its review of the evidence, that the Applicant had not demonstrated a well-founded fear of persecution.

14 The Board found that the incidents complained about by the Applicant amounted to discrimination but did not meet the standard of persecution. The Board ultimately concluded that the Applicant had not established a well-founded fear of persecution by reason of his race, in the Czech Republic. Accordingly, the Board concluded that the Applicant falls within the terms of Article 1E and is excluded from the convention refugee definition.

15 In his application for judicial review, the Applicant raised for several arguments. First, he argued that the burden is upon the Minister, not on him, to prove the elements underlying exclusion pursuant to Article 1E. Next, he argued that the Board misinterpreted the application of Article 1E by failing to appreciate that a national would not have to apply for re-entry to a country, submitting that without the right of return, he does not have the rights of a national. As part of this argument, the Applicant says it is misleading to suggest that he had initiated a cancellation of his permanent residence in the Czech Republic.

16 Finally, the Applicant argued that the Board erred in law in its interpretation of "persecution" in the convention refugee definition when it found that the actions complained of in the Czech Republic did not amount to persecution.

17 According to its reasons, the Board placed great reliance upon the letter dated July 13, 1999 from the Consulate General of the Czech Republic, Montreal Office. This letter clearly states that the Applicant does not have an automatic right of re-entry into the Czech Republic. The letter states:

3. Due to expiry of the re-entry visa Mr. Nepete cannot automatically re-enter the Czech Republic - it means he has to apply for the Czech visa. In other words, he does not have an automatic right of re-entry to the Czech Republic².

² Tribunal Record, supra.

18 In *Shamlou v. Minister of Citizenship and Immigration* (1995), 103 F.T.R. 241 and *Shahpari*, supra, the Applicants' re-entry visa or travel documents had also expired at the time of the hearing, yet this Court found that that was not an impediment to exclusion under Article 1E.

19 The hearing took place on July 15, 1999. The Board relied on the letter of July 13, 1999 and found that, as of that date, the Applicant was considered by the Czech authorities to have the status of a permanent resident, although he did not have an automatic right of re-entry to the Czech Republic due to the expiry of his re-entry visa.

20 In other cases, this Court has decided that Article 1E will apply, for exclusion purposes, even when an applicant does not enjoy the full rights of a national of another country. It is sufficient for the Respondent to show that the Czech Republic recognizes that the Applicant may apply for re-entry to the Czech Republic; see *Shahpari*, supra.

21 There is no dispute that the Respondent bears the burden of showing that Article 1E applies to exclude the authority. The point was addressed by Justice Rothstein in *Shahpari*, supra, paragraph 11, where he said:

At the very least, once the respondent put forward prima facie evidence that Article 1E applies the onus shifted to the applicant to demonstrate why, having destroyed her carte, she could not apply and obtain a new one. She did not do so. (Para. 11)

22 In my opinion, the Respondent has met this burden by producing the letter dated July 13, 1999 from the Consulate General of the Czech Republic in Montreal. The burden then shifts to the Applicant, to show that he does not enjoy the "rights and obligations" which belong to the nationals of the Czech Republic.

23 There is no evidence on the record to show that the Applicant would be denied a re-entry visa for the Czech Republic, although it is clear that he has no right to obtain such a visa. While it may seem inconsistent to say that recognition of permanent residence status can co-exist without a right of re-entry, that distinction has been recognized by the Court in *Shamlou*, supra and *Shahpari*, supra.

24 In the present case, the Board applied the decision in *Shahpari*, supra, to the evidence before it. Its decision appears reasonable, having regard to the evidence and the prevailing law.

25 However, even if I were to find that Article 1E does not apply, this application for judicial review must fail.

26 The Board went on to consider the application for convention refugee status on its merits and found that the Applicant had failed to demonstrate that he had a well-founded fear of persecution in relation to the Czech Republic.

27 This is clearly a matter of weighing the evidence and within the jurisdiction of the Board. In the absence of anything on the record to show that the Board misinterpreted the evidence or based its findings on irrelevant or extraneous matters or reached a conclusion in a capricious or perverse manner, there is no basis for interfering with the decision of the Board.

28 The application for judicial review is dismissed.

29 At the request of Counsel, the parties will have seven days from receipt of these reasons to submit a question for certification.

HENEGHAN J.