Federal Court  Cour fédérale

Date: 20090608

Docket: IMM-5148-08

Citation: 2009 FC 594

Ottawa, Ontario, June 8, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

DALE GENE LANDRY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Dale Gene Landry, a member of the United States Air Force, refused to be deployed to Iraq. While in the midst of disciplinary proceedings, he fled to Canada where he sought refugee protection. He believed he would be ordered to commit illegal and immoral acts against Iraqi civilians and would be persecuted, not merely prosecuted, for failure to obey. Having now deserted because of his political beliefs and public proclamation thereof, he also fears that if returned to the United States he would be treated more harshly than other deserters.

[2] The Refugee Protection Division (RPD) of the Immigration and Refugee Board dismissed his claim. It was of the view that he did not take all reasonable steps in the circumstances to pursue available state protection, and that there was no persuasive evidence he would be treated more harshly because he had spoken publicly to the media about his opposition to the war in Iraq.

[3] In this judicial review of that decision, Mr. Landry submits that the Board made state protection findings without regard to the evidence before it. It failed to consider whether his claim fell within paragraph 171 of the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR). Although the Handbook provides that it is not enough for a person to be in disagreement with his or her government regarding the political justification of, or for, a particular military action, it goes on to say: "...Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution." Furthermore, the Board applied the wrong test for determining whether a law of general application, i.e. the law which punishes desertion, was being applied in a persecutory manner.

THE FACTS

[4] In July 2003, just two days after his 18th birthday and fresh out of high school, Mr. Landry joined the United States Air Force Reserve. He later enlisted in the regular U.S Air Force. Subsequent events led him to oppose the multinational military action in Iraq. He considered that some of the tactics used by the U.S. Forces were contrary to international law and were immoral. He

pursued a number of avenues which could have led to his early separation from the Armed Forces, or at least given him the status of a conscientious objector. His efforts were unsuccessful.

[5] When he learned that his unit was going to be deployed to Iraq, he told his Commanding Officer he would not go. This led to an administrative disciplinary hearing, which he hoped would result in his discharge. However, following the hearing, but before sentence, the Commanding Officer told his JAG lawyer that he would be punished and then sent to Iraq anyway. He decided to absent himself without official leave and came to Canada.

[6] At the beginning of the hearing before the RPD, the deciding member stated there were two issues: credibility and state protection. The member did not consider it necessary to rule on credibility because of his views of state protection. I nevertheless infer that Mr. Landry was credible in that what he stated happened did happen and that what he said he was told he was told. However, it does not follow that there was any basis in fact for his fear that, if deployed in Iraq, he would be given illegal orders.

[7] There were a number of events leading up to Mr. Landry's desertion. In March 2004, he left on a mission said to be to Germany. While in the air they were told they were going to Afghanistan on an extraction mission. They removed six detainees and their captors from Afghanistan and then transferred them somewhere in Europe. He assumes that the detainees were Afghani and were taken to Guantanamo, Cuba. Nevertheless he enlisted for active duty several months later.

[8] He then came to disbelieve the declared reason for the invasion of Iraq, the presence of weapons of mass destruction, and learned that the United Nations had not sanctioned the presence of the multinational forces in Iraq.

[9] Two defining events were the Abu Ghraib prison scandal relating to the mistreatment of detainees, and stories recounted to him by a good friend who had served in Iraq. As a member of a patrol unit, he would be instructed to kick down doors of civilians in the middle of the night, and seize and detain any male who appeared to be more than 14 or 15 years of age. His friend then committed suicide.

[10] Thereafter, his Squadron Commander ordered him to consult the base psychiatrist, which he did over a period of a few years. His understanding is that the psychiatrist, or perhaps he was a psychologist, recommended that he be discharged as being unfit for military service, but his view did not prevail.

[11] He applied for early separation under what was called the Force Shaping Program, as there was an overabundance of personnel. This application was rejected, which he accepts as his particular unit was short-staffed and because there was a demand for those with his training as an air transport specialist.

[12] He filed a harassment charge which went nowhere.

[13] He applied for conscientious objector status but was turned down. He did not pursue the matter beyond his own base, believing that he did not qualify as he was not a pacifist opposed to all wars. In fact, at his RPD hearing he testified: “I am not debating the legality of the war itself, I am debating the legality of this particular action.”

[14] There would have been two aspects to his duties in Iraq. When not engaged as an aircrew member, he would be required to join army and marine combat crews. In his mind there was a great possibility that he, like his friend, would be called upon to kick down doors of civilians, detain those who looked to be above the age of 14 or 15, handcuff and blindfold them, and then render them out of the country.

[15] He considered that such orders would be illegal, all contrary to various Geneva conventions. He also challenges the legitimacy of the *United States Patriot Act*.

[16] Upon expressing his intent not to deploy to Iraq, he was charged with missing a military movement and failure to follow a general order or regulation. There were a few other charges as well, but he did not bring copy of the charge sheet with him and does not recall what they were.

[17] According to his evidence, he had an option to either demand a trial by court-martial or a hearing under Article 15 of the United States’ *Uniform Code of Military Justice* which is entitled *Commanding Officer’s Non-Judicial Punishment.* If found guilty under the latter, the commanding officer is entitled, in addition to or in lieu of admonition or reprimand, to impose certain limited disciplinary punishments.

[18] On the advice of his JAG lawyer, he opted for Article 15 as even on a worse scenario basis he would not be stained with a criminal record. If found guilty at a court-martial, and he considered he would be found guilty, he assumed that at the very least he would be dishonourably discharged, which would leave him with a criminal record. In addition his punishment could be severe.

[19] Having opted for Article 15, he and his lawyer prepared and presented a written brief. Essentially, it was a plea for clemency with the hope that he would be discharged from the Air Force. This was on a Friday. On the Saturday, following a discussion with the Commanding Officer, his lawyer told him that the Commander was more than likely going to reduce him in rank, with a reduction to half pay for three months, 30 days in "correctional custody" and then he would be sent to join his unit in Iraq. He would not be discharged. Rather than await his sentence, in July 2007 he left his base in Abilene, Texas and drove to Canada.

[20] He now fears persecution by the U.S. Military and also by huge segments of the American population at large. He believes that in the United States even the most liberal of people who may oppose the war dislike deserters. He has no doubt that if someone recognized him on the street he would be assaulted and maybe even killed. The police would not help him. "Even my own dad, you know, is pretty well… his words like pissed off enough at me to come to blows…" He would be readily recognized because of various speaking engagements, media interviews and his appearance in what is called *Resister Profiles*. However, not a scintilla of evidence was offered that he would not be afforded police protection.

THE RPD'S DECISION

[21] Mr. Landry submitted that because his claim fell within paragraph 171 of the UNHCR Handbook, any punishment he would receive for desertion would, in and of itself, amount to persecution. However, basing himself largely on the decisions of Madam Justice Mactavish in first instance in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, [2007] 1 F.C.R. 561 and *Hughey v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 421, 61 Admin L.R. (4th) 159, and the decision of the Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration, Hughey v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1, the member held that the legality of the military action was not in issue and that the primordial issue was that of state protection.

[22] The member determined that he must address that issue first. Having concluded that Mr. Landry had not rebutted the presumption of state protection with clear and convincing evidence, he held it was not necessary to consider paragraph 171 of the Handbook.

[23] In a carefully reasoned decision, he reviewed all the events preceding Mr. Landry's desertion. Mr. Landry had conceded that he had not pursued the avenues open to him to the limit. As the member noted: "He did not allow the Article 15 application to take its full course before he decided to leave the U.S.A. He still had legal avenues open to him, including court-martial process and other legal steps up to and including *certiorari* to the U.S. Supreme Court."

[24] With respect to differential treatment, and affidavit evidence from similarly-placed deserters, he pointed out that there was no evidence that they had not been able to go through a legal

process with proper safeguards and a neutral law of general application. He found that there was no persuasive evidence that Mr. Landry would be treated more harshly because he was publicly outspoken in his opposition to the war in Iraq.

DISCUSSION

[25] In my opinion, the member was both correct in law and reasonable in his findings of fact. Mr. Landry's problem is that he has lost faith in America.

[26] I do not agree with the submission that the member had to assess the risk of persecution on the scenario presented by Mr. Landry which was that he would receive illegal orders to commit illegal acts upon Iraqi civilians. *Hinzman* got to the Court of Appeal because Madam Justice Mactavish certified the following question:

> When dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR *Handbook*?

[27] The Court of Appeal found it unnecessary to answer that question. In speaking for the Court, and basing himself upon the decision of the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 153 N.R. 321, Mr. Justice Sexton said:

> [42] The appellants say they fear persecution if returned to the United States. However, to successfully claim refugee status, they must also establish that they have an objective basis for that fear: *Ward* at page 723. In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. …
>
> …

> [62] In conclusion, the appellants have failed to satisfy the fundamental requirements in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the appellants in the United States. Because the appellants have not adequately attempted to access these protections, however, it is impossible for a Canadian court or tribunal to assess the availability of protection in the United States. Accordingly, the appellants' claims for refugee protection in Canada must fail.

[28] Consequently, the member was correct in not assessing what Mr. Landry might have been called upon to do in Iraq. Such orders he might have been given, and the repercussions of his refusal to obey, only became relevant if it were found that the United States was incapable of protecting him.

[29] The laws of the United States pertaining to desertion are supposedly neutral and general in application. It was not unreasonable for the member to hold that that presumption was not ousted by affidavits from other deserters, or even indications that over time the penalties have become harsher. In 2005, there were more than 4,000 desertions. A handful of affidavits hardly forms the basis for a statistical analysis.

[30] Although judicial review was allowed in *Key v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 838, 331 F.T.R. 137, that case is readily distinguishable. The Board member in that case had put state protection aside, while *Ward*, reaffirmed in this context by *Hinzman*, teaches us that state protection is the prime consideration.

[31] Another decision of the Federal Court of Appeal directly on point is *Ates v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322, 343 N.R. 234. Mr. Ates, a citizen of Turkey, was, unlike Mr. Landry, subject to conscription. Turkish law did not allow for conscientious objectors. Madam Justice Sharlow, speaking for the Court, answered the following certified question in the negative:

> In a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offence of refusing to do his military service, constitute persecution based on a Convention refugee ground?

CERTIFIED QUESTION

[32] Mr. Landry proposes the following certified questions:

1. What sanctions, either official or unofficial, would constitute "punishment" and therefore persecution in a claim for refugee protection falling under Article 171 of the UNHCR Handbook?

2. When assessing whether a claim for refugee protection is objectively well-founded under section 171 of the UNHCR Handbook, is it permissible for the decision-maker to address state protection without first identifying the risks facing the claimant, from which he or she would require state protection?

[33] I decline to certify. As clearly stated by the Court of Appeal in *Hinzman*, above, if there is adequate state protection, the UNHCR Handbook is irrelevant.

[34] To revert to *Hinzman* for a moment, following dismissal of his refugee claim, he sought permission to apply from within Canada for permanent resident status based on humanitarian and compassionate grounds. Although his application was rejected, and the judicial review thereof dismissed (2009 FC 415), on June 2, 2009, Mr. Justice Russell certified the following question:

> Can punishment under a law of general application for desertion, when the desertion was motivated by a sincere and deeply held moral, political and/or religious objection to a particular war, amount to unusual, undeserved or disproportionate hardship in the context of an application for permanent residence on humanitarian and compassionate grounds?

However, it must be borne in mind that hardship considerations in a humanitarian application are far less demanding than risk of persecution considerations under ss. 96 and 97 of IRPA.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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