Date: 20080626

Docket: IMM-5059-07

Citation: 2008 FC 805

Ottawa, Ontario, June 26, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JUSTIN COLBY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of Immigration Division of the Immigration and Refugee Board (the Board), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), dated October 26, 2007. The Board found that the applicant, Justin Colby, is not a Convention refugee or a person in need of protection.

ISSUES

[2] The applicant raises three issues in the case at bar:

a) Did the Board err by ignoring or misconstruing evidence?

b) Was there a breach of natural justice resulting from the applicant's ineffective counsel?

c) Did the Board err in its determination of the facts?

[3] It is my opinion that the determinative question is the following: Did the Board err in determining that the applicant failed to avail himself of the protection of his state?

FACTUAL BACKGROUND

[4] The applicant is a citizen of the United States. On May 6, 2003, he joined the US Army as a medic. He believed he was doing a good thing in combating terrorists, particularly those responsible for the attacks on the World Trade Center on September 11, 2001. He completed his basic training and was deployed for a year to South Korea.

[5] In July 2004, the applicant was ordered deployed to Iraq. While he was on pre-deployment leave, he spoke with his uncle, a university professor, who informed him that no weapons of mass destruction were found in Iraq and that Iraqis had no involvement in the September 11 attacks. The applicant expressed his belief to his First Sergeant that the troops were being lied to. He was told not to question the chain of command.

[6] After arriving in Kuwait, the applicant was informed by the First Sergeant that the Secretary of Defence was expected to conduct a review of the personnel. The applicant was told that he was

expected to express support for the mission. All who disagreed were asked to raise their hands, which the applicant did. As punishment for his public disagreement, the applicant was subject to an off-the-books form of discipline, referred to as “smoking”.

[7] Following this, the applicant attended the chaplain’s office, where it was suggested to him that he might obtain status as a conscientious objector. When he approached the First Sergeant regarding the possibility, he was told that conscientious objector status was reserved for people who refused to pick up a gun. The First Sergeant called him a “domestic terrorist”. The applicant was also told that he could be prosecuted under the Uniform Code of Military Justice for his dissent.

[8] The applicant arrived in Iraq in August 2004, where he worked as a medic. In this capacity, he performed administrative tasks and attended to patients in a medical capacity. He was given Iraqi patients on whom to “practice” procedures which were outside of the scope of practice allowed of a medic, including tracheotomies, intubations, chest tubes and veinous cutdowns. The applicant was required to perform these procedures on Iraqi patients without administering anaesthetic. He was told that the use of anaesthetic on terrorists was a waste. Patients who were labelled as combatants, as opposed to civilians, were denied anaesthetics, and the applicant recalled 11 and 12 year old children being labelled as combatants. The applicant described these acts as atrocities.

[9] The applicant’s unit left Iraq in August 2005 and he was stationed in the US. He left the Army in July 2006, and arrived in Canada on September 18, 2006, where he claimed refugee status.

DECISION UNDER REVIEW

[10] The Board began its decision by reviewing the background and allegations of the claim. The facts relating to the applicant's views and military service were provided in some detail. However, all of the applicant's allegations in his Personal Information Form (PIF) regarding the acts which he was required to perform as a medic are not mentioned.

[11] The Board found, as a preliminary matter, that it was bound by the decision of the Federal Court in *Hinzman v. Canada (Minister of Citizenship and Immigration),* 2006 FC 420, [2006] F.C.J. No. 521, which held that the legality of the war in Iraq is not a relevant consideration in the determination of a refugee claim.

[12] In its analysis, the Board determined that the ground for the applicant's claim was political opinion. The Board concluded that the applicant is not a Convention refugee or a person in need of protection. The determinative issue was found to be state protection. The Board determined that it was bound by 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 (*Hinzman*), with regard to an applicant seeking refugee protection because he objects to participate in a war for reasons of conscience. The findings of this decision were reviewed at length. Notably, the Board considered the conclusion of the Court of Appeal that an applicant must adequately attempt to access his or her home state's mechanisms of protection before a claim for protection can succeed.

[13] In light of this case, the Board determined that the applicant's preliminary inquiries into obtaining conscientious objector status fell short of meeting the burden to rebut the presumption of state protection. The Board noted the existence of judicial and military mechanisms which the applicant could have accessed. The Board reviewed documentary evidence dealing with the ways in which military deserters are usually disciplined if they avail themselves of these mechanisms, and noted that a lenient approach is taken in the majority of cases.

[14] The Board noted that punishment for desertion is given in accordance with laws of general application after a court martial or other due process. It took notice of the existence of a right to counsel and to an open and transparent hearing.

[15] The submissions of the applicant's counsel, Mr. Jeffry House, were examined. The Board found that no grounds were provided upon which the present case could be distinguished from *Hinzman*, and that no facts were raised which might provide evidence of a lack of state protection.

[16] The Board concluded that the applicant did not exhaust all recourse available to him in the US and that no exceptional circumstances existed which would exempt him from the requirement of seeking protection there.

ANALYSIS

Standard of Review

[17] Whether the Board erred in its assessment of state protection is reviewable on a standard of reasonableness (*Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232; *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraphs 55, 57, 62, and 64). For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above at paragraph 47).

Did the Board err in determining that the applicant failed to avail himself of the protection of his state?

[18] The applicant raises a number of issues in his memorandum; however, the determinative issue found by the Board was state protection.

[19] The essence of the applicant's application challenges the Board's determination that there was no evidence before it upon which the case at bar could be distinguished from *Hinzman*. Particularly, the applicant argues that his claims of mistreatment of Iraqi patients constitute special circumstances, which serve to distinguish the case at bar from the *Hinzman* line of cases. He submits that in light of paragraph 171 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Handbook), the Board erred by failing to consider his particular circumstances.

[20] The UNHCR Handbook acknowledges that, as a general rule, prosecution of deserters does not amount to persecution. However, paragraph 171 provides a caveat:

> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. 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.

[21] Paragraph 171 of the UNHCR Handbook deals with the question of persecution, and not the availability of state protection. The Court of Appeal in *Hinzman*, stated that state protection is the first step in assessing the existence of objective fear. Justice Sexton of the Federal Court of Appeal laid out the analytical framework for evaluating the availability of state protection at paragraph 42 of the decision:

> [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**. As the Supreme Court of Canada explained in Ward at page 722, "[i]t is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." [Emphasis [underlining] in original.] **Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status. It is only where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of**

> **persecution.** If indeed the illegality of the war is relevant, it is at this second stage that the court would consider it. However, because I have determined that the appellants are unable to satisfy the first stage of the analysis, that is, that the United States is incapable of protecting them, it is unnecessary to consider the issues arising in the second stage, including the relevance of the legality of the Iraq war. [Emphasis added in bold].

[22] Therefore, the facts raised by the applicant that would fall under paragraph 171 of the UNHCR Handbook are relevant only if he can establish that state protection is unavailable to him.

[23] On this issue (state protection), I am of the opinion that the Board's determination is reasonable.

[24] The respondent highlights the fact that the applicant asked his First Sergeant about the possibility of obtaining status as a conscientious objector, but made no further inquiries. The Board concluded that "Mr. Colby's tentative and preliminary inquiries as to obtaining conscientious objector status fall far short of exhausting all of his remedies in his own country, prior to seeking the international surrogate protection of refugee status." As a person from a democratic country, the applicant was required to exhaust all forms of recourse available to him domestically. This is confirmed at paragraph 57 of *Hinzman*:

> *Kadenko* and *Satiacum* together teach that in the case of a developed democracy, the claimant is faced with the burden of proving that he exhausted all the possible protections available to him and will be exempted from his obligation to seek state protection only in the event of exceptional circumstances: *Kadenko* at page 534, *Satiacum* at page 176. Reading all these authorities together, a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust

> all of the recourses available to him domestically before claiming refugee status. In view of the fact that the United States is a democracy that has adopted a comprehensive scheme to ensure those who object to military service are dealt with fairly, I conclude that the appellants have adduced insufficient support to satisfy this high threshold. Therefore, I find that it was objectively unreasonable for the appellants to have failed to take significant steps to attempt to obtain protection in the United States before claiming refugee status in Canada.

[25] I agree with the respondent's contention that the applicant's claim is materially indistinguishable from the decision in *Hinzman* except that in the case at bar, the applicant is a medic who was deployed to Iraq instead of a foot soldier who deserted after his unit had been deployed to that country.

[26] Finally, I would add that the applicant had the opportunity at the hearing to address, give details or be questioned about his ordered inhumane actions while in Iraq but failed to do so (Tribunal Record, pages 692 to 695). The Board cannot be faulted for not mentioning the entire applicant PIF's allegations in its reasons. The applicant has to bear the consequences of the legal strategy adopted by his former counsel.

[27] The Applicant proposes the following questions for certification:

> 1. Does a soldier who refuses to continue to serve in the military because of being required to personally participate in actions contrary to international humanitarian law, come within the special exception provided in paragraph 171 of the UNHCR Handbook?
>
> 2. Could a person in this situation be granted refugee protection if facing punishment for desertion for his refusal to engage in actions contrary to international humanitarian law?

[28] The respondent is opposed to these questions being certified. It is my opinion that they are not determinative of an appeal in this matter.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	**JUSTIN COLBY** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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