REASONS FOR JUDGMENT

MacGuigan, J.A.

This section 28 application focuses on the proper interpretation of the definition of "Convention refugee" contained in paragraph 2(1)(a) of the Immigration Act, 1976 ("the Act"). That definition is as follows:

"Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country □

The applicant claimed Convention refugee status by reason of political opinion and membership in two social groups, the Trade Union Congress and the People's National Party, in Ghana. There was uncontradicted evidence that the trade union movement in Ghana had a political as well as an economic aspect (Appeal Book 152-3) but in any event no issue was raised as to the reason for which the applicant qualified as a Convention refugee.

In its decision of May 19, 1988, the Immigration Appeal Board ("the Board") concluded that the applicant was not a Convention refugee on the following basis (Appeal Book 357-8):

The definition of "convention refugee" in the Immigration Act, 1976, which governs this Board in cases of this type, has been quoted above on page seven. The Board notes that it is not necessary for Mr. Adjei to show that it is likely that he suffer persecution. On the other hand, the mere possibility of persecution will not result in a finding of Convention refugee status. The test is whether there is a reasonable chance, or are substantial grounds for thinking that the persecution may take place.[1]

The fear of persecution in the definition has a two-fold aspect. On the one hand, the applicant must experience a subjective fear. A man with great fortitude may not have a subjective fear of persecution until adverse circumstances are worse for him than for his less courageous fellow countryman; nevertheless such a fear must be present in the mind of the applicant for the definition of Convention refugee to be met. The appropriate test as to whether or not a subjective fear exists is that appropriate for determining the existence of other matters of fact in a case of this kind, namely balance of probabilities.

The second aspect is the objective element. The subjective fear of the applicant discussed in the preceding paragraph must have an objective basis.[2] In the present case the Board's conclusion with respect to the objective element of the test makes it unnecessary for it to comment further on the subjective component of Mr. Adjei's fear.

The Board, after considering all the evidence presented, is of the view that it is insufficient for it to conclude that there are substantial grounds for thinking that persecution would result were he to return or be returned to Ghana. Although, as mentioned above, the Board recognizes that it is possible that persecution might occur, it does not believe that there is a serious possibility of such persecution.

In the light of the uncontradicted evidence by the applicant as to his fear of persecution if he returned to Ghana, and by Dr. Timothy Shaw of Dalhousie University and documentary evidence (particularly Amnesty International reports) as to an objective basis for such fear, the Board's reluctance to acknowledge even the applicant's subjective fear reads strangely. However, the issue raised before this Court related rather to the well-foundedness of any subjective fear, the so-called objective element, which requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.

It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not. Indeed, in Arduengo v. Minister of Employment and Immigration (1982) 40 N.R. 436, at 437, Heald J.A. said:

Accordingly, it is my opinion that the board erred in imposing on this applicant and his wife the requirement that they would be subject to persecution since the statutory definition supra required only that they establish "a well-founded fear of persecution". The test imposed by the board is a higher and more stringent test than that imposed by the statute. [Emphasis added].

The parties were agreed that one accurate way of describing the requisite test is in terms of "reasonable chance": Is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?

We would adopt that phrasing, which appears to us to be equivalent to that employed by Pratte J.A. in Seifu v. Immigration Appeal Board (A-277-822, dated January 12, 1983):

[I]n order to support a finding that an applicant is a convention refugee, the evidence must not necessarily show that he "has suffered or would suffer persecution"; what the evidence must show is that the applicant has good grounds for fearing persecution for one of the reasons specified in the Act. [Emphasis added].

What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

In considering similar but not identical legislation,[3] the House of Lords in R.v. Governor of Pentonville Prison (Ex Parte Fernandez), [1971] 1 W.L.R. 987 at 994 (per Lord Diplock) said:

I do not think that the test is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient A reasonable chance,' substantial grounds for thinking,' a serious possibility' -- I see no significant difference between these various ways of describing the degree of likelihood of the detention or restriction of the fugitive in his return which justifies the court in giving effect to the provisions of section 4(1)(c).

These words were expressly applied by a later House to refugee status determination on words virtually identical to those in the Canadian legislation[4] in R.v. Secretary of State for the Home Department; Ex Parte Sioakumarin, [1988] 1 All E.R. 193 at 196 (Lord Keith).

Despite the terminology sanctioned by the House of Lords for interpreting the British legislation, we are nevertheless of the opinion that the phrase "substantial grounds for thinking" is too ambiguous to be accepted in a Canadian context. It seems to go beyond the "good grounds" of Pratte J.A. and even to suggest probability. The alternative phrase "serious possibility" would raise the same problem except for the fact that it clearly remains, as a possibility, short of a probability.

In the case at bar, the Board relied, as one of its equivalent terms, on "substantial grounds". In our view this introduced an element of ambiguity into its formulation. Indeed, two factors incline us to believe that it may have been misled by this phrase: its use of the verb "would" rather than "could" in its summation on this point; and its stringent conclusion on the facts. In any event, it is impossible to be satisfied that the Board applied the correct test to the facts.

In the light of our comments on this question, it is unnecessary to consider the applicant's alternative argument under paragraph 28(1)(c) of the Federal Court Act.

The application should be allowed, the Board's decision of May 19, 1988 set aside, and the matter returned to the Board for reconsideration not inconsistent with these reasons.

[1] For a discussion of the appropriateness of the "serious possibility", "reasonable chance" and "substantial grounds for thinking" test, see the dissent in Satiacum, Robert v. M.E.I. (I.A.B. 85-6100), Chambers, Howard, Anderson (dissenting), 10 July 1987. The dissenting reasons are date 25 March 1988.

[2] Re Naredo and M.E.I. (1981), 130 D.L.R. (3d) 752 (F.C.A.) at 753-4

[3] Subsection 4(1) of the Fugitive Offenders Act 1967, provides that a person shall not be returned to a country if it appears that "he might, if returned, be prejudiced at his trial or punished, detained or restricted" [Emphasis added].

[4] " owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such is unwilling to avail himself of the protection of that country"