

BETWEEN: MOHAMMED **AL-MAISRI** Appellant - and - THE MINISTER OF EMPLOYMENT AND IMMIGRATION Respondent

[Indexed as: **Al-Maisri** v. Canada (Minister of Employment and Immigration)]

File No. A-493-92

Federal Court of Appeal

April 28, 1995

SUBSEQ-HISTORY: Received May 24, 1995

KEYWORDS: IMMIGRATION -- Refugee status -- Requirements -- Claimant sought judicial review of dismissal of claim on grounds that claimant would face prosecution for deserting his country's military rather than persecution for political opinion -- Division erred in concluding that Iraq's actions in invading and occupying Kuwait were not contrary to basic rules of human conduct -- Punishment for desertion if he returned to Yemen would amount to persecution of which he had well-founded fear -- Claimant was declared Convention refugee

COUNSEL: Mr. Harvey Naiman For the Appellant

Mr. Kevin Lunney For the Respondent

SOLICITORS OF RECORD:

Mostyn, Mostyn & Naiman Barristers & Solicitors Toronto, Ontario For the Appellant

George Thomson Deputy Attorney General of Canada For the Respondent

JUDGES: Stone, Robertson and McDonald JJ.A.

STONE JA

REASONS FOR JUDGMENT

The appellant is a citizen of Yemen, who claims a well-founded fear of persecution by reason of political opinion.

The basis of the appellant's claim is set forth in the following paragraphs of his Personal Information Form:

Yemen was one of the few countries which supported Saddam Hussein in his invasion of Kuwait. I thought that my government's position was wrong, although I was fearful of speaking out against it. Yemenese people by the thousands were able to work in Kuwait, which also supported public projects in my country As well, my country's policy was adverse to the policies of Saudi Arabia, which could result in even more isolation for Yemen. In October, 1990, the reserves in Yemen were mobilized Although I opposed my government's policy, I was quite prepared to fight to protect my country from foreign aggression. Shortly after being called up, we were told to hand in our identification documents as we were soon told that we were going to Iraq by way of Jordan. Our identification was taken from us so that we would not be recognized as Yemenese. We were also told that if foreign journalists approached us in Jordan and Iraq, we were not to say where we were from.

On October 25, 1990, we left Yemen by boat for Jordan. Not wishing to fight for the defence of Iraq, I left my military unit while on leave in Jordan and walked to the city of Tabuk in Saudi Arabia, and then to the city of Jeddah. There, with the help of some Yemenese who were Saudi citizens, I was able to make arrangements to leave the country, which I did in May, 1991. I had been able to obtain a false Saudi passport with an American visa. I arrived at the Canadian border on June 1, 1991, at which time I indicated that I wished to make a refugee claim. I was allowed into Canada for one week and told to return to the border on June 7. I was then directed

back to the United States and returned to Canada on July 5. I believe that I will be killed if I am forced to return to Yemen. Accordingly, I am requesting that the Canadian government consider my claim for refugee status in this country.

The Refugee Division rejected the claim on the ground that the appellant would face prosecution in Yemen for deserting his country's military rather than persecution for political opinion. It stated that it did 'not have access to a list of sanctions that could be imposed by the government of Yemen for the act of desertion after which it turned to the provisions of the National Defence Act R.S.C. 1985, c.N-5, which provides in subsection 88(1) that a person who deserts while on active service or while under orders for active service is liable 'to life imprisonment or to less punishment'. From this the Refugee Division concluded that the punishment which the appellant fears in Yemen is not 'disproportionate to the gravity of the offence' and therefore that he does not have a well-founded fear of persecution if returned.

The Refugee Division went on to consider whether the appellant was opposed to participation in military service because of genuine conviction. This argument, too, was rejected. In the view of the Refugee Division, the grounds relied upon were not covered by paragraph 171 of the UNHCR Handbook. That paragraph and paragraph 170 are interconnected. They read:

170 There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

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.

The point was disposed of by the Refugee Division in these cryptic words.

The panel is not satisfied that the claimant meets this requirement. Although the United Nations condemned the Iraqi invasion of Kuwait, declared the Iraqi annexation of Kuwait "null and void" and condemned the Iraqi occupation of Kuwait, hostage-taking and mistreatment of the Kuwaiti population, it did not condemn the Iraqi's actions as being contrary to the basic rules of human conduct. [footnotes omitted]

The appellant contends that the Refugee Division erred in relying on Canadian law for the standard of the sanctions which might be imposed by the Yemen government for the act of desertion. According to the evidence contained in the appellant's PIF, he believed that he 'will be killed' while in his oral testimony he stated that 'the easiest thing to expect would be life imprisonment'. What is clear is that the content of Yemen law, if any, was not before the Refugee Division when it ruled that the appellant faced prosecution rather than persecution and no explanation was offered for why that was so. This is not to suggest that the Refugee Division was under an obligation to determine the law of Yemen, but rather that the issue must be addressed having regard to that country's human rights record. In any event, in view of what I am about to say on the second issue, it is not necessary to say anything further on the issue just discussed.

More importantly, in my view, the Refugee Division misapplied the guidance afforded by paragraph 171 of the UNHCR Handbook, when it ruled that Iraq's invasion of Kuwait as not 'condemned by the international community as contrary to basic rules of human conduct' notwithstanding, as it found, that the invasion and occupation of Kuwait was condemned by the United Nations and the annexation of that country by Iraq was declared by that body to be 'null and void'.

In *The Law of Refugee Status* (Toronto:1991), Professor Hathaway states at page [7] 180-181:

... there is a range of military activity which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory

Where an individual refuses to perform military service which offends fundamental standards of this sort,

"punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution". [emphasis added; footnotes omitted]

On the basis of these views, the correctness of which were not challenged, I am persuaded that the Refugee Division erred in concluding that Iraq's actions were not contrary to the basic rules of human conduct. Accordingly, in my view, the punishment for desertion which would likely be visited upon the appellant if he were returned to Yemen, whatever that punishment might be, would amount to persecution of which the appellant has a well-founded fear.

I would allow the appeal and set aside the decision of the Refugee Division. The respondent conceded before us that in the event the Court concluded as I have, that it would be appropriate to make a declaration pursuant to paragraph 52(c)(i) of the Federal Court Act that the appellant is a Convention refugee. I would so declare.

J. T. Robertson J. A: I agree.

F. J. McDonald J. A: I agree.