Ciric *v.* Canada

A-877-92

Slavko Ciric and **Slavica Ciric** (*Applicants*)

v.

The Minister of Employment and Immigration (*Respondent*)

Indexed as: Ciric v. Canada ***(*Minister of Employment and Immigration*) (*T.D.*)***

Trial Division, Cullen J."Toronto, December 2; Ottawa, December 13, 1993.

Citizenship and Immigration " Status in Canada " Convention refugees " Application for judicial review of IRB decision applicants not Convention refugees " Applicants, Serbians, leaving Yugoslavia to avoid conscription " Not opposed to war to protect national sovereignty, but to fighting fellow countrymen " Asserting punishment for desertion death " Board erred in holding applicants would only be fined, in ignoring evidence of international condemnation of violation of basic rules of human conduct in Yugoslavia " Test formulated by F.C.A. in Zolfagharkhani to determine whether law of general application persecutory applied " Conscription of Serbian reservists persecutory.

This was an application for judicial review of the Immigration and Refugee Board's decision that the applicants were not Convention refugees. The applicants, a husband and wife, were Serbians who had lived in Yugoslavia until 1991. Both had served in the Yugoslav army and were in the reserves. In June 1991 civil war broke out and all Serbian men aged 18 to 60 were to be conscripted. The applicants were not opposed to fighting to protect Yugoslavia's sovereignty, but objected to waging war against their own countrymen. They asserted that if returned to Yugoslavia they would be forced to participate in the civil war or be imprisoned or executed for desertion. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* provides that refugee status may be granted to persons who object to performing military service for genuine reasons of conscience. The Board held that as the applicants were not opposed to bearing arms in all circumstances, having previously served in the army, their reluctance to fight other ethnic groups in Yugoslavia was not sufficient grounds for avoiding further military service that would provide grounds for claiming refugee status. The Handbook further states that where the military action is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion can be regarded as persecution. Although the Board had before it reports of various international agencies which recited atrocities in Yugoslavia, including extra-judicial killings, it held that there was insufficient evidence that the on-going military action in Yugoslavia was condemned by the international community as contrary to the basic rules of human conduct. The Board found that the applicants would merely be fined for violating a law of general application, and therefore did not face a serious possibility of persecution. The issues were whether the Board based its decision on an erroneous finding of fact which it made in a perverse or capricious manner or without regard to the material before it; and whether the Board failed to apply a proper test to determine whether the applicants had a well-founded fear of persecution rather than merely a fear of prosecution.

Held, the application should be allowed.

The Board neither questioned the applicants' credibility nor suggested that they were speculating about punishment if returned to Yugoslavia. If returned, the applicants would face imprisonment and death, not a fine. It was impossible to conceive that the Board could conclude, with respect to the most vicious of civil wars, that the only punishment the applicants would receive was a fine. The Board missed the important fact that the law permitted persecution. It also erred in ignoring evidence of international condemnation of the situation in Yugoslavia. Although the United Nations had not been quick to condemn the atrocities committed by all sides, Amnesty International, Helsinki Watch and ICRC all have made

pronouncements which the Board should have seen as condemnation by the world community. By down-playing the woundings, killings, torture and imprisonment, the Board treated the evidence before it in a capricious, perverse manner. Its conclusion was not made in regard to the totality of the evidence and was an error of law.

The F.C.A. set out the following guidelines for determining whether an ordinary law of general application was persecutory in *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*: (1) the intent or principal effect of the law, rather than the motivation of the claimant, is relevant to the existence of persecution; (2) the neutrality of the law must be judged objectively by Canadian tribunals and courts; (3) the onus is on the claimant to show that the law is inherently persecutory; (4) the law, not the regime, must be shown to be persecutory. The law referred to herein is the forced conscription of Serbian reservists to fight their fellow countrymen. The test outlined in *Zolfagharkhani* was met.

statutes and regulations judicially considered

Immigration Act, R.S.C., 1985, c. I-2 , s. 2(1) (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1; S.C. 1992, c. 49, s. 1).

cases judicially considered

applied:

Zolfagharkhani v. Canada (Minister of Employment and Immigration), 1993 CanLII 2971 (F.C.A.), [1993] 3 F.C. 540 (C.A.).

referred to:

Musial v. Minister of Employment and Immigration, [1982] 1 F.C. 290; (1981), 38 N.R. 55 (C.A.); *Padilla v. Canada (Minister of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 1 (F.C.A.); *Camara v. Canada (Minister of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 145 (F.C.A.).

authors cited

Hathaway, James C. *The Law of Refugee Status*, Toronto: Butterworths, 1991.

United Nations. Office of the United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, September 1979.

APPLICATION FOR JUDICIAL REVIEW of the Immigration and Refugee Board's decision that the applicants were not Convention refugees. Application allowed.

counsel:

Harvey S. Savage for applicants.

Rosemary Muzzi for respondent.

solicitors:

Hoppe, Jackman, Toronto, for applicants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Cullen J.: This is an application for judicial review of a decision of the Immigration and Refugee Board of Canada, (the Board) dated April 13, 1992 that the applicants are not Convention refugees within the meaning of subsection 2(1) of the *Immigration Act*, R.S.C., 1985, c. I-2 (as amended by R.S.C., 1985 (4th Supp.), c. 28, s. 1; S.C. 1992, c. 49, s. 1) (the "Act").

This file was listed under Direction No. 17 of the Chief Justice. Leave for judicial review was granted by Mr. Justice MacGuigan of the Federal Court of Appeal on July 14, 1992.

FACTS

The applicants, Slavko Ciric and his wife, Slavica Ciric, claim to be Convention refugees by reason of their nationality, political opinion and membership in a particular social group. Slavko Ciric is the principal applicant and Slavica Ciric bases her claim on the same grounds and incidents as described by her spouse. The applicants are Serbian and lived in Kikinda, Yugoslavia until August of 1991. Slavko Ciric had served in the Yugoslav army for one year in 1987/1988 and had been in the reserves since then. Slavica Ciric had served in the Yugoslav army for three months and had been in the reserves since 1986. While in the army, no distinction was made between Serbs, Croatians, Slovenians, Macedonians or any other national/ethnic group. Many of their closest friends were from Slovenia and Croatia. The applicants were not opposed to going to war if Yugoslavia was threatened by an outside country, but felt it was quite another thing to wage war against one's own brothers.

In June 1991, civil war broke out and a full mobilization of Serbian men between the ages of 18 and 60 commenced. There were reports of soldiers coming to houses in the middle of the night and advising Serbian men that they had to leave immediately to enter battle. To avoid mobilization, the applicants did not stay in one residence for more than a few days at a time. The applicants were told that Croatians had attacked Serbian people all along the common borders but they did not believe this "government propaganda". The applicants believe that the Croatians want a separate state. If there is no peaceful way to accommodate this, the applicants will not take part in a war against their friends and brothers.

In August, 1991 the applicants obtained visas from the Canadian Embassy in Belgrade to visit a sister who lived in Toronto. They arrived in Canada on September 19, 1991 and claimed refugee status. Since their arrival in Toronto, the applicants have been informed by family members in Yugoslavia, that nearly 75% of the adult males in Kikinda have been mobilized and the army is requiring 60-year-old men to take fitness tests in order to determine whether they can fight.

The applicants do not support the position of the Yugoslav (Serbian) government. They assert that if they are returned to Yugoslavia they will be forced to take part in the civil war or be punished by the government and military.

BOARD'S DECISION

The Board first considered whether objection to military service could form the basis for a refugee claim. They referred to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* and Professor Hathaway's book, *The Law of Refugee Status*. The Handbook provided [at page 41] that it would be "open to Contracting States to grant refugee status to persons who object to performing military service for genuine reasons of conscience." Similarly Hathaway asserted that the right to conscientious objection to military service is an emerging part of international human rights law.

The Board considered that the applicants were not opposed to bearing arms in all circumstances as they had previously served in the Yugoslav army and the male applicant testified he would go to war to defend his country from another country. It rejected the applicants' refugee claim on the following basis:

Their reluctance alone, no matter how sincere with respect to fighting other ethnic groups in Yugoslavia is not sufficient for avoiding further military service that [it] would provide grounds for claiming refugee status. [Page 4 of reasons.]

The Board then considered whether objection to a particular military action could be sufficient to claim refugee status. The UNHCR Handbook provided [at page 40] that "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 light of all other requirements of the definition, in itself be regarded as persecution." The Board considered the civil war in Yugoslavia and concluded:

In the Board's opinion, there is insufficient evidence that the on going military action in Yugoslavia is one that is condemned by the international community as contrary to the basic rules of human conduct, such as to justify the claimant's avoidance of military service as a ground for claiming Convention refugee status. [Page 5 of reasons.]

The applicants stated that if they returned to Yugoslavia they would be imprisoned or executed for leaving their country. Referring to an Amnesty International article, the Board noted that criminal proceedings would be initiated only against officers and reservists who took their weapons with them when they deserted. Any other deserters would be administratively punished with a fine. The Board reasoned that as the applicants left Yugoslavia before mobilization, they likely did not have weapons with them and would be subject only to an administrative fine if returned.

The Board concluded:

The tribunal is not persuaded that the claimants face a serious possibility of persecution should they return to Yugoslavia for any of the reasons set out in the definition of Convention refugee. [Page 6 of reasons.]

ISSUES

1. Did the Board base its decision on erroneous finding of fact which it made in a perverse or capricious manner or without regard to the material before it?

2. Did the Board err in law in that it failed to apply a proper test to determine whether the applicants had a well-founded fear of persecution rather than merely a fear of prosecution?

APPLICANTS' SUBMISSIONS:

I. Erroneous finding of fact and ignoring evidence

The applicants submit that the Board erred in seeking to characterize their objection to participating in war against their fellow countrymen as one of conscientious objection. The Board either ignored or did not sufficiently evaluate their real motive against being mobilized, which was their distaste of being compelled to fight their fellow countrymen. The applicants were explicit that they favoured peaceful negotiation and did not support the position of the Yugoslav government. The applicants' moral objection to war was a circumstance which must be considered on a proper analysis, and whether or not one is a conscientious objector to war is not necessarily the major issue to consider in order to determine whether the claim is persecution rather than prosecution.

The applicants submit that the Board erred in ignoring evidence of condemnation of the actions of the government in the war as being contrary to the basic rules of human conduct. Reports by Helsinki Watch and Amnesty International, the ICRC atrocities, including extra-judicial killings were before the Board and were indicative of external, international condemnation of actions which were contrary to the basic rules of human conduct by any of the standards in any of the international and domestic laws. Because the Board ignored evidence of international condemnation for violation of basic rules of human conduct, it also was in error in its failure to consider such condemnation as relevant to the applicant's claim for Convention refugee status: *Musial v. Minister of Employment and Immigration*, [1982] 1 F.C. 290 (C.A.).

The Board erred in accepting, uncritically, the military source quoted in the Amnesty International report that the punishment awaiting the applicants for desertion was a fine. The Board ignored evidence to the contrary: the applicants' statements, reports of atrocities by the military, and the fact that legislation allowed for the imprisonment of persons who refused to do military service on grounds of their conscientiously held beliefs. The Board misinterpreted the applicants' statements that they were fortunate in leaving the country before being called up as

implying that they thought themselves fortunate in leaving without weapons. In fact, the applicants felt they were fortunate in leaving before they were forced to participate in a war that was morally repugnant to them.

II. The proper prosecution versus persecution test

The applicants submit that the jurisprudence has moved from a restrictive analysis, where the legitimacy of foreign law was accepted at face value to an inclusive approach. The inclusive approach starts in each case by examining the motives of the claimant for breaching the law and those of the state in enacting or enforcing the law. If there is some evidence to suggest a connection between the claimant's commission of an offence and one or more of the grounds in the definition of Convention refugee, whether the connection appeared in the claimant's motive or in the motive of the state, the analysis would continue to consider whether what the claimant feared was persecution: *Padilla v. Canada (Minister of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 1 (F.C.A.) and *Camara v. Canada (Minister of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 145 (F.C.A.). Further, the inclusive approach is consistent with the views of noted scholars such as Goodwin-Gill and Grahl-Madsen.

The Board erred in the instant case, in applying the more restrictive analysis. It failed to carefully examine all the circumstances of this case, particularly the applicant Slavko Ciric's motivation, in its consideration of whether he had a well-founded fear of persecution.

CONCLUSION

It is important to note that the Board did not question the applicants' credibility nor suggest they were speculating about punishment if they returned as Serbians to their country. I accept without question, therefore, that the Board misinterpreted the applicants' statements that they were fortunate in leaving the country before being called up whereas the applicants meant that they were fortunate in leaving before they were forced to participate in a war that was morally repugnant to them. Also, if returned, it was not a fine they would face but rather imprisonment and possibly death"life is given so little regard in that civil war. Again, the applicants can hardly be described as "conscientious objectors" because they were prepared to serve in the Yugoslavian military and in fact did, but to protect national sovereignty if it was threatened and not to bear arms against their friends. Here it is clear they took steps to avoid conscription, which not incidentally took the form of rounding up people capable of fighting. To escape this process they hid out and later made it to Canada. To my mind the Board missed this important fact, namely, the law permitted persecution and even if that may not have been apparent in the law itself, its effect was clear.

I believe the applicants are correct in asserting that the Board erred in ignoring evidence of international condemnation of the situation in Yugoslavia. The Board's conclusion that there was insufficient evidence that the on-going military action in Yugoslavia was one that was condemned by the international community such as to justify the applicants' avoidance of military service flies in the face of the evidence it had before it to consider. This evidence included reports from Helsinki Watch, Amnesty International, ICRC and the applicant's own, uncontradicted testimony. Thus, their conclusion cannot be said to have been made in regard to the totality of the evidence and amounts to an error of law.

With respect to the conclusion of the Board that the applicants would merely be punished for violating a law of general application, applicable to reservists, the Court of Appeal has recently commented on the issue of persecution versus prosecution and conscientious objectors in the case of *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2971 (F.C.A.), [1993] 3 F.C. 540. The facts of that case were similar to this one. The applicant was an Iranian who objected to the use of chemical warfare against his fellow Iranians, the Kurds, therefore, he objected to serving with the Revolutionary Guards.

In discussing the oft-quoted prosecution/persecution case of *Musial, supra*, and other case law in this Court which have dealt with the restrictive and the inclusive approaches, Mr. Justice MacGuigan stated at page 552:

After this review of the law, I now venture to set forth some general propositions relating to the status of an ordinary law of general application in determining the question of persecution:

(1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.

(2) But the neutrality of an ordinary law of general application, *vis-à-vis* the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.

(3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.

(4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

In this case, the law referred to is the forced conscription of Serbian men and women reservists to fight their fellow countrymen. The applicants have not shown a reluctance to fight for their country against other nations, however, they believe that fighting their own people is morally wrong. The Board concluded that since the applicants would only face a fine for their desertion, there was no serious possibility of persecution. The question then becomes; does this conclusion accord with the reasoning set forth by Mr. Justice MacGuigan?

The Board may take some comfort in the fact that the United Nations was not quick off the mark in condemning the violations by all sides. It must be remembered that this world organization, intent on maintaining peace, must act of necessity slowly and carefully if it is to remain the honest broker in any conflict. Fortunately, respected organizations like Amnesty International, Helsinki Watch and ICRC, are able to move quickly, study sufficiently and make pronouncements. And all did so here which surely the Board should have seen as condemnation by the world community. The atrocities committed were immediately abhorrent to the world community, eventually leading to a more public position by the United Nations. Basic human rights were violated through woundings, killings, torture, imprisonment and all clearly condemned by the world community.

The Board, it is agreed, was aware of all of this sickening activity, and by down-playing it, treated the evidence before them in a capricious, perverse manner.

The Board wrote in its decision, at pages 174-175:

The Board has addressed the following issue in determining this claim:

Are the claimants' reasons for avoiding further military service a basis for a well-founded fear of persecution because of their nationality, political opinion and membership in a particular social group?

The claimants testified that if they were required to serve in the Yugoslavian army at this time, they would be sent to fight against other ethnic groups. They oppose doing this because they believe the other ethnic groups are equal and that they believe in brotherhood. The Board has noted the following from the UNHCR Handbook. (Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, Geneva, January 1988, p. 40-41).

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim for refugee status should be considered in the light of more recent developments in this field. An increasing number of states have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to performing alternative (i.e. civilian) service . . . In light of these developments, it would be open to

Contracting States to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

James C. Hathaway in his book *The Law of Refugee Status* (Toronto: Butterworths, 1991) at page 182 states:

The notion of conscientious objection to military service speaks to the predicament of individuals whose own beliefs conflict with participation in legally permissible military activities.

The right to conscientious objection is an emerging part of internal human rights law, based on the notion that "freedom of belief cannot be truly recognized as a basic human right if people are compelled to act in ways that absolutely contradict and violate their core beliefs." [Emphasis added.]

The tribunal must determine if the claimants are opposed to bearing arms under all circumstances. The male claimant in Exhibit C-1, stated he served in the military from June 15, 1987 to June 9, 1988. He also stated orally that he would go to war to defend his country from another country. The female claimant in Exhibit C-2, stated she served with the military from August 2, 1984 to October 26, 1984. Orally, she testified she has been in the reserves since 1986. She also stated she agrees with her husband regarding the grounds on which they base their claim to Convention refugee status.

Their reluctance alone, no matter how sincere with respect to fighting other ethnic groups in Yugoslavia is not sufficient grounds for avoiding further military service that would provide grounds for claiming Convention refugee status.

The tribunal finds paragraph 171 of the UNHCR Handbook instructive in considering this matter.

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. (Emphasis added.)

With respect to the issue of military action which is "condemned by the international community as contrary to the basic rules of human conduct" we look to Professor Hathaway, (supra, p. 180-181), he suggests there is a range of military activity that is simply not 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 .

The tribunal recognizes that some human rights violations may occur during a civil war however that does not necessarily turn a military action into one which is intended to violate basic human rights or an undertaking that is in breach of the Geneva Convention standards of the conduct of war. The civil war may be deplored by and the cause of concern to various nations; that does not mean there has been a condemnation on their part of the incursion of the Yugoslavian authorities into secessionist Croatia.

In the tribunal's opinion, there is insufficient evidence that the on going military action in Yugoslavia is one that is condemned by the international community as contrary to the basic rules of human conduct, such as to justify the claimant's avoidance of military service as a ground for claiming Convention refugee status.

The claimants have deliberately violated the legal requirements of military service and could perhaps face, as would others who fail to perform their military obligations, the risk of prosecution and punishment for evasion of military service. The tribunal sympathizes with the claimants but after careful consideration of the merits of this claim, conclude that their reasons

to evade further military service are not sufficient to differentiate their case from the cases of any other Yugoslavian reservist.

It is just impossible to conceive that the Board could accept in the most vicious of civil wars that the only punishment this couple would receive is a fine. The source itself is suspect"a federal government official.

The test outlined by Mr. Justice MacGuigan has been met. In the *Zolfagharkhani* case, the applicant refused serving in the military because he was concerned his country would "probably engage in chemical warfare." *A fortiori* here, the atrocities had in fact occurred and were continuing.

Amnesty International, quoted at page 118 of the Board's transcript, states:

The degree to which international norms for the conduct of war have been flouted in the conflict in Yugoslavia has been widely recognized and condemned. On 5 September the I.C.R.C. appealed to Yugoslavian leaders to ensure respect for international humanitarian law in time of war. In its appeal the I.C.R.C. repeatedly called on all parties to the conflict to cease all attacks against civilian populations and property, to spare the life of those who surrender [which had not occurred], to treat humanely captured enemy fighters and to respect the Red Cross symbol. [My emphasis.]

Accordingly the decision of the Board of Refugees which found the applicants not to be Convention refugees is quashed and said applicants may resubmit their claim to a new hearing before a differently constituted panel of the Board.