Date: 19990310

Docket: IMM-3425-97

BETWEEN:

MOUSA HAMED ELASTAL,

Applicant,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

REASONS FOR ORDER

MULDOON, J.

[1] The applicant challenges by way of judicial review the decision (T96-03986) of the Convention Refugee Determination Division ("CRDD") of the Immigration and Refugee Board dated July 21, 1997, in which the CRDD determined that the applicant was not a Convention refugee within the meaning of subsection 2(1) of the *Immigration Act* , R.S.C. 1985, c. I-2 (the "Act"). Leave to commence an application for judicial review was granted on July 24, 1998. The application was heard in Toronto on October 21, 1998. At the conclusion of the hearing, this Court concluded that the application must be dismissed, and these are the reasons that follow that determination.

Background

[2] The applicant, Mousa Hamed Elastal, is a 29-year-old stateless Palestinian. He was born in the Gaza Strip, Israel and lived there until he entered Egypt illegally in December 1991. He remained in that country until June 1995, working on farms. Fearful of being caught and returned to Gaza, he obtained travel documents enabling him to enter the United States illegally. He had also obtained an Egyptian travel document issued to Gaza Palestinians for facilitating their movement, but not entitling them to residence in Egypt.

[3] The applicant lived and worked in Michigan for a year, until he was advised by some people he met that seeking refugee status in Canada was his best option. He sought asylum in Windsor, Ontario on July 23, 1996.

[4] In his personal information form (application record ["AR"], pp. 31-34), the applicant gives details of the harassment he claims to have suffered as a youth at the hands of the occupying Israeli forces. (It should be noted that those forces have now been withdrawn, and the Palestinian Authority ["PA"], while not a true sovereign authority, has been established in their stead.) According to the applicant, however, his current fear of persecution stems from the militant Palestinian organization known as Hamas.

[5] The applicant"s fear of Hamas dates back to October 1991, when he received four letters from them. The first three letters requested him to meet with them in an isolated area, away from the public and soldiers. The applicant declined the invitation and did not show up at the meeting spots. He did not want to become involved with Hamas, nor indeed with any Palestinian group operating in the Gaza Strip. The fourth and final letter he received from Hamas threatened him with punishment if he did not appear as requested. The applicant was told he would either be killed or beaten, and rumours would be spread to the effect that he was a coward who did not want to join the movement. Sensing his life was in danger, the applicant stayed in a different house in Gaza until he was able to make his way to Egypt in December 1991.

[6] The applicant fears his return to the Gaza Strip will lead to his detention and torture by the Israelis. Subsequent to that, he fears death at the hands of Hamas.

Tribunal"s Decision

[7] In its negative determination, the CRDD stated that the first issue to be determined was the identification of the applicant"s country or countries of former habitual residence as he fell within subparagraph 2(1)(*a*)(ii) of the Act which applies to stateless persons. Israel (Gaza), Egypt, and the United States were all identified as such. In making this finding, the CRDD noted that the concept of requiring a legal right of return for a country to be considered a country of former habitual residence has been overruled by the Federal Court in *Maarouf* v. *Canada (MEI)*, [1994] 1 F.C. 723. The CRDD made this finding despite the applicant"s illegal entry into both Egypt and the United States based on his *de facto* residence in those countries: *Thabet* v. *Canada (MCI)* (1995), 105 F.T.R. 49 (T.D.).

[8] The CRDD then turned to the second issue: in cases where a stateless claimant has more than one country of former habitual residence, must he establish his claim as against each such country, or one only, and if so, which one? The panel considered itself bound by the Federal Court Trial Division decision in *Thabet*, despite voicing a strong preference for the approach proposed by Professor James C. Hathaway in his oft-cited text, *The Law of Refugee Status* (Toronto: Butterworths, 1991 at pp. 59-63), where he suggests that a legal right to return is a *sine qua non* for a country to be considered a country of former habitual residence.

[9] Following *Thabet*, the claim was determined with reference to the *last* country of former habitual residence, the United States. The applicant"s fear of deportation from that country does not amount to a fear of persecution because nations have the sovereign right to determine who may remain inside their territory. Removing those who are in the country illegally is within the nation"s sovereignty and does not amount to a Convention reason for persecution.

[10] Turning to the issue of the applicant"s well-founded fear of persecution in Gaza, the CRDD made a negative determination. First, based on documentary evidence, the tribunal found the claimant"s testimony that he would be forced to join Hamas not credible. Second, the CRDD concluded that because Hamas is voluntary, albeit militant and extremist, it follows that there is no serious possibility that he would be persecuted for refusing to join. Thus, the applicant has no well-founded fear of persecution. In reaching this conclusion, the CRDD noted that the documentary evidence relied on is not contradicted by any other documentary evidence, and is drawn from mutually exclusive sources, neither of which have any vested interest in the applicant"s claim for refugee status.

Applicant"s Position

[11] The applicant takes issue with the CRDD"s conclusion that both Egypt and the United States constitute countries of former habitual residence within the meaning of subparagraph 2(1)(*a*)(ii) of the Act, as well as the CRDD"s conclusion that his claim must be determined with regard to his last country of former habitual residence, the United States. The applicant argues that his presence in those countries falls short of the required *de facto* residence, and that his presence was merely an ongoing, transient one. Gaza, he argues, is the only country of former habitual residence. If several such countries are found, the relevant ones are those to which the applicant could legally return to and take up residence.

[12] It should be noted that the applicant conceded and informed this Court at the hearing that he can legally re-enter and remain in Gaza. Counsel argued that this is technically so, but the problems which would arise are those which were asserted in these proceedings and matters in which the applicant argues that the CRDD fell into error.

[13] Regarding the applicant"s well-founded fear of persecution should he return to the Gaza Strip, he argues that a reasonable chance exists that he will face persecution by the Israelis. This is based on his past treatment by them, as well as the suspicions his seven year absence will necessarily raise. The applicant asserts, contrary to the documentary evidence, that Hamas forcibly recruits young Palestinian men to participate in their bloody fight against Israel. He claims and fears that he will not be permitted to remain neutral and passive.

[14] Finally, the applicant argues that the CRDD erred in considering whether the applicant could avail himself of state protection in Gaza. The issue of availability of protection, it seems to this Court, is really a non-issue for stateless persons claiming refugee status: *Thabet* v. *Canada (MCI)* (1998), 160 D.L.R. (4th) 666, 227 N.R. 42 (F.C.A.).

Respondent"s Position

[15] The respondent relies on the recent Federal Court of Appeal decision in *Thabet*for the correct methodology in determining stateless claims. First, countries of former habitual residence are identified. Second, the issue of whether the claimant has a well-founded fear of persecution in any of those countries is determined; if not, the claimant is not a Convention refugee. Third, if a well-founded fear is established, the panel must determine whether the claimant is unwilling or unable to return to all countries of former habitual residence; if there is none, the claim succeeds. Fourth, if the claimant is able or willing to return to a country of former habitual residence, it must be determined whether that country will receive the claimant. If there is no country of former habitual residence to which the claimant can return legally, the claim succeeds.

[16] The CRDD"s conclusion that the applicant does not have a well-founded fear of persecution in Gaza is based on documentary evidence, which it cites in its decision. The question of state protection is equally relevant to claims by both stateless and national claimants. Finally, the applicant argued before the tribunal that he has a right of return to the Gaza Strip, and so he cannot raise doubts regarding that right on this review.

Issues

1. Did the CRDD err in considering the applicant"s last country of former habitual residence instead of all such countries?

2. Did the CRDD err in making a negative determination as to the credibility of the applicant regarding his well-founded fear of persecution in Gaza?

Analysis

1. Any country of former habitual residence

[17] In *Thabet*, the Federal Court of Appeal set out the correct test for determining Convention refugee claims for stateless persons. Mr. Justice Linden answered the certified question with regard to Convention refugee claims by a stateless person thus:

> In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in *any* country of former habitual residence, and that he or she cannot return to any of his or her countries of former habitual residence.[emphasis added]

[18] In the case at bar, the CRDD made its decision in reference to the applicant"s *last* country of habitual residence, thus erring in law. However, it should be noted that the tribunal recognized the deficiency of such an approach, and although it acknowledged that it was bound to follow the trial decision in *Thabet*, the CRDD went on to canvass Egypt and Israel (Gaza) as potential countries of former habitual residence.

[19] The CRDD stated it was bound by *Maarouf* where it was held that the legal right of return to a country of former habitual residence is not a requirement. In *Thabet*, Mr. Justice Linden stated that the CRDD is compelled to ask itself *why* the applicant is being denied entry to a country of former habitual residence because the reason for the denial may amount to persecution. While the CRDD questioned the sense of even considering a country of former habitual residence to which the applicant has no legal right of return, it did cast its mind as to the rationale behind the applicant"s situation vis-à-vis the United States. It held,

> His lack of a right of return to the United States also cannot be considered to be an act of persecution. He never had any right to return to the United States, so it cannot be said that he is now being denied that right. One cannot be denied that which one never had *ab initio*. The claimant therefore has no well-founded fear of persecution in the United States.
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> (AR, reasons for decision, p. 12)

2. Credibility

[20] In its reasons, the CRDD stated that it preferred the documentary evidence over the *viva voce* testimony of the applicant regarding his fear of persecution for not submitting to forced Hamas membership. It is trite to say that a panel may choose to believe documentary evidence over sworn testimony so long as it states clearly and unequivocally why it prefers such evidence: *Aligolian v. Canada (MCI)*(IMM-3684-96 , April 22, 1997) (F.C.T.D.),*Okyere-Akosah* v. *Canada (MEI)* (A-92-91, May 6, 1991) (F.C.A.), and *Hilo* v. *Canada (MEI)* (A-260-90, March 15, 1991) (F.C.A.).

[21] In the instant case, the CRDD did state why it preferred the documentary evidence over the applicant"s sworn testimony. After specifically noting the relevant documentary evidence, the CRDD stated,

> The foregoing evidence leads us to two conclusions: first, that it is not credible that the claimant would have been subjected to attempts at forced recruitment; and secondly that there is no serious possibility that he would be persecuted for his refusal to join. These two findings lead to a conclusion that the claimant has no well-founded fear of persecution in Gaza.
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> In so finding, we are assigning greater weight to the documentary evidence than we are to the evidence of the claimant, as the documentary evidence relied upon is not contradicted by any other documentary evidence, and is

drawn from mutually exclusive sources, neither of whom can have any vested interest in whether or not the claimant is found to be a Convention refugee. To that extent, they are free of bias.

(AR, reasons for decision, p. 13)

[22] The CRDD went on to consider, in the alternative, whether the applicant could avail himself of state protection. It held that he could. In light of *Thabet*, however, the issue of availability of state protection for stateless persons is not relevant. Thus, the tribunal has committed an error in law in considering state protection. However, it must be noted that this portion of the CRDD"s decision followed its determination that the applicant"s fear of persecution was not credible based on the available documentary evidence. Therefore, while the CRDD did indeed err, its error does not affect its credibility determination. The evidence before it, it appears to this Court, was not persuasive to the effect that the applicant would fear crossing into Gaza, since Israel controls the border. There is no reason found in the evidence other than the applicant"s assertion, which is self-serving.

[23] The CRDD"s negative determination of the applicant"s claim for Convention refugee status is supportable based on its credibility finding regarding the non-existence of the applicant"s well-founded fear of persecution in Gaza. Regardless of any errors it may have made elsewhere, the CRDD"s preference for the documentary evidence over the applicant"s sworn testimony, while it may be regrettable to the applicant, is unassailable.

[24] Accordingly, and with no joy whatever, the Court must conclude that the application is dismissed. At the conclusion of the hearing, counsel were in agreement that there was no question of general importance, and so none will be certified.

F.C. Muldoon

Judge

Ottawa, Ontario

March 10, 1999