IMM-3886-96

BETWEEN:

LIOUDMILA KATKOVA

Applicant

- AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

McKEOWN J.

The applicant seeks judicial review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the Board) dated October 1, 1996, wherein the Board determined the applicant not to be a Convention refugee.

The issues are whether by virtue of Jewish nationality the applicant has a connection with the State of Israel through the Law of Return and hence Israel should be considered as her country of nationality within the meaning of subparagraph (1) of the definition of Convention refugee and whether the Board ignored the clearly expressed desire of the applicant not to go to Israel. I was unfortunately deprived of any submissions from the respondent in this matter. The respondent sought an adjournment a week before the matter was to be heard on the basis that it involved complex and significant issues. However, a motion had been brought a month earlier to provide for further affidavits and memorandum of law to be filed by April 1st. The April 1st period went by without any submissions from the respondent and in light of the applicant's desire to have this matter dealt with at the date of the hearing, I refused the adjournment.

I will deal with the second matter. First, the Board ignored extensive evidence from the applicant that she did not wish to go to Israel. The applicant stated on at least four occasions that she did not wish to go to Israel and even indicated the reasons therefor: 1) her husband was not Jewish and that this would cause him difficulties in finding employment there; 2) the applicant was concerned about terrorist acts and for her safety and that of her family. This evidence is very important because the Law of Return in Israel requires that it only applies "to every Jew who has expressed his desire to settle in Israel". At this stage it is appropriate to set out the two key sections of the Law of Return which reads as follows:

> 1. Every Jew has the right to come to this country as an Oleh.
>
> 2. (a) Aliyah shall be by Oleh's visa
>
> (b) An Oleh's visa shall be granted to every Jew who has expressed his desire to settle in Israel,
>
> unless the minister of Immigration is satisfied that the applicant
>
> (1) is engaged in an activity directed against the Jewish people; or
>
> (2) is likely to endanger public health or the security of the state;
>
> (3) is a person with a criminal past, likely to endanger public welfare.

Notwithstanding the evidence of the applicant and the provision in the Law of Return, the Board stated as follows at page 4 of its reasons:

> Counsel also stated that the desire of the claimant to settle in Israel should be given due consideration. The panel cannot fathom why a person fleeing persecution would not have a desire to go to an almost guaranteed safe place. Of course, there may be exceptional circumstances where the claimant may not want

> to exercise this option. We heard no such evidence in this claim. The Convention refugee determination process is to be applicable to people fleeing persecution for one of the Convention grounds and not to people who seek an alternative option for their settlement, or who simply has no desire to settle in the readily available safe place.

The Law of Return states that the desire to settle in Israel is a requirement for immigration. It is not a matter which a tribunal can determine. The Law of Return does not say that every Jew should return to Israel. In this case the applicant clearly stated that she does not want to go to Israel. This is a fundamental error by the Board and it is a finding which is patently unreasonable in light of the requirements of the Law of Return. The Law of Return does not require any applicant to give reasons as to why they desire to return to Israel.

Accordingly, the matter must be returned to a differently constituted Board for redetermination in a manner not inconsistent with these Reasons. However, in light of the importance of *Grygorian v. The Minister of Citizenship and Immigration*, November 23, 1995, Court File IMM-5158-94, it is necessary for me to review the first issue as well in order that the Board may have a proper legal basis in which to determine if the Law of Return is applicable in this case. The Board stated at page 4 of its reasons:

> ... The panel feels that in this claim the decision of Justice Joyal in *Grygorian* is binding and his decision mirrors the trend in jurisprudence related to Convention refugee law -- which favours the position that protection should be provided only to those who truly require it and to those who have no other viable options available.

In my view, there is nothing binding about the decision of Joyal J. in *Grygorian, supra*. He specifically stated:

> In the matter before me, I see no reason to intervene in the Board's judgment that Canada's refugee claims system is not just another quick fix to obtain landed status here ...

He goes on to say:

> ... Nor is there reason to criticize the Board's analysis of the nationality rules pertaining to Convention refugee status. As stated earlier, the basic principle of refugee law is to grant such status only to those requiring surrogate protection and not to those who have ready and automatic right to another country's nationality.

I am unable to agree with these latter two sentences which are *obiter* in his decision. However, it is clear that Joyal J. is just finding that the Board's judgment was open to it and is of no precedential value. However, as stated earlier, because this matter is returning to a differently constituted Board, I feel that it is necessary to review the whole first issue.

The Board has referred to *Bouianova v. Minister of Employment and Immigration* (1993), 67 F.T.R. 74 and *Zdanov v. Minister of Employment and Immigration* (1994), 81 F.T.R. 246. These are both cases which involve stateless persons who could have citizenship in Russia. As Rothstein J. said in *Bouianova, supra* at 76:

> In my view, the applicant, by simply making a request and submitting her passport to be stamped, becomes a citizen of Russia. On the evidence before me, there is no discretion by the Russian officials to refuse her Russian citizenship. I do not think the necessity of making an application, which in these circumstances is nothing more than a mere formality, means that a person does not have a country of nationality just because they choose not to make such an application.

The judgment in *Zdanov, supra* is to the same effect.

I agree with the analysis of Board member Kalvin at pp. 11-12 of his reasons:

> ... In *Bouianova* and *Desai* the desire to live in the countries under consideration was not a condition precedent to obtaining nationality in those countries. I agree with the observations of Lorne Waldman in *Immigration Law and Practice* where he indicates that *Bouianova* and *Desai* stand for the proposition that a refugee claimant cannot choose to be stateless when application to the authorities of a particular country for citizenship would result in the confirmation of a *pre-existing* status. This situation may be contrasted with that of a claimant who has *potential* rather tha[n] *pre-existing* status as a national of a particular country.
>
> It is clear from the facts of the case [*Bouianova*] that this decision does not stand for the proposition that claimants are required to apply for citizenship and prove a well founded fear of persecution from each potential country of nationality. The applicant in this case was a citizen of Russia by birth, and, as a result of the operation of Russian law and the application to the Russian consulate, was merely asking for recognition of a pre-existing status. Upon application, the Consulate would put a stamp in her passport and this stamp would merely be a declaration or confirmation of the applicant's actual nationality. This situation is clearly different from that of a person who does not have nationality at the time the application for refugee status is made, but who must make an application in order for citizenship to be conferred. The application in the latter case is a necessary step to the obtaining of citizenship and not merely an application for recognition of a pre-existing status. In such a circumstance, the applicant need not demonstrate a fear of persecution from this country of "potential nationality".
>
> [footnote omitted]

And then the Board member continues at page 12:

> In my opinion, the fact that the claimant does not desire to live in Israel means that she is not eligible for citizenship of the country pursuant to its *Law of Return*. If the claimant were to go to Israel and was asked by immigration officials in the course of assessing her application for citizenship whether she desired to live in Israel, then she would either have to lie, or have her application turned down ... This Board does not, in my view, have any legal or moral authority to tell the claimant that she should desire to live in any particular country. The claimant testified that she does not have a desire to live in Israel. That is the evidence before us. As such, the claimant does not meet one of the required conditions to obtaining Israeli citizenship under the *Law of Return* ...

The facts in the case before me are identical to those in T95-07590 and I adopt the reasoning of the Board member.

The Board in the case before me concluded that the applicant has a connection with Israel but it appears to have ignored *Canada (Attorney-General) v. Ward* (1993), 103 D.L.R. (4th) 1 (S.C.C.). It is important that potential nationality is not confused with actual nationality. In my view, the *Ward* decision does not deal with potential nationality and it will be helpful to review some of La Forest J.'s comments in *Ward*. La Forest J. relied on the alternative grounds of home country or citizenship and he was looking at it in connection with the necessity of approaching the home state for protection. At 12 he states:

> ... The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged ...

And then at 13:

> ... The respondent, also contended that there is no such prerequisite for state complicity when the refugee asserts that he or she is "unable" to seek the protection of his or her home state ...

The intervener Council for Refugees argued at 13:

> ... that "unable" or "unwilling" refer only to the refugee claimant's situation outside the country, vis-à-vis the consular officials of his or her home country.

La Forest J. then stated at 17:

> The international community was meant to be a forum of second resort for the persecuted, a "surrogate", approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution ...

La Forest J. then supports Professor Hathaway and in his view when he states at 23:

> ... Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

In my view, there must be a genuine connection and physical link with the home state. La Forest J. switches to citizenship when he states at 43:

> As described above, the rationale underlying international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option. The fact that this Convention provision was not specifically copied into the Act does not render it irrelevant. The assessment of Convention refugee status most consistent with this theme requires consideration of the availability of protection in *all* countries of citizenship.

Although there is no definition of home country or home state in the dictionaries, it is interesting to note the definitions used for "homeland" and "nationality" in both *Webster's New Twentieth Century Dictionary of the English Language* (Webster's) and *The New Shorter Oxford English Dictionary on Historical Principles*, volume 1 (Oxford). In Webster's "homeland" is defined as "the country in which one was born or makes one's home" and "nationality" is defined as "1. national quality or character, 2. the condition or fact of belonging to a nation by birth or naturalization, 3. the condition or fact of being a nation, 4. a nation or national group". Oxford defines "homeland" as, *inter alia*," (a) one's native land; *esp*. Great Britain; (b) *S. Afr*. an area reserved for members of a particular (indigenous African) ethnic or linguistic group (the official name for a Bantustan)"; and "nationality" is defined in part as "2. nationalism; attachment to one's country or nation; national feeling ... The fact of belonging to a particular nation; national origin; *spec*. the status of a citizen or

subject of a particular State; the legal relationship by which this is defined, usu. involving allegiance by the individual to the State and protection by the State of the individual".

The concept of genuine connection is well described by Board member Z. Sachedina in [1996] C.R.D.D. No. 17 (No. T94-01251):

> Another component of nationality in international law is the concept of "genuine connection." As stated earlier, international law leaves it to each state to lay down the rules governing the grant of its own nationality?
>
> The International Court of Justice then went on to state:
>
> ... On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.
>
> The ICJ continued on to say:
>
> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.
>
> International arbitrators have decided ... numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next; the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.
>
> Nationalisation is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently, in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him
>
> In addition to the language of the legislation of a country granting citizenship, the issue of nationality in international law is decided on the basis of whether there is a "genuine link" between the person and the state. The question before me, therefore, is whether the mere fact of being Jewish creates a "genuine link" between any Jewish person and the State of Israel. I do not find that this is so. In considering what is a "genuine link," I am guided by the International Court of Justice in the Nottebohm case:

Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

I do not find that all Jews have the connection with the State of Israel to make them nationals of Israel. In the present case, I do not find that the claimant exhibited the degree of attachment to the State of Israel such as to make it the "centre of her interests," etc. The claimant has never set foot on Israeli soil; she has no immediate family in Israel and no desire to settle in Israel. The only connection she has with Israel is that she is a Jew. I do not find that fact, by itself, is enough to make one an Israel citizen.

As well as requiring a genuine connection with home state it is also necessary to look at the question of whether the Law of Return is mandatory or discretionary. I endorse the comments of Board member Kalvin at page 7 of his decision when he states:

With respect, in suggesting that Israeli citizenship is conferred "*not* on a *discretionary* basis, but according to Israeli law", the CRDD panel in *Grygorian* has misunderstood the nature of discretionary powers. All discretionary powers exercised by administrative officials are powers which are conferred by legislative provision, that is by law. Administrative officials do not have inherent powers of discretionary authority. Discretionary power must be conferred upon them. In other words when administrative officials are authorized to make decisions at their discretion, that discretion is conferred by way of legislative provision. The fact that powers are conferred on the Israeli Minister of the Interior pursuant to subsection 2(b) of the Law of Return, or "according to Israeli law" as was said by the *Grygorian* panel, does not make those powers non-discretionary. The only way in which discretionary powers can be conferred on administrative officials is "according to Israeli law".

With respect to my colleagues in the *Grygorian* case, I simply cannot agree that Israel's *Law of Return* is one "which confers no discretion in that country's authorities" and confers on persons such as the claimant in *Grygorian* and in the instant case "an absolute right to citizenship". On the contrary, the *Law of Return* is in fact a classic example of a legislative provision conferring discretionary power in an administrative authority -- in this case the Minister of the Interior.

Discretionary power may be contrasted with *mandatory* power. A power is discretionary when, given a particular factual circumstance, the administrative authority, in exercising that power, is free to choose from a variety of options: in other words, his or her conduct is not prescribed in advance by legislative provision. A power is mandatory when, given a particular factual circumstance, the administrator is required to make a particular decision. J. Evans and the other authors of *Administrative Law* put it this way

The legal concept of discretion implies a power to make a choice between alternative courses of action. If only one course can be lawfully adopted, the decision taken is not the exercise of a discretion but the performance of a duty.

There can be little doubt that a statute which gives the Israeli Minister of the Interior the power to deny citizenship to applicants where the Minister "is

satisfied that" the conditions in paragraphs (1), (2) and (3) of subsection 2(b) apply confers upon the Minister a discretionary power. The fact that the Minister's discretion is not open-ended but is structured by the conditions set out in paragraphs (1) to (3), does not mean that the power is non-discretionary. Thus in determining whether an individual is someone who "is liable to endanger public health or the security of the State" the Minister will often have more than one legal option to choose from. The Minister's decision is not predetermined by the provisions of the *Law of Return* and therefore the power conferred on the Minister is clearly a discretionary one.

In my opinion, subsection 2(b) confers on the Israeli Minister of the Interior a wide discretion to exclude prospective applicants for Israeli citizenship. That a given factual circumstance does not require the Minister to make a particular decision, but allows the Minister to choose from a variety of options, is well illustrated by the CRDD decision in T95-00412, in which my colleague Avarich-Skapinker poses the example of a person with H.I.V. Does such a person constitute a danger to "the public health of Israel"? The answer to that question, is not found in the *Law of Return*, except to the extent that that law confers upon the Minister of the Interior discretion to make that decision. It is difficult to predict how the Minister might exercise that discretion. What is clear, however, is that the power is discretionary and not mandatory, that is, this particular factual circumstance does not require the Minister to exercise his or her power in a particular way. Rather the Min[i]ster will choose between options in exercising the power conferred under subsection 2(b). Moreover, even in cases where it is easy to predict how the Minister might exercise his or her power, that does not make the exercise of that power "non-discretionary": sometimes it is easy to predict how discretion will be exercised. I agree with my colleague Noseworthy in A95-00490 where she says the following:

> What diseases or illnesses would be liable to endanger public health or security of the state as envisioned by s. 2(b)(2)? Again, this is not a matter for this panel to decide, but rather a discretionary power of the Minister of Immigration.

An article by M. Grayson entitled "Israeli Citizenship Law -- Immigrant Visa -- Meaning of Section 2(b)(3) of the Law of Return" fortifies me in my conclusion that Israel's *Law of Return* confers discretionary power on the Israeli Minister of the Interior with respect to applications for Israeli citizenship. This article examines the operation of the *Law of Return* in the context of the decision by the Minister to deny an immigrant's visa to Meyer Lansky, a citizen of the United States and a well-known criminal figure. Mr. Grayson concludes as follows:

> The decision also indicates that the Minister of Interior will have *wide discretion* in applying the exceptions of the Law of Return, due in part to the highly informal nature of Israeli administrative proceedings.

With respect to my colleagues in the *Grygorian* case, in my view it is clear that Israel's *Law of Return* does not confer "absolute right to citizenship, where the authorities have no discretion to refuse her". Rather, it is my opinion, and I so find, that the *Law of Return* confers a wide discretion on the Israeli Minister of the Interior to reject applications for citizenship. Thus a refugee claimant, by virtue of being Jewish does not come within the principle enunciated in the *Bouianova* and *Zdanov* decisions, which principle the CRDD panel

in *Grygorian* enunciated as follows: "where a claimant can as of right, obtain the citizenship of a country by mere formality of application, and where there is no discretion in that country's authorities to refuse the application, then that country is to be considered a country of nationality". In the case of a Jewish claimant, not only is that person's application subject to the discretion of the Israeli Minister of the Interior, but further, the process of applying for and being granted citizenship is not, in my view, one which can be described as a "mere formality". A Response to Information Request prepared by the Documentation, Information and Research Branch of the Immigration and Refugee Board ("DIRB") in 1991 indicates that

> [J]ews have the right to ask for permission to return to Israel, but there is a procedure that involves checking criminal records and personal background. Applying for an immigrant's visa (Oleh) requires interviews and a waiting period for approval. *It is not an automatic process*.

Although the response to information request in the above case was in 1991 in the case at bar there was a similar response to information request in 1994 which is not different in substance.

There is a major difference between Israeli Law of Return and Russian citizenship laws. There is no discretionary provisions in the Russian citizenship laws. Secondly, it is very important to review the cases which involve a stateless person since there is no other location. In this case, the Board found that the applicant was a national of Ukraine and the question of statelessness does not arise. The Board erred in its interpretation of nationality for the above reasons. In light of the foregoing, I do not need to deal with other matters raised by the applicant. The matter is returned to a differently constituted Board for redetermination in a manner not inconsistent with these Reasons. The Board will only need to deal with the Law of Return in this matter since the previous Board made no error in finding that:

> ... what the claimant fears if returned to Ukraine is of a substantially prejudicial nature so as to constitute persecution and that the state authorities, regardless of their good intentions, are not able to protect the claimant. I find that she has a well-founded fear of persecution on the basis of her nationality if she were to return to Ukraine.

There is no need for the Board to re-examine this finding. The applicant did not make a claim against the state of Israel thus the only question to be answered is whether Israel is another country of nationality. Both parties agreed on a question of general importance for certification. It reads as follows:

By virtue of Israel's Law of Return should Israel be considered as a country of reference for all Jewish refugee claimants who apply in Canada for Convention refugee status?

I hereby certify this question.

(Sgd.) "William P. McKeown"

Judge

VANCOUVER, B.C.

May 2, 1997

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE: LIOUDMILA KATKOVA - and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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REASONS FOR ORDER:

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DATED: MAY 2, 1997

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