REASONS FOR JUDGMENT

The application under section 28 is allowed; the decision of the Refugee Division announced on July 18, 1989, dated August 18, 1989 and signed on August 23, 1989, is quashed and the case is returned to the said Division to be reviewed.

DECARY J:

This application which is brought before us under section 28 of the Federal Court Act raises two questions: one is the jurisdiction of this Court, the other, if the case requires, is the interpretation of the definition of a Convention refugee.

The applicant claimed refugee status. The Refugee Division concluded that the applicant was not a refugee and that his claim did not have a credible basis. In accordance with the requirements of subsection 69.1(12) of the immigration Act ("the Act"), the Division reported this conclusion in its decision.

Since the applicant did not have the right of appeal to this Court under the terms of subsection 82.3(2) of the Act, basing his action on subsection 82.1(1) of the Act, he applied to this Court for authorization to have the Refugee Division's decision reviewed in accordance with section 28 of the Federal Court Act.

JURISDICTION OF THIS COURT

In allowing the application for authorization, my brother Pratte J added the following reservation:

This order is handed down on the assumption, which has not been decided upon, that the decision which the applicant wishes to challenge may be appealed pursuant to section 28 of the Federal Court Act, notwithstanding subsection 83.3(1.1) of the Immigration Act (now subsection 82.3(2)); this question will have to be decided by the Court when it rules on the application under section 28.

In her brief, the representative of the Attorney General of Canada conceded that this Court had jurisdiction. This concession on a point of law and, more important, of jurisdiction cannot, however, bind the Court or justify it in not examining the question more thoroughly.

The relevant legislative provisions are as follows:

Immigration Act, subsections 69.1(12), 82.1(1), 82.3(1) and 82.3(2):

69.1(12) If the Refugee Division determines that a claimant is not a Convention refugee and does not have a credible basis for the claim to be a Convention refugee, the Refugee Division shall so indicate in its decision on the claim.

82.1(1) An application or other proceeding may be commenced under section 18 or 28 of the Federal Court Act with regard to any decision or order made, or any other matter arising, under this Act or the rules or regulations only with leave of a judge of the Federal Court -- Trial Division or the Federal Court of Appeal, as the case may be.

82.3(1) An appeal lies to the Federal Court of Appeal with leave of a Judge of that Court from a decision of the Refugee Division under section 69.1 on a claim or under section 69.3 on an application; on the ground that the Division

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

(2) Notwithstanding subsection (1), no appeal lies to the Federal Court of Appeal from a decision of the Refugee Division under section 69.1 on a claim, if the Refugee Division, pursuant to subsection 69.1(12), has indicated in the decision that the claimant has no credible basis for the claim.

Federal Court Act, subsection 28(1) and section 29:

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision, or order, whether or not the error appears on the face of the record; or

(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

that in establishing in this instance the right of appeal to this Court on the same grounds as those stated in section 23 of the Federal Court Act, the legislator set aside the recourse to review provided in the same section (see also Re Wah Shing Television and CRTC [1985] 14 DLR (4th) 425; Cathay International Television Inc v CRTC [1987] 80 NR 117; and Mojica v Minister of Manpower and Immigration [1977] 1 FC 458).

The question which arises is to decide whether, by withdrawing this right of appeal as soon as it is granted in the case contemplated in subsection 69.1(12) of the Act, the legislator restored recourse to review for this particular case. If there were nothing but subsections 82.3(1) and 82.3(2) of the Act, it could be maintained that the legislator wanted to remove any recourse of appeal or review in the case contemplated in subsection 69.1(12); by basing appeals on the same grounds as were used for review, thus ending by the effect of section 29 of the Federal Court Act any possibility of review, the legislator cold have placed "appeal" and "review" on the same footing for purposes of subsections 82.3(1) and 82.3(2) of the Act and successively abolishing, for the cases contemplated in subsection 69.1(12) of the Act, first review and then appeal.

When, however, it is a question of setting aside this Court's general power of review in regard to certain administrative decisions, and especially when it is a question, as would be the case here if this Court did not have jurisdiction, of preventing all possibility of judicial control over a decision of such importance to a person's rights as that handed down by the Refugee Division, it is my opinion that this Court must interpret as strictly as possible any provisions tending to set aside any judicial control. I also note that in this instance, the Refugee Division would merely have to state itself in its decision that the claim did not have a credible basis in order to free itself from any judicial control. This would mean creating such an arbitrary authority in the field of immigration that I could not resign myself to acknowledging it, unless the legislator had expressed itself in clear terms which were not open to even a remote possibility of contrary interpretation; and in that case perhaps the provisions of the Canadian Charter of Rights and Freedoms would in any event come to the aid of the person suffering from this arbitrary treatment.

In the case at bar, two reasons lead me to believe that such was not or could not have been the legislator's intention. First, in section 82.1 of the Act, the legislator refers to "an application or other proceeding under section 18 or 28 of the Federal Court Act", and we are entitled to believe

that having thus expressly preserved, in general terms, the Federal Court's power of control, it would have excluded it expressly two sections later if such had been its intention. Second, since this Court has authority to review, at the first stage, a conclusion reached by the access tribunal to the effect that a claim does not have a credible basis (section 46.02 of the Act), it would seem to me surprising, to say the least, in the absence of any indication to the contrary by the legislator, that the possibility of an application for review should no longer be recognized when, at the second stage, the Refugee Division, reversing the conclusion of the access tribunal, concludes that the claim does not have a credible basis.

I am therefore of the opinion that this Court has jurisdiction, pursuant to section 28 of the Federal Court Act and subsection 82.1(1) of the Immigration Act, to review the Refugee Division's decision even though that decision cannot be appealed to this Court according to the terms of subsection 82.3(2) of the Immigration Act.

In view of the conclusion I reach on this first question, we should consider the second.

DEFINITION OF A CONVENTION REFUGEE

First let me call to mind the definition of a "Convention refugee" as it appears in subsection 2(2) of the Immigration Act:

"Convention refugee" means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b) has not ceased to be a Convention refugee by virtue of subsection (2).

In the case at bar, the applicant, a Lebanese citizen, claimed Convention refugee status on the grounds that he had a well-founded fear of persecution for the reasons stated in the above definition. His testimony, which was not questioned by the Refugee Division, and the summary presented by the refugee hearing officer, which the Refugee Division adopted, show that the applicant was an Armenian Christian who had experienced various incidents connected with the fact that he was Armenian and Christian. After relating these incidents, the Refugee Division handed down the following decision:

[TRANS] According to his testimony, his fear stems from the barricades, these various incidents, his religion, his social group, his political opinions, his race and his nationality. Mr Salibian's political opinions favour neutrality and, according to his evidence, Christian Armenians are neutral, which facilitates their contacts in West Beirut. This makes them envied by people in East Beirut and causes them to be questioned at the barricades because of their neutrality, religion and place of birth, but the same is true of everyone else.

We have listened attentively to the applicant's evidence and studied the documents produced. We do not, in general, question the facts reported, although there were some contradictions. We consider that nothing in the testimony leads us to believe that the applicant himself was personally targeted by opponent groups. He was the victim of reprehensible acts which cannot, however, be considered to have been directed at him in particular.

There is at present a conflict, we would even say conflicts, in Lebanon which disrupt the life of every Lebanese citizen. The applicant is a victim in the same way as every other Lebanese citizen. We would add that we are aware of the situation prevailing in Lebanon, as reported in the documents submitted to us and in the testimony, and we understand that having endured

the situations described, the applicant wants to rebuild a normal life. But we are bound by an Act which we must apply and which contains a precise definition of what constitutes a Convention refugee.

We are bound to conclude that the applicant does not meet the criteria in that definition. Moreover, we consider that your application does not have a credible basis. Consequently, your refugee status claim is rejected, in accordance with subsection 2(1) of the Immigration Act. (Emphasis added.)

In short, the Refugee Division concluded that to qualify for refugee status, the applicant had to be singled out by reprehensible acts aimed at him in particular. The Refugee Division further concluded, despite the evidence that the applicant was a victim of these acts in his capacity not as a Lebanese citizen but as an Armenian Christian Lebanese citizen, that the applicant was a "victim in the same way as every other Lebanese citizen". We have here, in my opinion, an error of law, in the first case, and an erroneous conclusion of fact in the second case, drawn without taking into account the factual elements placed before the Refugee Division. This error of fact acquires its full meaning in the context of the error of law.

In light of this Court's case law relating to Convention refugee status claims, we can assert:

(1) that the applicant need not prove that he himself has been persecuted in the past or that he himself would be persecuted in future;

(2) that the applicant may prove that the fear he felt resulted not from reprehensible acts committed or liable to be committed directly against him, but from reprehensible acts committed or liable to be committed against the members of a group to which he belonged;

(3) that a civil war situation does not pose an obstacle to a claim provided the fear is not a fear felt by all citizens indiscriminately because of the civil war but a fear felt by the applicant himself, by a group with which he is associated or, at the very least, by all citizens because of a risk of persecution based on one of the reasons in the definition.

(4) that the fear is of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin (see Seifu v Immigration Appeal Board, A-277-82, January 12, 1983, quoted in Adjei v Canada [1989] 2 FC 680, at p 683; Darwich v Minister of Manpower and immigration, [1979] 1 FC 365; Rajudeen v Minister of Employment and Immigration, [1984] 55 NR 129, at pp 133 and 134).

The decision being challenged stands squarely within the mainstream of case law which Professor Hathaway[1] describes as follows:

[ORIGINAL ENGLISH FOLLOWS]

I adopt this description of the applicable law which appears at the end of the above-mentioned article:

[ORIGINAL ENGLISH FOLLOWS]

In the case at bar, the Refugee Division was mistaken as to the nature of the burden which the applicant had to discharge and it rejected his application on the grounds that he had not proved personal persecution in the past. This conclusion is doubly erroneous; there is not the slightest need for a person claiming Convention refugee status to demonstrate either that persecution is personal or that persecution occurred in the past.

In the circumstances, it thus seems necessary to me to return the file to the Refugee Division so that it may examine the well-foundedness of the applicant's claim in light of the reasons in this decision and of the other elements in the definition of a refugee on which it was not called upon to pronounce.

FEDERAL COURT OF APPEAL

BETWEEN:

VAHE SALIBIAN,

Applicant

- and -

AND: THE MINISTER OF EMPLOYMENT AND IMMIGRATION,

Respondent

- and -

AND: THE ATTORNEY GENERAL OF CANADA,

Mis-en-cause

REASONS FOR JUDGMENT

The application should be allowed, the decision of the Refugee Division should be set aside and the case should be returned for re-examination not inconsistent with these reasons.

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[1] In a chapter entitled "The Determination of Refugee Claims Grounded in Generalized oppression" in a book entitled The Law of Refugee Status, to be published shortly by Butterworths and Co (Canada) Ltd with the assistance of the Canadian Law Information Council.