

citizenship judge in the first instance. The appeal was dismissed.

Saba Naqvi

Embarkation Law Group

Immigration and Citizenship Lawyers

Box 26, 609 West Hastings Street

6th Floor, Princess Building

Vancouver BC, Canada V6B 4W4

Tel: (604) 662-740; Fax: (604) 662-7466

saba@elgcanada.com

The Test for Well-Foundedness of a Fear of Persecution under Canadian Refugee Law

Edward C. Corrigan

The 1951 Geneva Convention refugee definition only speaks about the "well-founded" fear of persecution when describing the nature of the test for well-foundedness which provides the basis for a fear of persecution. The Federal Court of Appeal of Canada set out in *Adjei v. Canada (Minister of Employment & Immigration)*¹ the test for well-foundedness of a refugee claimant's fear in establishing the criteria for assessing the need for protection in terms of Canadian law. The Court ruled that:

5 It was common ground that the objective test is not so stringent as to require a *probability* of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not. ...

6 The parties were agreed that one accurate way of describing the requisite test is in terms of "reasonable chance": is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?

7 We would adopt that phrasing, which appears to us to be equivalent to that employed by Pratte J.A. in *Seifu v. Immigration Appeal Board* (12 January 1983) A-277-82 (Fed. C.A.):

[I]n order to support a finding that an applicant is a convention refugee, the evidence must not necessarily show that he 'has suffered or would suffer persecution'; what the evidence must show is that the applicant has *good grounds* for fearing persecution for one of the reasons specified in the Act.

(emphasis added)

8 What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50 per cent chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

The "reasonable chance" or "good grounds" test established by the Federal Court in *Adjei* was further elaborated by the Court in *Ponniah v. Canada (Minister of Employment & Immigration)*.² Desjardins J.A. speaking for the Court held as follows:

9 "Good grounds" or "reasonable chance" is defined in *Adjei* as occupying the field between upper and lower limits; it is less than a 50per cent chance (i.e., a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds".

10 If the claimant, as the Board said, "may face slightly more than a mere possibility" of persecution, he had crossed the lower limit and had made his case of "good grounds" or a "reasonable chance" for fearing persecution.

The Federal Court in *Madelat v. Canada (Minister of Employment & Immigration)*³ discussed the degree of proof required to establish a well-founded fear of persecution. MacGuigan J.A. ruled as follows:

2 Coupled with the foregoing is the additional consideration that the Board commented that "it must be *convinced* that the claimant's fear of persecution is well founded" (*Appeal Book II* at 226, emphasis added), which raises the question whether the Board understood the limited burden of proof on the appellant as developed in *Adjei v. M.E.I.* (1989), 57 D.L.R. (4th) 153.

There is no requirement in law that the applicant actually be "physically harmed" before he can be accepted as a Convention refugee. The correct test "is there more than a mere possibility"

2. 1991 CarswellNat 43, 13 Imm. L.R. (2d) 241, 132 N.R. 32.

3. 1991 CarswellNat 871, 179 N.R. 94.

1. 1989 CarswellNat 40, 7 Imm. L.R. (2d) 169, [1989] 2 F.C. 680, 57 D.L.R. (4th) 153, 132 N.R. 24.

that there is a risk of persecution to establish the well-foundedness of his claim.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status makes the following observation at para. 65:

65. Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

In *Rajudeen v. Canada (Minister of Employment & Immigration)*,⁴ the Federal Court of Appeal ruled that the police indifference to the plight of a refugee claimant from Sri Lanka justified the claimant's reluctance to seek their protection. As Mr. Justice Stone stated:

Obviously, an individual cannot be considered a "Convention refugee" only because he has suffered in his homeland from the outrageous behaviour of his fellow citizens. To my mind, in order to satisfy the definition the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in it knowingly tolerating the behaviour of private citizens, or refusing or being unable to protect the individual from such behaviour.

The law with respect to refugees in the United States also supports the view that "a well-founded fear of persecution" includes the actions of non-governmental persecutors where the state cannot or will not protect the claimant from those threats. In *McMullen v. Immigration & Naturalization Service*, the U.S. Court of Appeal found that the concept of persecution included "persecution by the government or by a group which the government is unable to control". This legal view was upheld in other U.S. rulings on refugees:

McMullen v. Immigration & Naturalization Service, 658 F.2d 1312, C.A.9, 1981 at p. 1315;

Artiga Turcios v. I.N.S., 829 F.2d 720, C.A.9, 1987. at p. 723;

Arteaga v. I.N.S., 836 F.2d 1227, C.A.9, 1988;

Estrada-Posadas v. U.S. I.N.S., 924 F.2d 916, C.A.9, 1991 at p. 919.

The Supreme Court of Canada decision *Ward v. Canada (Minister of Employment & Immigration)*⁵ confirmed the view that state complicity is not a requirement to obtain protection under the Geneva Convention and that "persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens". The Supreme Court of Canada held that:

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. The former is, of course, comprised in the latter, but the drafters of the Convention had the latter, wider purpose in mind. The state's inability to protect the individual from persecution founded on one of the enumerated grounds constitutes failure of local protection. ... persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens.

La Forest J. summarized this issue for the Supreme Court of Canada as follows:

...state complicity is not a necessary component of persecution, either under the "unwilling" or under the "unable" branch of the definition. A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced. I recognize that these conclusions broaden the range of potentially successful refugee claims beyond those involving feared persecution at the hands of the claimant's nominal government. As long as this persecution is directed at the claimant on the basis of one of the enumerated grounds, I do not think the identity of the feared perpetrator of the persecution removes these cases from the scope of Canada's international obligations in this area.

The 1951 Geneva Convention refugee definition does not set out a test of what constitutes a "well-founded" fear of persecution and

4 1984 CarswellNat 675, 55 N.R. 129.

5 1993 CarswellNat 90, 20 Imm. L.R. (2d) 85, 103 D.L.R. (4th) 1, 153 N.R. 321, [1993] 2 S.C.R. 689.

which provides the basis for obtaining protection. Canadian jurisprudence on this question, as set out by the Federal Court, has set a very low legal threshold for a "well-founded" fear of persecution. Accordingly the burden of proof for a refugee claimant is to demonstrate that he faces a risk of "more than a mere possibility of persecution" if the individual is returned to a country where they have fear of persecution. If the refugee claimant meets the test of "more than a mere possibility" then under Canadian law they deserve the protection of Canada as Convention refugees.

Edward C. Corrigan is a lawyer certified as a Specialist in Immigration Law and Immigration and Refugee Protection by the Law Society of Upper Canada in London, Ontario. He can be reached at corriganlaw@edcorrigan.ca or at (519) 439-4015.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo

Live-in Caregiver

Case: *Salman v. Canada (Minister of Citizenship & Immigration)*

Docket: IMM-4492-06

Decider: P. Blais J.

Court: F.C.

Citations: 2007 CarswellNat 2749, 2007 FC 877

Notes: Should have advised educational documents were believed fraudulent and investigated more thoroughly

Medical

Case: *Ching-Chu v. Canada (Minister of Citizenship & Immigration)*

Docket: IMM-694-07

Decider: M.A. Kelen J.

Court: F.C.

Citations: 2007 CarswellNat 2684, 2007 FC 855

Notes: Willingness and intention to pay applies to provincial nominee – failure to grant an extension in all cases is an unlawful fettering of discretion

Case: *Colaco v. Canada (Minister of Citizenship & Immigration)*

Docket: A-366-06

Deciders: G. Létourneau J.A., Linden J.A., Sexton J.A.

Court: F.C.A.

Citations: 2007 CarswellNat 2909, 2007 FCA 282

Notes: Reasoning in *Hilewitz* applies to skilled workers

Permanent Residence

Case: *Khalil v. R.*

Docket: T-2066-03

Decider: Layden-Stevenson J.

Court: F.C.

Citations: 2007 CarswellNat 2910, 2007 FC 923

Stay of Removal

Case: *Babolim v. Canada (Minister of Citizenship & Immigration)*

Docket: IMM-3618-07

Decider: O. Frenette J.

Court: F.C.

Citations: 2007 CarswellNat 2900, 2007 FC 909

Notes: R/MOH to life not considered in officer's notes

Case: *Garcia c. Canada (Ministre de la Citoyenneté & de l'Immigration)*

Docket: A-142-06

Deciders: A Desjardins J.A., J.D.D. Pelletier J.A., M. Noel J.A.

Court: F.C.A.

Citations: 2007 CarswellNat 3016, 2007 FCA 75, 2007 CAF 75

Paragraph 16: For a decision made in a judicial proceeding to be "directly contravened" by the enforcement of the removal order, an express provision of an order must be inconsistent or irreconcilable with the removal of the person concerned. Therefore, I agree on this point with paragraph 34 of *Alexander*, referred to above.

Paragraph 24: I would respond to the following certified question in the negative:

Could a judgment by a provincial court refusing to order the return of a child in accordance with the *Convention on the Civil Aspects of International Child Abduction*, [1989] R.T. Can. No. 35, and section 20 of *An Act respecting the Civil aspects of international and interprovincial child abduction*, R.S.Q., c. A-23.01 (ACAICA) have the effect of directly and indefinitely preventing the enforcement of a removal order which is effective under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA)?