BETWEEN: ALEXANDER KLINKO, LYUDMYLA KLINKO, and ANDRIY KLINKO, Appellants AND: MINISTER OF CITIZENSHIP AND IMMIGRATION, Respondent

[Indexed as: KLINKO v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)]

File No. A-321-98

Federal Court of Appeal

2000 ACWSJ LEXIS 1294; 2000 ACWSJ 170138; 95 A.C.W.S. 3d 140

February 22, 2000, Decided

PRIOR-HISTORY: [*1] Appeal from 148 F.T.R. 69 allowed

KEYWORDS: IMMIGRATION -- Refugee status -- Requirements --Appellant appealed decision denying claim for refugee status -- Question on appeal was whether appellant suffered persecution on account of political opinion when conduct complained of was not officially sanctioned, condoned or supported by state

STATUTES -- Interpretation -- General -- Immigration Act (Can.), s. 2(1) -- Opinion could be political whether or not it accorded with official government position -- Political opinion did not cease to be political because government agreed with it

SUMMARY: Appellant appealed decision of motions judge at 79 A.C.W.S. (3d) 801, dismissing application for judicial review of appellant's claim for Convention refugee status -- Question on appeal was whether appellant suffered persecution on account of political opinion when conduct complained of was not officially sanctioned, condoned or supported by state -- Appellant filed complaints respecting government officials -- Thereafter appellant was subject to physical assaults and harassment -- Board ruled that appellant's expression was not political opinion as corruption complained of was not promoted or sanctioned by state [*2] --
HELD:Appeal was allowed -- Opinion could be political whether or not it accorded with official government position -- Political opinion did not cease to be political because government agreed with it -- Further, it was not required that government be persecuting agent -- Immigration Act (Can.), 2(1).

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JUDGES: Letourneau, Noel and Malone JJ.A.

Letourneau J.A.

[**1] This is an appeal against a decision of a motions judge dismissing an application for judicial review of a denial of the appellants' claim for Convention refugee status by the Immigration and Refugee Board (Board). Although he dismissed the application, the learned judge certified the following question:

Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported [*3] by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee in subsection 2(1) of the Immigration Act ?

[**2] Essentially, this appeal involves the determination of the following questions in addition to the one certified:

[**3] a)what is the appropriate standard of review of the decision of the Board and that of the motions judge?

[**4] b)did the motions judge commit a reviewable error in upholding the Board's finding that Mr. Klinko's well-founded fear of persecution was not connected to a political opinion?

[**5] c)did the motions judge commit a reviewable error in confirming the Board's assessment of the refugee claims of Mrs. Klinko or her son?

Facts

[**6] The Klinkos were citizens of the Ukraine. The husband and father, Alexander Klinko, was an importer.

[**7] In 1995, Mr. Klinko and five other businessmen filed with the regional governing authority a formal complaint about widespread corruption among government officials. They did not have a group name and met only four times. The complaint was signed by each of them individually. There is no indication in the record that the wife of [*4] Mr. Klinko was involved with the group or that she made any public statements with respect to corruption herself. In the end, the group's complaint was denied by the regional authority.

[**8] The evidence is clear that widespread corruption existed at the time in the Ukraine. The year after the complaint was made 9,000 officials were convicted of economic crimes in 1996 and the President of the Ukraine had called this activity, in conjunction with overall economic crimes, a "fifth" and political power.

[**9] After filing the complaint, the Klinkos suffered retaliation. Mr. Klinko's problems included being beaten, receiving anonymous telephone calls, intimidation of his employees, damage and destruction of his property and an arrest for interrogation (*1) . Mrs. Klinko received threatening telephone calls and requests by police to provide evidence against her husband. Their son Andriy endured disturbing events such as the searching of the Klinko home and having police hint that his father was dead; however no psychological assessment was provided of the "trauma" he allegedly suffered.

[**10] (*1) See Board's Decision, Appeal Book, pages 23-24.

[**11] On the basis [*5] of these events the family claimed refuge in Canada. Mr. and Mrs. Klinko claimed Convention refugee status based on political opinion or imputed political opinion and membership in a particular social group (i.e. the group of businessmen), and Mrs. Klinko and her son claimed Convention refugee status based on membership in a particular social group (i.e. their family).

Decision of the Immigration and Refugee Board

[**12] The Board accepted the testimony of the Appellants as credible. It recognized that Mr. Klinko had been persecuted, but not on account of a Convention ground. It went on to reject each of the following grounds on which refugee status was claimed.

[**13] Group of Six Business People as Particular Social Group - Adult Claimants : The Board found that the claimants" persecutors did not persecute them as members of a group, but rather individually. It concluded that the adult claimants" problems arose out of their individual actions, not their membership in any identifiable social group.

[**14] Political Opinion - Adult Claimants : In the case of Mrs. Klinko, the Board was of the view that her fear was not of persecution but of harassment, which does not [*6] rise to the level of a Convention ground. Mr. Klinko, on the other hand, was found to have a fear of persecution but it did not qualify as fear of persecution for reasons of "political opinion".

[**15] In determining the meaning of the term "political opinion", the Board had recourse to two cases: the leading case of Canada (Attorney General) v. Ward (*2) (hereinafter Ward), which provides a definition of political opinion as "any opinion on any matter in which the machinery of state, government, and policy may be engaged", and the decision of the Trial Division of this Court in Femenia v. Canada (Minister of Citizenship and Immigration) (*3) (hereinafter Femenia), which specified that for a matter to be "engaged" in by the machinery of state, it must be "sanctioned by, condoned by or supported by" the state. Given these definitions, it ruled that the complaint against corruption did not amount to political opinion as the state of Ukraine, far from condoning the corruption of its officials, was taking active steps to eliminate it.

[**16] (*2) [1993] 2 S.C.R. 689 at 746.

[**17] (*3) (30 October 1995), IMM-3852-94.

[**18] The Particular Social Group [*7] "Family" - Minor Claimant : The son's claim was denied for two reasons. First, there was insufficient evidence that he was indeed traumatized at all, or to an extent that would amount to persecution. As well, his problems were derivative of his parents" problems, which the Board was unable to connect to a recognized Convention ground. To that extent, the Board believed that it would be illogical to find that the son nonetheless qualified as

a refugee when his father who was the main target of the persecution had not been found to have been persecuted on account of a ground enumerated by the Convention. The Board, however, did not address Mrs. Klinko's claim as member of that particular social group.

Decision of the Trial Division

[**19] The motions judge dismissed the application for judicial review. He found no reviewable error in any of the aspects of the decision of the Board.

[**20] He accepted the Femenia interpretation of Ward . The Board had evidence before it that the Ukraine government did not sanction, condone or support corruption by its officials. Perhaps, he said, if the Ukraine government's anti-corruption efforts had been only of a token nature, the opposite [*8] could be argued, but in fact the Ukraine government had made a substantial number (9,000) of convictions of corrupt officials. Based on this evidence, he concluded that it was reasonable for the Board to find that the state was therefore not "engaged" in the criminal conduct of corrupt police and customs officials. From this, he believed the Board correctly found that Mr. Klinko's complaint could not be said to be a political opinion within the Convention refugee definition.

[**21] In his view, the Board's finding that the businessmen did not form a particular social group was also based on factual findings. While he said that he might have reached a different finding he did not find the Board's assessment of the evidence unreasonable.

[**22] Finally, he found that the Board was correct in concluding that when the primary victim of persecution does not come within the Convention refugee definition, any derivative Convention refugee claim based on family group cannot be sustained. Otherwise, the anomaly of derivative claims being allowed but primary claims being denied could result.

[**23] The motions judge dismissed the judicial review but certified the question previously [*9] mentioned.

The appropriate standard of review of the decision of the Board and that of the motions judge

[**24] The central issue of this appeal is the certified question under subsection 83(1) of the Immigration Act (*4) (Act), namely whether the opinion expressed by Mr. Klinko in the context previously described is a political opinion or not. On this issue, there is no doubt that, in view of the importance of the question and the precedential value of the Court's decision on that question, the standard of review applicable is that of correctness. In Pushpanathan v. Canada (Minister of Citizenship and Immigration) (*5) , Bastarache J. wrote for the majority:

[**25] (*4) R.S.C., 1985, c. I-2, as amended.

[**26] (*5) [1998] 1 S.C.R. 982, at p. 1015.

In my judgment, however, applying the pragmatic and functional analysis to the Act indicates that the decision of the Board in this case should be subjected to a standard of correctness.

First, s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of [Emphasis start] [*10] general[Emphasis end] importance" (emphasis added). The general importance of the question, that is, its applicability to numerous future cases, warrants the

review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable?

[**27] The same standard of review applies at the Trial Division level where review of the Board's decision occurs (*6) :

[**28] (*6) Id ..

The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal - and inferentially, the Federal Court, Trial Division - is permitted to substitute its own opinion for that of the Board in respect of questions of general importance.

[**29] In the present instance, while the motions judge did not explicitly discuss the standard applicable, I am satisfied that, [*11] in reviewing the Board's interpretation of the law with respect to the notion of "political opinion", he applied the standard of correctness. I draw such inference from his approval of the definition of the word "engaged" set forth in the Femenia case and applied by the Board. With this principle in mind, I now propose to address the certified question.

The Certified Question

[**30] For a proper understanding and analysis of the certified question, it is helpful to recall the context in which the notion of "political opinion" was first defined and then subsequently evolved into the restriction at issue in this appeal: that a public complaint about corruption of government officials is not an expression of political opinion within the terms of the definition of Convention refugee in subsection 2(1) of the Act where the corrupt conduct is not officially sanctioned, condoned or supported by the state .

[**31] The notion of "political opinion" was first considered by the Supreme Court of Canada in the Ward case (*7) . Clearly in that case, the Court rejected a narrow definition of "political opinion" whereby in order to be political, an opinion would have to hold views contrary [*12] to, or be critical of, the policies of the government. The need for a broad definition of the concept was justified by the fact that persecution for having expressed a political opinion may originate from a third party without complicity of the state. The Court adopted a broad interpretation of "political opinion" which includes "any opinion on any matter in which the machinery of state, government, and policy may be engaged". This excerpt from the decision illustrates well the rejection of the narrow definition and the adoption of the general interpretation (*8) :

[**32] (*7) [1993] 2 S.C.R. 689.

[**33] (*8) Id. at p. 746.

Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as persecution of persons on the ground "that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party"; see Grahl-Madsen, supra , at p. 220. The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors. Grahl-Madsen's definition assumes that the persecutor from whom the claimant is fleeing is always the government or ruling party, or at least some party [*13] having parallel interests to those of the government. As noted earlier, however, international refugee protection extends to situations where

the state is not an accomplice to the persecution, but is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real. The more general interpretation of political opinion suggested by Goodwin-Gill, supra , at p. 31, i.e., "any opinion on any matter in which the machinery of state, government, and policy may be engaged", reflects more care in embracing situations of this kind.

[**34] In Femenia , supra , the refugee claimant complained of persecution by corrupt policemen as a result of denouncing crimes and corruption among state officials. The motions judge accepted the very fact of persecution, but proceeded to define the word "engaged" used by the Supreme Court of Canada in Ward . Basically, the learned judge concluded that even though state officials may be de facto carrying out certain activities of corruption, the state is not, for the purpose of determining whether [*14] the claimant expressed a political opinion within the terms of the Convention, truly "engaged" in these activities if it officially disapproves of those acts (*9) :

[**35] (*9) [1995] F.C.J. no. 1455, at p. 2 (F.C.T.D.).
In my view, it cannot be said that the state, government or police is engaged in police corruption. In my view, "engaged" means sanctioned by, condoned by or supported by. The state in this case is engaged in the provision of police services, but it is not engaged in the criminal conduct of corrupt officers.

a) Inconsistency with the law set forth in Ward

[**36] A careful analysis of the meaning given to the word "engaged" in the Femenia case convinces me that such meaning is inconsistent with the law as set forth in Ward .

[**37] In Ward , the Supreme Court found that Mr. Ward, who belonged to the Irish National Liberation Army (INLA), had expressed a political opinion in allowing the hostages under his guard to escape when he discovered that they would be executed. For his act, he feared he would be assassinated by the ruthless para-military organization of which he was a member. There was no state complicity in the persecution that Mr. Ward [*15] faced. Indeed, the alleged persecution emanated from the INLA. Neither the Irish nor the British governments condoned, sanctioned or supported execution of hostages as a means of achieving secession from Great Britain. Mr. Ward was in harmony with the state in opposing such violence. If we were to apply the definition of "engaged" adopted in Femenia , Mr. Ward's actions in liberating the hostages would not have amounted to an expression of "political opinion". However they did (*10) :

[**38] (*10) Ward , supra , note 2, at p. 747.
The act for which Ward was so punished was his assistance in the escape of the hostages he was guarding. From this act, a political opinion related to the proper limits to means used for the achievement of political change can be imputed.

[**39] The position taken by Mr. Ward with respect to the proper means of achieving secession thus satisfied the definition of political opinion "as any opinion on any matter in which the machinery of state, government, and policy may be engaged". Yet, the British and Northern Ireland governments were certainly "engaged" on the issue of secession even though they were not sanctioning, supporting or condoning [*16] it as the Femenia definition requires.

[**40] Hence, the Supreme Court in the Ward case accepted that an opinion could be "political" for the purposes of subsection 2(1) of the Act whether that opinion accorded or not with

the official government position. In other words, the definition chosen by the Supreme Court and given to the words "political opinion" was broad enough to cover all instances where the political opinion expressed or imputed attracted persecution, including those where the government officially agreed with that opinion.

b) Inconsistency among grounds for persecution recognized by the Convention

[**41] The application of the test articulated in the Femenia case, in my view, also creates an inconsistency among the grounds for persecution recognized in the refugee Convention.

[**42] It is common ground that an act of persecution does not require that it be committed by the government and, therefore, that the government be the persecuting agent. It is also common ground that persons who are persecuted without government approval and who are unable to obtain the protection of their government can qualify for refugee status provided that their persecution [*17] is based on one of the enumerated grounds, i.e., race, religion, nationality, membership in a particular social group (*11) and political opinion. These statements normally hold true for all the grounds recognized by the Convention.

[**43] (*11) I refrain from and do not want to be read as expressing any views as to whether that ground of persecution stands alone or needs to be related to another of the enumerated grounds.

[**44] However, this would no longer be true for political opinion under the Femenia test since the political opinions expressed by the victims of persecution at the hands of third parties who disobey an official government policy would be discarded for Convention purposes. Thus a victim of persecution on the ground of race could still qualify as refugee, subject to the issue of state protection and internal flight alternative, in situations where the government does not condone racism and opposes his or her persecutors, but not a political opinion claimant.

[**45] In my view, the inconsistency results from a confusion between two concepts related to the issue of persecution: that of the nature of political opinion and that of the state's willingness [*18] or ability to protect a victim of persecution. A political opinion does not cease to be political because the government agrees with it.

[**46] For these reasons, I believe the certified question should be answered in the affirmative.

Whether the motions judge committed a reviewable error in upholding the Board's finding that Mr. Klinko's well-founded fear of persecution was not connected to a political opinion

[**47] In my view, the learned motions judge erred when he applied the Femenia definition or restriction to the opinion expressed by Mr. Klinko. The nature of the claimant's opinion should have been assessed by the test enunciated in Ward . I emphasize that such test does not require that the state or machinery of state be actually engaged in the subject-matter of the opinion. It is sufficient in order to meet the test that the state or machinery of state "may be engaged".

[**48] The opinion expressed by Mr. Klinko took the form of a denunciation of state officials' corruption. This denunciation of infractions committed by state officials led to reprisals against him. I have no doubt that the widespread government corruption raised by the claimant's opinion [*19] is a "matter in which the machinery of state, government, and policy may be engaged".

[**49] Indeed, the record contains ample evidence that the machinery of government in the Ukraine was actually "engaged" in the subject-matter of Mr. Klinko's complaint. The country information reports, in the present instance, contain statements by the President of Ukraine and two senior members of the Security Service of Ukraine about the extent of corruption within the government and the need to eradicate it both politically and economically. Where, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of "political opinion". Mr. Klinko's persecution, in my view, should have been found to be on account of his "political opinion".

[**50] Unfortunately, the Board in this case refrained from assessing the issue of state protection and the possibility of an internal flight alternative. It did mention and acknowledge, at page 8 of its decision (*12) , the fact that the Ukraine government had undertaken various measures in its fight against corruption. This evidence of state action is obviously [*20] a factor to be considered in assessing the state's willingness and ability to provide Mr. Klinko with protection against persecution, but it is not conclusive evidence of that capacity or willingness.

[**51] (*12) Appeal Book, p. 28.

[**52] In these circumstances, I am left with only one alternative, i.e., send the matter back to the Board for a determination of the state's ability and willingness to protect the claimant against persecution as well as a determination of the possibility of an internal flight alternative.

Whether the motions judge committed a reviewable error in confirming the Board's assessment of the refugee claims of Mrs. Klinko and her son

[**53] In view of the conclusion that I have reached with respect to Mr. Klinko's claim who was the target of the persecution, this ground of appeal has become moot. I do not think, for two reasons, that it is in the interest of justice that I address the question of so-called derivative claims.

[**54] First and foremost, any opinion I could express or conclusion I could come to would be obiter . I believe it would be inappropriate, when there is another appeal pending on that same issue in which it appears [*21] that the issue is material to the case (*13) , to condition, dictate or perhaps preempt by way of obiter a forthcoming discussion of such a material point. In addition, the matter was not the central focus of the appeal and, therefore, was not fully and satisfactorily canvassed.

[**55] (*13) Serrano v. Canada (Minister of Citizenship and Immigration) , [1999] F.C.J. No. 570 (F.C.T.D.).

[**56] For these reasons, I would allow the appeal, set aside the decision of the motions judge and hold that the Board erred in law in failing to recognize that the persecution suffered by Mr. Klinko was on account of his political opinion. I would refer the appellants' refugee claims back to the Board for a determination of the issue of state protection and the possibility of an internal flight alternative.

[**57] Noel J.A. : I agree

[**58] Malone J.A. : I agree