Date: 20060929

Docket: IMM-6743-05

Citation: 2006 FC 1141

BETWEEN:

KORNIY RUDYAK

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") dated September 23, 2005, wherein the Board found that the applicant is not a "Convention refugee" or a "person in need of protection" as defined in sections 96 and 97 respectively of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 because he is excluded under Article 1F(*b*) of the *Convention Relating to the Status of Refugees* (the "Refugee Convention").

[2] Article 1F(*b*) of the Refugee Convention states:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
[…]	[…]
(*b*) he has committed a serious non-political crime outside the country of	*b*) Qu'elles ont commis un crime grave de droit commun en dehors

refuge prior to his admission to that country as a refugee;	du pays d'accueil avant d'y être admises comme réfugiés;

[3] The Board determined that the applicant is excluded from refugee protection pursuant to Article 1F(*b*) for the following reasons:

- When the applicant joined Agroinvest as a salesman in 1995, he knew that there was a systematic pattern of paying 'kickbacks' to farm accountants and district managers of farming cooperatives for buying his firm's products. Farm inspectors were being paid money by Agroinvest to approve substandard crops and falsify weight scale figures, to the benefit of the farm accountants and managers in collusion with his employer. As well, records were falsified during the purchase and use of products used to increase the yield of wheat and sugar beets sold by his employer.

- The applicant was promoted to management in 1999 and remained employed with this firm until he left Ukraine in 2000. As a manager of Agroinvest he sat in on at least three meetings where defrauding the state of tax money and state property was discussed with a deputy of the Ukrainian parliament.

- The applicant entered into evidence six contracts that he signed, knowing that they contained illegal interest rates, could be used to enrich his company and others through fraud, and were intended to defraud the state. These contracts contained very high interest rates that are illegal in Ukraine and Canada.

- The type of criminal activity that the applicant was complicit in is more serious than the Ukrainian police definition of 'organized crime', which is nothing more than two or three persons who meet to plan a crime. The crimes that he was complicit in are similar to *prestunaia organizatsiia* or large criminal formations with connections to authorities at the regional level.

- The applicant was complicit in a number of transactions that, in and of themselves, do not amount to a serious non-political crime. However, when seen in the context of criminality in Ukraine, these transactions amount, cumulatively, to serious non-political crimes.

- The applicant testified that he became aware of the corruption in 1999, about four years after he joined the company. The Board found that the applicant was not totally truthful in this regard. It is reasonable that he knew of the company's illegal business practices before 1999, as he did not testify that he was surprised about the contents of these contracts that he was party to or the penalties for late payment.

- The applicant testified that when he found out what was going on, he contacted a journalist. However, the applicant presented the Board copies of contracts from April 1998 and did not allegedly approach a journalist until July of 1999. This significant delay negates the applicant's stated intention.

- At no time did the applicant testify that he tried to bring his allegations to the police or other authorities having jurisdiction over fraud, tax evasion or illegal contracts. This lack of action negates the applicant's stated objective of trying to stop these wrongdoings.

- The applicant worked for the same company from 1995 until he left the Ukraine in 2000. His stated purpose for remaining is that he had a well-paying job. He did not try to leave his organization at the first opportunity, which makes him complicit in the company's illegal activities. This is not the case where the applicant had no choice but to remain with his employer, as he could have resigned and sought employment elsewhere with no negative consequences. At no time did he say that he was afraid to leave.

- The interest rates being charged were usurious and in contravention of laws in Ukraine. The Hearings Officer provided information illustrating acceptable interest rate calculations in Exhibit M3, pages 18 and 19 and calculated the effective interest rates contemplated in these contracts. In one contract, the simple interest rate was 75% for 6 months, which exceeds the legal Ukrainian interest rates of 50% per annum. A consequence of charging these high interest rates to these farms is that some of them were forced into bankruptcy. As the conspirators listed above became aware of the dire straights of these farmers, they purchased their farms for below market rates. This "insider information" gave them an unfair advantage over others who might have wanted to purchase these farms. Corruption in Ukraine has serious negative economic consequences for the country.

- The Hearings Officer presented extracts from the Canadian *Criminal Code* that indicate that the actions of the applicant are criminal acts in Canada. The Court stated in *Moreno* [*v. Canada (M.E.I.)*, [1994] 1 F.C. 298 (C.A.)] that any crime that carries a maximum penalty of ten years or more is a "serious" crime. The *Criminal Code* indicates in section 380 that Fraudulent Transactions Relating to Contracts and Trade is an indictable offence and is punishable by a term of imprisonment not to exceed ten years. The crimes involve amounts over $5000. Since each crime would be punishable by up to ten years of imprisonment, and as the applicant's evidence is that he was complicit in at least six such contracts, it is indeed "serious".

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[4] According to the applicant, the Board erred in law by engaging in speculation and by taking into account erroneous and irrelevant considerations in reaching its decision. The applicant refers the Court to the following excerpt of the Board's reasons:

> Mr. Rudyak is complicit in the commission of a serious non-political crime of usury. The contracts that he knowingly signed on behalf of SNVF Agroinvest contained a debt obligation to be greater than allowed by the Ukrainian state. For example, in contract dated April 27, 1998 [Exhibit C3] the amount initially owing was about $6,431.20 USD (about $7,685.28 Cdn.). After six months the debt owing amounted to approximately $11,229.24 USD (about $13,418.94 Cdn). This is a simple interest

> rate of 75% for 6 months, which exceeds the legal Ukrainian interest rates of 50% per annum [Exhibit M3, page 19]. This makes this one illegal contract a serious crime inCanada as the offence involves an amount greater than 5,000 Canadian dollars. A consequence of charging these high interest rates to these farms is that some of them were forced into bankruptcy. As the conspirators listed above became aware of the dire straights of these farmers, they purchased their farms for below market rates. This "insider information" gave them an unfair advantage over others who might have wanted to purchase these farms.

[5] The applicant contends that the Board thereby speculated about the effects of the contracts that the applicant had presented to the Board, because there was no evidence before the Board that indicated which, if any, of the farms with which he dealt had gone bankrupt or that the loans in question had been the cause of any bankruptcy. Further, the applicant submits that there was no evidence as to which, if any, of the farms had been sold, and that there was no evidence before the Board upon which to make its determination that farms had been purchased below market rates by the company, the owners of the company, or any other persons.

[6] According to the applicant, engaging in speculation, and taking into account erroneous and irrelevant considerations, the Board sought to bolster its finding that the applicant had been complicit in criminal activity.

[7] However, there clearly was evidence before the Board that farms had gone bankrupt that were then purchased below market rates. This evidence came directly from the applicant's testimony:

> Well, in the contract it states a deadline by which date the accounts are to be settled. Failure to do so within the set deadline results in accrued interest; I don't remember exactly, it's something like one per cent per day. Naturally because the farms were not in a position to pay off the debt before the set deadline, the interest which accrued after that was just so it eventually led to bankruptcy in many cases and that's when they were able to move in and get equipment and other things that had (inaudible).

[8] Therefore, it is my opinion that the applicant has failed to show that the Board engaged in speculation or that the Board took irrelevant considerations into account.

[9] The applicant further argues that, without more information on the history of interest rates in Ukraine during the period of the applicant's employment with Agroinvest, the Board could not fairly conclude whether there was any illegality by the company. The decision of the Board was therefore based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it.

[10] However, the issue concerning the legal rates of interest charged in the Ukraine is not material, as the notion of what is to be considered a serious crime is in relation to the criminal law system of the country of refuge (*i.e.* Canada), rather than the country of origin (*i.e.*Ukraine).

The Federal Court of Appeal, in *Zrig v. Canada (M.C.I.)*, [2003] 3 F.C. 761, stated:

> [134] . . . The phrase "serious non-political crime" requires that three conditions be met: there must be a crime, the crime must be a non-political one and the crime must be serious.
>
> [135] The courts and commentators have so far considered the second and third conditions, in my view probably because it was generally assumed that the first condition simply required there to be a "crime" within the meaning of the ordinary criminal law of the country of refuge. The English wording of Article 1F(b) justifies this approach. It speaks of a "serious non-political crime", and it is the word "non-political" which is rendered in French by "*de droit commun*". "Crime" in English is of course "crime" in French, and "serious" in English is "*grave*" in French. The word "*crime*", which is the word that interests us here, can only be understood in its ordinary meaning in criminal law, as opposed to those crimes said to be international that are covered by Article 1F(a), namely crimes against peace, war crimes or crimes against humanity, and as opposed to the "*délit*" [crime] referred to by the French version of Article 33 of the Convention. In short, on the question that arises here the wording of Article 1F(b) seems clear to me.
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> […]
>
> [158] The judgment of the Federal Court of Australia in*Ovcharuk*, *supra*, supports my interpretation. That case concerned a Russian national who had been convicted of importing narcotics into Australia. The evidence was that the claimant, who was serving his sentence in Australia, had

> conspired with another person in Russia to commit the offence. Refugee status was denied under the exclusion mentioned in Article 1F(b).
>
> [159] The Court held that an offence had been committed outside Australia, that Article 1F(b) did not apply only to criminals threatened with criminal prosecution abroad and that the question of whether there were serious reasons for considering that a serious non-political crime had been committed had to be decided in accordance with the concepts of criminality recognized in the country of refuge.
> [160] I agree completely with these conclusions.

[11] In the case at bar, there was ample evidence before the Board that the applicant had been complicit in the serious crimes of usury and fraud (affecting the public market), in relation to Canada's criminal law system. Therefore, it is my opinion that the Board did not err in determining that there were serious reasons for considering that the applicant had committed a serious non-political crime prior to his admission to Canada.

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[12] It is my opinion, therefore, that the Board did not err in determining that there were serious reasons for considering that the applicant had committed a serious non-political crime prior to his admission to Canada. Additionally, the applicant has failed to show that the Board engaged in speculation or that the Board took irrelevant considerations into account.

[13] Consequently, the application for judicial review is dismissed.

"Yvon Pinard"

Judge

Ottawa, Ontario
September 29, 2006

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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