

Date: 19990907

Docket: IMM-1356-98

BETWEEN:

OLEG DEMCHUK

Applicant

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

CULLEN J.

[1] The applicant challenges by way of judicial review the decision of the Immigration and Refugee Board, Convention Refugee Determination Division ("CRDD"), dated 25 February 1998, in which the CRDD held that the applicant is not a Convention refugee within the meaning of subsection 2(1) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the "Act"). Leave to commence this application for judicial review was granted on 4 November 1996 by Mr. Justice Evans.

Background

[2] The applicant, Oleg Demchuk, is a 36 year old citizen of the Ukraine. His claim for Convention refugee status is based on political opinion and membership in a particular social group. He fears persecution at the hands of the Ukrainian or Russian mafia.

[3] In his personal information form (applicant's application record ["AR"], tab 4, pp. 27-29), the applicant sets out the events which led him to seek asylum in Toronto on 10 April 1996.

[4] From October 1992 until October 1995, the applicant worked for a company called Energetic, 80 per cent of which was government controlled. The branch in which he worked dealt with maintenance and the set-up of energy distribution stations. Starting at the beginning of 1995, he also worked on contracts with another company called the Ukrainian Energy Consortium; he became president of that company in October 1995.

[5] At the beginning of 1995, the applicant also began to receive threatening phone calls from persons unknown who wished to dictate to whom he was to sell energy, as well as the prices to be paid. The callers also wanted him to illegally transfer company funds to them. The callers promised to initiate the applicant's political career, should he so aspire. He did not report the calls to anyone, fearing it would have a negative impact on his position in the company. He also refused to accede to the callers' demands.

[6] For his refusals, the applicant claims he was beaten on three separate occasions. The first incident occurred on 5 April 1995. He reported the incident and had his injuries documented, but no one was ever arrested. The threatening phone calls continued unabated, and the applicant suffered a second beating on 23 August 1995. Again, he reported the incident and had his injuries documented, and again, no arrests followed. Any investigations may have been hampered, of course, by his inability to identify any of his attackers. The third incident occurred on 27 December 1995, in the lobby of the building in which he worked. By this time, the applicant was being escorted to and from work by a chauffeur to ensure his personal safety. He had his injuries documented, but declined to report the incident to the police, as he believed this to be futile.

[7] On 3 January 1996, after talking things over with his wife, the applicant decided his situation had become intolerable, so he applied for a visitor's visa to come to Canada, ostensibly to visit a friend. For the next three months, he was out of the Ukraine on business trips, and his wife continued to receive calls from unknown people seeking her husband's whereabouts. Finally, while on business in Poland, the applicant purchased a ticket to Canada, and he arrived here on 10 April 1996, whereupon he made his claim for Convention refugee status.

[8] He states that his wife, who has remained in the Ukraine, continues to receive phone calls from these unknown persons, but she tells them that her husband is in Poland on business.

CRDD's Decision

[9] The CRDD heard testimony over three days, on 9 September, 5 and 10 November 1997, and issued its decision on 25 February 1998.

[10] In its reasons (AR, tab 3, pp. 9-13), the panel identifies the determinative issue as that of nexus. The applicant based his claim on political opinion and membership in

a particular social group; however, the panel concluded that there is no nexus between what the applicant fears and any of the grounds set out in the Convention.

[11] With regard to the overall situation in the Ukraine and organized crime, the panel had this to say,

The documentary evidence supports the claimant's statements about organized crime in his country [footnote omitted]. There is also evidence of corrupt officials and of the government's efforts to deal with these people [footnote omitted]. In our view, the Ukrainian government is not tied to the corruption such that to challenge the corrupt or criminal behaviour would be seen as a threat to the government's authority. On the contrary, the documentary evidence shows that the government is fighting organized crime and some members of the government have been seriously assaulted because of the government's stand [footnote omitted].

Moreover, the claimant is not a "threat" to the criminals such that his refusal to go along with them in any way challenges their position. Indeed, the claimant is no longer in his senior position at the energy company so he is no longer in a position to assist the criminals even if he wanted to. What he fears now is revenge for his decision not to help them. But as has been noted by the court:

The fear of personal vengeance is not a fear of persecution
[footnote omitted].

(AR, tab 3, p. 11)

[12] The panel concluded that the applicant's claim to persecution on the basis of political opinion was not sound.

[13] The panel also concluded that victims of organized crime do not constitute a particular social group, as contemplated by *Ward v. Attorney General of Canada et al.*, [1993] 2 S.C.R. 689.

Applicant's Position

[14] The applicant submits that the CRDD erred when it determined that no nexus existed between the applicant's situation and Convention refugee grounds. The applicant contends that the CRDD relied on selective portions of the documentary evidence which supported its view of the organized crime in the Ukraine, while ignoring those parts which contradicted its position.

[15] The applicant provides various examples from other documents within exhibit R-3, which the panel relied on. These excerpts indicate, *inter alia*, that government corruption by criminal elements runs deep in the Ukraine, and the mafia now exert considerable influence on state bodies at all levels. Furthermore, the Ukraine does not appear to be able to adequately address the corruption, let alone eradicate it.

[16] The applicant contends that given the pervasiveness of the climate of corruption in the Ukraine, his refusal to cooperate with the mafia because of his personal moral convictions would be considered to be a political statement. Leaving

his position at the company cannot change this, contrary to what the CRDD held. The panel considered that because the applicant was no longer with his former company, the threat he faced was extinguished. The applicant points out that his wife has continued to receive threatening phone calls long after his departure.

Respondent's Position

[17] The respondent maintains that the CRDD thoroughly canvassed the documentary evidence and that it took into account the totality of the evidence before it. The respondent submits that what the applicant is taking issue with is really a matter of the weight assigned to the evidence by the CRDD.

[18] The respondent submits that the panel's finding that the applicant is not a member of a particular social group is in line with the relevant jurisprudence, which indicates that victims of organized crime or opponents to corruption do not constitute particular social groups within the meaning of the Convention.

Discussion

[19] In *Vassiliev v. Canada (MCI)* (IMM-3443-96, 4 July 1997), Mr. Justice Muldoon held that the CRDD erred when it found that the Russian claimant in that case did not express a political opinion when he refused to capitulate to the corrupt element:

On the evidence before it, the CRDD erred in determining that Mr. Vassiliev did not express a political opinion when he refused to transfer bribes ... and launder money... .

Refusing to participate in criminal activity, while laudable, has often been found not to be an expression of political opinion. In this regard, the Board's finding does not depart from recent jurisprudence of this Court which has found that opposition to criminal activity *per se* is not political expression. One example which this Court has considered is informing on drug traffickers [*Munoz v. Canada (MCI)* (IMM-1884-95) (February 22, 1996) and *Suarez v. Canada (MCI)* (IMM-3246-96) (July 29, 1996)]. The situation before the Court is distinguishable from these cases. The facts as found by the CRDD show that in this case criminal activity permeates State action. Opposition to criminal acts becomes opposition to State authorities. On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. Why should Mr. Vassiliev's refusal to participate in a corrupt system be any different? His is an equally valid expression of political opinion and is contemplated by Mr. Justice La Forest's words in *Ward* . While this error alone is sufficient to send this decision back for reconsideration, the CRDD also erred in its assessment of State protection and internal flight alternative.

[20] In the instant case, the applicant's situation is somewhat similar to that of the claimant in *Vassiliev* , especially if one accepts his contention that criminal corruption permeates the Ukrainian state apparatus to a great extent. The panel, however, did not

accept this contention, relying as it did on certain portions of the documentary evidence before it.

[21] The panel concluded that the Ukrainian government is fighting organized crime and is not so enmeshed in organized crime such that to challenge corrupt behaviour amounts to challenging the government's authority. This conclusion is based on the existence of the Coordinating Committee for Combatting Corruption and Organized Crime, which is headed by Ukraine's deputy prime minister. This, the panel says, shows that the government is serious about going after organized crime. Well, that sentiment may be so, but is the committee in any substantive way effective?

[22] Upon further perusal of the other documentary evidence, it appears evident that the Ukraine is mired in serious economic corruption and chaos. Mafia gangs are rampant and exist almost without impunity. One article, entitled *Ukraine: Crimean Criminal Privatization Expanding* (certified tribunal record, p. 000078-82), dated 12 July 1996, proclaims that the situation is catastrophic and that the building of criminal feudalism is going ahead full speed. Another article, *Fighting Against the Sixth Power* (certified tribunal record, p. 000099), dated 7 February 1995, states that law enforcement is virtually useless, and Ukraine's president intones that the country's national security is threatened by economic crime and corruption.

[23] An interview conducted with Ukraine's deputy prime minister (certified tribunal record, p. 000149-155), dated 22 May 1997, reports that official as stating,

Regrettably, the scale of economic crime continues to increase: there are abuses in the credit and finance system, in the privatization sector, and in the market for energy resources; bribes; the concealment of profits in both hryvnias and hard currency; the evasion of taxes; the illegal and untargeted use of budget means; thefts of materials; and fraud. The level of these crimes is quite high and the effectiveness of the counteraction to these dangerous manifestations remains low.

[24] In its reasons, the CRDD takes the view that the situation in the Ukraine is not so terrible and that the government is actively and effectively fighting corruption. It relies on portions of the documentary evidence to support this view. However, the CRDD fails to address those portions of the evidence which paint a somewhat different picture of the situation. In so doing, the panel has failed to take into account the totality of the evidence before it; the panel should have addressed the contradictory evidence.

[25] In the result, this application for judicial review is granted and the matter is to be sent back for redetermination by a differently constituted panel.

Ottawa, Ontario

September 7, 1999

B. Cullen

J.F.C.C.

