

Between:

ANATOLI FEDOROV VASSILIEV,

Applicant,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

REASONS FOR ORDER

and

ORDER

Muldoon, J.

The applicant seeks *certiorari* quashing the decision of the Convention Refugee Determination Division (CRDD) made on August 21, 1996 which holds that the applicant is not a Convention refugee, and an order returning his case to the CRDD for a rehearing of his refugee claim. At the opening of the hearing in Court in Ottawa, this judge noted that it was he who granted leave, and offered to obtain a different judge for the parties, especially the respondent, but the respondent's counsel waived any consideration of a new judge.

The CRDD in this case did indeed misapprehend the facts before it and did err in law, as a consequence.

The hearing before the CRDD was held on March 5 and May 7, 1996. The claimant either foolishly, or unluckily, was not represented by counsel. An interpreter proficient in Russian acted and was present during the CRDD's hearing.

The CRDD panel found the applicant's testimony to be credible (application record (hereinafter AR): p. 9). "Therefore", wrote the panel, "the only issue before the panel is whether the persecution alleged by the claimant [applicant] is related to any of the reasons set out in the definition of Convention refugee."

The CRDD panel found the following facts.

In the former Soviet Union the claimant had worked as an electrical technician and driver of heavy motor vehicles in and around the St. Petersburg region. In October, 1990 he went to work for "Ventor", a company which was part of the St. Petersburg Regional Executive Committee, or regional government. Ventor was a liaison with small business. The Executive Committee applied the rules and regulations set by the national government for

small business enterprises. The Executive Committee organized a union of small businesses to extend control over them. The claimant explained this was how the communist party functionaries under the previous Soviet system were able to move in and control the emerging independent, market-oriented businesses of the new Russia. The claimant was secretary of the management office of the committees by December, 1990. In this way he said the communist party was able to gain some measure of control and influence over the development and work of small business in the country.

The next move by the Executive Committee was to organize the Russian Association of Small Business, which controlled all small business in Russia. The claimant said he realized for the first time just how ruthless and dishonest the politicians were in their grab for control of small fledgling enterprises. He said it had all been arranged beforehand as to who would fill all executive positions on the RASB. Elections were rigged. Family members of powerful local Executive Committee members were illegally elected to vacant offices. No media were allowed to be present at the meetings. The meeting hall was secured by the police. All candidates to have been elected were in fact, selected to fill offices of the RASB. For example, the head of the small business department of the St. Petersburg Regional Executive Committee became the President of the RASB.

The claimant, a former truck driver and electrical worker, was appointed deputy director of the RASB. The claimant said he made several attempts to resign, but failed. He said he realized that in the eyes of the RASB he knew too much. He said the RASB attempted to force him to transfer bribes from business people to government officials, an action he told the panel, he refused to do. However, this did not prevent his bosses from blackmailing him, he said.

In March, 1991, the claimant said that he resigned when RASB management were absent, and on the advice of a senior official, moved away. A few days later he was hired by "Russia" a state-run business. He was soon promoted to commercial director. He organized work at the St. Petersburg stock exchange. He trained brokers and set up work with the banks. He discovered that several senior political leaders of the Executive Committee were now senior officials in banks and the stock exchange where they received monthly salaries.

The claimant said he was approached by a former associate at RASB, Youri Malykhin, who asked him to launder some money through the claimant's new firm. The claimant said he refused to do this and was warned to fall in line. The next day the claimant was riding as a passenger in a car with the Director General of his firm "Russia". The car was pulled over by the police. The claimant was accused of drunk driving even though he was not driving and had had nothing to drink. The Deputy General and the driver were allowed to go. The claimant spent four hours in the police station, had all his business documents removed and when he asked what was wrong, was told, "You know".

The claimant went back to the police station the following day, 21 June, 1991, on the advice of his Director General to get his documents. The Director General also asked him to consider whether he should stay with the firm. The police told him they had never seen him before, and knew nothing about any documents. The police at district level were of no help to the claimant as well.

Following this the claimant said he was sent to the Tiraspol region of

Moldova to set up a brokerage office. He said the situation there was dangerous at the time and when he managed to get back to St. Petersburg he accused his superior of deliberately endangering his life by sending him there. After his return from a business trip to Kirgizstan, the claimant said he was demoted to the rank of a clerk at the minimum salary. (In his oral testimony the claimant said he had never been highly paid and saved little or no money.)

In February of 1992, the claimant said he was in the Deputy Director's car when two men in black uniforms and wearing bullet proof vests smashed the windshield and sprayed tear-gas into the car then left. The Deputy Director had left the car when the two uniformed personnel came back and beat him severely. The claimant said he was taken to hospital and the next day his attackers returned and promised him that he would die in his bed where he was. They then left.

The police came back the following day and said they had been told the claimant wanted to withdraw his report and state that his injuries were the result of an accident. The claimant told them he could not remember anything. Soon after this the claimant's mother visited him and told him she had been advised to pay him a visit to say good-bye because he was about to be killed. The claimant produced documents and medical reports relating to his beating.

On 25 March, 1992, the claimant said friends came from Moscow and took him back with them where he stayed until June, 1993. That month the claimant said he returned to St. Petersburg where he was again involved in another car accident which was not his fault. He said he was able to conceal his whereabouts until October 1993. At that time, he said, he received compensation from the court for loss of his vehicle and with the proceeds he opened a new business. Again another car accident occurred that resulted in the claimant's being injured. This time, however, he was able to walk away.

The claimant said he now moved to Vorkuta near St. Petersburg for safety reasons. His mother told him on the phone that his apartment had been vandalized. The claimant said he tried to get another identity, but was unable to. He said he then returned to St. Petersburg in January, 1995, determined to leave the country. The claimant then moved to Belarus, but before leaving, learned from a friendly local police officer that his former associates already knew his address in Belarus.

The claimant said he realized he would have to flee. He said he now knew he could never hope to receive protection from the police or anyone else. He said he sold some personal items and departed in the late spring of 1995 for Canada.

In oral testimony the claimant explained that official sounding job descriptions such as Deputy Director, management secretary, director etc., were quite meaningless terms, used as much for self-promotion as an indicator of what one actually did. He said, for example, he was designated a specialist in manufacturing when in fact he never made anything. He said most of his work for the period covering the post-soviet transition, was travelling around the country acting as a liaison officer between the RASB and its small business affiliates. He would bring them rules and regulations, information and messages from the Executive Committee, and take back to that same government committee inquiries and problems from the small businesses he serviced. He said he was only the courier, not their boss.

(AR, pp. 5 to 9)

The claimant's counsel changed the focus of his judicial review application between the times of filing his originating notice of motion (by counsel) in September, 1996, and his filing of his memorandum of argument (in person) in October, 1996. The respondent's counsel commented on this at the hearing in this Court in May, 1997, but the applicant's straddle does not invalidate his application, on that score, at least.

The claimant's *sine-qua-non* grievance against the CRDD is the new focus of his application, that is: that Mr. Vassiliev acting for himself, without counsel and through an interpreter was not provided a reasonable opportunity (a) to make representations in support of his claim, and (b) to present evidence in support of that claim.

With regard to the first above mentioned ground (a), counsel gave several examples, and there are examples of both (a) and (b) on the record, for example pp. 0000330 *et seq.* One mentions representations and evidence in one breath because it seems that the claimant himself could not easily distinguish. The utility and value of counsel are never more clearly seen than in a situation like this. The claimant attempted to tell the CRDD that despite the fact that the Soviet communists seem to Canadian eyes no longer to be exercising State power in Russia, such is illusory and that in his particular circumstances he was their victim.

At one point in the claimant's interrogation by the Refugee Claims Officer (the RCO), she asked him to give a proffered answer because "It wasn't put as a question" and he did, coming to this reported point on p. 0000338:

* * * The money I brought with me to Canada was the money I got from selling housing -- apartment or whatever.

I can't call myself a businessman, because before my departure to my -- the day of my departure in Russia, I had been living a room in the apartment with a neighbour. I rented a room and I had a car which could have been sold for only \$500.00. After my departure, it was broken or vandalized by my persecutors. That's all the money which I can tell you about. And if I can be called a businessman from Russia, this is level of businessman's life in Russia. But I can't call myself a businessman.

BY PRESIDING MEMBER

Okay. That completes the questioning. I have a request to the RCO. Would you like to make any observations at this time?

BY REFUGEE CLAIMS OFFICER (to presiding member)

Well, I think the only thing I would like to say is that the Panel should consider carefully the definition of a refugee. And as I outlined in my questioning, the Panel should decide if the claimant's claim meets one of the five reasons to be a convention refugee.

(p. 0000338)

A. May I ask a question?

BY PRESIDING MEMBER (to person concerned)

Q. Just a moment please.

(p. 0000339)

[There followed some discussion by members and the RCO not involving the claimant.]

BY PRESIDING MEMBER (to person concerned)

Q. Okay you had something to say? Smaller, smaller.

A. I am afraid that in my recent story, there are not enough facts. If you need any extra facts, I can tell you about my being persecuted. In other words, this particular story was written during my first days in Canada and I was told to write it as short as possible.

Q. By whom?

A. That was told by the interpreter in Mr. Fine's office. The only thing I did -- I wrote major facts of my life.

Q. That's what is required, the major events in your life. The Panel feels that it has sufficient information -- facts -- now, after a full morning hearing in which to discuss between the two of us what determination we will come to.

(p. 0000340)

So I wish to thank you for appearing this morning at the hearing. You have made several statements in the last few minutes as a closing statement, and I am just wondering if you have any more -- anything else you would like to say at this time?

A. You said it is not really necessary, but I can tell you the whole story from the very beginning.

A. Well, we -- are you talking about before 1990? I am going to go off the record.

BY MEMBER (to person concerned)

Q. You have given us a lot of detail in your personal information form. And in fact, to be frank, it is quite a bit longer than a lot of the personal information forms that we do see.

The Panel is quite comfortable in saying that we understand the significant incidents in your life which caused you to claim refugee status in Canada and we are able to understand your case from what you have written and what you have told us.

My colleague and I will now need to discuss your case to decide what determination your case will result in. And when we come to that determination, we will let you know of our decision in writing. So it is important that if you move that you let this office know where you have moved to, okay? Thank you.

(p. 0000341)

It would not have killed the panel members to hear out that unrepresented, Russian-speaking claimant. Everyone knows that the CRDD is busy, but if he had

truly trespassed on their time by being repetitive, the CRDD panel could have stopped him, and most importantly *on the record*.

Some of the matters of which the panel might well have had knowledge, notorious matters of which this Court has knowledge is that President Boris Yeltsin does not control the Duma, much less a honeycomb of corrupt offices and officers, who resent an idealist or just a garden-variety honest person attempting to operate honestly. This claimant was assaulted and battered by thugs while he was riding with the director in the director's car, but the director was spared any assault or battery by those thugs on that occasion. When persecutors operate State organisms with impunity, because they operate State organisms, the CRDD should re-think whether the claimant shows a nexus with the definition of refugee (*Ward*, [1993] 2 S.C.R. 689 @ p. 717 and pp. 746-47).

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 (AR, p. 6) and launder money (AR, p. 7).

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. (M.C.I.)* (IMM-1884-95) (February 22, 1996) and *Suarez v. (M.C.I.)* (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. One would never deny that refusing to vote because an election is rigged is a political opinion. 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.

What did the panel mean to say, as recorded on p. 0000289, when this was said by the presiding member:

Now, you have no counsel. So there is no one here today really to lead you in questions to establish the basic facts of your claim. However, we are not that concerned about the events that took place as recorded in your narrative with respect to the beatings and your movements and so on, but we are concerned about -- we want questions put on what we call an IFA, internal flight alternative. Are there other parts of Russia where you could live in reasonable security?

The claimant clearly said he was basing his claim on political opinion, and social group after the end of Soviet government.

Asked why his persecutors would be interested in him now, he replied:

A. Here is where politics is involved. In 1992, '93 and '94, they were afraid of my being aware of the information or of my knowledge of the information -- important information. And at some point to some extent, I was ready to reveal that information because those people were threatening my life. And I was trying to do that, but all the information in the state and all state authorities who were supposed to protect me were linked or connected with the direct power.

(p. 0000327)

This answer was followed by a soliloquy by the RCO diminishing the importance of the claimant's answer. The claimant's assertion that the old communists are positioned in and through the government as well as through the claimant's employer, the Russian Association of Small Business was left virtually dangling, as reported on p. 0000335.

The police were apparently in cahoots with the corrupt persecutors (AR, pp. 31 *et seq.*). On page 36 of his record the claimant states that he moved from St. Petersburg to a village in Byelarus, but a police officer with whom the claimant was a friend, "told me that everyone already knew my new address" there.

The claimant should be accorded a new hearing before a differently constituted board.

The respondent's counsel proposed that the following question be certified:

Whether the CRDD of the IRB is required to consider evidence of State ability to protect, or a claimant's unwillingness to seek State protection, where it is first determined that no nexus exists between the treatment of the claimant in the country of origin and a Convention Refugee ground?

This Court declines to certify that question. It is apparent that the CRDD panel which would first determine lack of nexus, before hearing all the cogent evidence would be premature in its conclusions. The CRDD must always hear all cogent evidence before forming conclusions.

The application for judicial review is allowed.

Ottawa, Ontario

July 4, 1997

Hon. Francis C. Muldoon

ORDER

The application by A.F. Vassiliev for judicial review of the CRDD's decision in file A95-00598, dated August 21, 1996 is allowed and said decision is quashed and A.F. Vassiliev's application is referred for adjudication by a newly and differently constituted panel of the CRDD which is directed to take note of the factors expressed in the Court's above reasons, among all other matters properly before it.

Judge

FEDERAL COURT OF CANADA TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE _RECORD

COURT FILE NO.: IMM-3443-96

STYLE OF CAUSE: ANATOLI FEDOROV VASSILIEV

v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO DATE OF HEARING: MAY 5, 1997

REASONS FOR ORDER OF MULDOON J. DATED: JULY 4, 1997

APPEARANCES:

Mr. Michael Bossin Mr. R. Jeff Anderson

FOR THE APPLICANT

FOR THE RESPONDENT

SOLICITORS ON THE RECORD:

Community Legal Services Ottawa, Ontario

FOR THE APPLICANT

Mr. George Thomson FOR THE RESPONDENT Deputy Attorney General of Canada