Date: 20030904

Docket: IMM-923-03

Citation: 2003 FC 1023

BETWEEN:

ROU LAN XIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

KELEN J.:

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Refugee Division") dated January 24, 2003, denying the applicant's claim for Convention refugee status. The Refugee Division found:

1. the applicant's refugee claim was not credible;

2. the applicant was excluded, in any event, under Article 1F(b) of the 1951 *Convention Relating to the Status of Refugees* from claiming refugee status; and,

3. the applicant was also excluded under Article 1(F)(b) from admission to Canada as "a person in need of protection".

FACTS

1. The Applicant's Claim

[2] The applicant is a citizen of China and claimed refugee status based on her political opinion and membership in a particular social group. She is divorced and has one daughter, who resides in Canada. The applicant has a diploma in accounting and in March 1996, became one of two Deputy Division Chiefs for the Plan and Finance Division of the Guangzhou Commission of Foreign Economic Relations and Trade ("CFERT"). As a deputy chief, the applicant was responsible for inspecting and approving Value Added Tax refunds for companies exporting goods from Guangzhou. The applicant claims she repeatedly disobeyed orders from her superiors to issue fraudulent export refund certificates. She also refused requests to compile and

approve reports that falsely accused individuals of financial mismanagement, insubordination, corruption and embezzlement.

[3] In July 1999 three investigators from the Procurator's Office began checking the accounting records at CFERT and interrogated the applicant regarding anomalies in two term deposits. The applicant was told by another staff member to be careful because he felt the Procurator's Officer was trying to frame the applicant. On July 28, 1999 the applicant overheard her immediate superior plotting to frame her and fled, going first to Shen Zhen and then Hong Kong. She decided to travel to Thailand, as she had obtained a visitor's visa for Thailand on June 25, 1999 with the intention of visiting a relative there. Before leaving Hong Kong on August 2, 1999, the applicant obtained a visitor's visa for Venezuela. She also applied for a Canadian visitor's visa and an interview at the Canadian Consulate was scheduled for the afternoon of August 2. The applicant did not attend the interview and instead withdrew her application. Materials submitted by the Canadian visa office in Hong Kong show the applicant "withdrew case today as she would to fly to Thailand today at 4:30 p.m."

[4] On August 6, 1999 the applicant travelled from Thailand to Venezuela, where she contacted a friend who worked for CFERT. She was informed that her office at CFERT had been searched and a notebook of hers was seized. The applicant claims her notebook contains information about the illegal requests made by her superiors at CFERT and criticism of China's economic reforms, its trade policies and its relationship with the World Trade Organization. In her opinion, the contents of the notebook would be embarrassing to the Chinese government if it were made public. The applicant remained in Venezuela until March 2001, at which time she travelled to Canada using a false passport. She decided to leave for Canada because it was rumoured that local Chinese gangs had been instructed by the Chinese Ministry of Security to arrest her. She obtained the false passport from a smuggler and left her own passport in Venezuela. Upon her arrival in Canada, the applicant made a refugee claim. Her claim was heard by a single member panel of the Refugee Division on July 5, 2002 and August 14, 2002.

2. The Minister's Position

[5] A representative of the Minister participated in the applicant's hearing and argued that she was excluded from protection by reason of Article 1F(b) of the *Refugee Convention*, which states:

> Article 1. Definition of the term "refugee"
>
> [...]
>
> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> [...]

> Article premier. -- Définition du terme "réfugié"
>
> [...]
>
> F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
>
> b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

[6] The respondent's position was based on a warrant for the applicant's arrest issued by INTERPOL on August 29, 2000. The warrant indicates the applicant is a fugitive wanted for embezzling over CNY 7 million (roughly C$1.4 million) between June 1997 and January 1999. It states that she has been charged under Article 382 of the Criminal Law of China and identifies the maximum penalty for the offence as life imprisonment. The following English translation of Article 382 and Article 383 is set out in the panel's decision:

> **Article 382.** State personnel who take advantage of their office to misappropriate, steal, swindle or use other illegal means to acquire state properties constitute the crime of graft.
>
> Those who are entrusted by state organs, state companies, state enterprises, state undertakings and mass organizations to administer and operate state properties but take advantage of their office to misappropriate, steal, swindle or use other illegal means to acquire state properties also constitute the crime of graft.
>
> Those who collaborate with those personnel as listed in the aforementioned two paragraphs and join the crime are considered as committing a joint crime.
>
> **Article 383.** Those who commit the crime of graft are to be punished according to the following stipulations depending on the seriousness of their cases:
>
> (1) Individuals who have engaged in graft with an amount of more than 100,000 yuan are to be sentenced to more than 10 years of fixed-term imprisonment or life imprisonment and may, in addition, have their properties confiscated. In especially serious cases, those offenders are to be sentenced to death and, in addition, have their properties confiscated.

[7] Also entered into evidence before the panel was a letter to the Canadian Embassy in Beijing from China's Public Security Minister, dated April 30, 2001, that outlined the charges against the applicant. This letter stated in part:

> On April 23, the Public Security Agency in the Guangdong Provice of our country received a note from your Consulate in Guanzhou [*sic*], stating that a Chinese woman by the name of XIE Ruo Lan was in the process of making a refugee claim in Canada, but said person was not in possession of any valid

> identity documents, and requested verification as to whether XIE was facing any allegations of criminal offence(s) in China.
>
> [...] On May 30, 2000 the People's Procuratorate in Guangzhou approved the arrest of XIE Ruo Lan on allegations of corruption. On August 29, 2000, at the request of China Central National Bureau of International Criminal Police Commission in our country, the Headquarters of International Criminal Police Commission issued "Red Arrest Warrant" No. 2000/39532 against XIE Ruo Lan (copy of arrest warrant attached).

[8] It is clear from this letter that the Canadian government informed the Chinese government, the alleged persecutor of the applicant, of her refugee claim. In its decision, the Refugee Division stated at page 20 that this was "something that should not have happened" and noted the Minister's representative "was at pains to make it clear at the hearing that this should not have occurred."

3. The Refugee Division's Decision

[9] The Refugee Division denied the applicant's claim because she lacked credibility, and was excluded from claiming protection by Article 1F(b). It rejected the applicant's allegation that she was framed by her superiors for refusing to carry out illegal orders. The Refugee Division cited numerous implausibilities, inconsistencies and contradictions in the applicant's version of events and the documentary evidence before the Board. It concluded at page 22 of the decision:

> The claimant never exposed anyone for anything in China. She was not a 'whistle blower.' There was no public political aspect to what she did.

[10] After impugning the applicant's credibility, the Refugee Division turned to the Minister's application for exclusion. The panel determined that the applicant was excluded from protection "as a person in need of protection" pursuant to section 97 of IRPA (see paragraph 14 below) because there were "serious reasons for considering" the applicant to have committed a "serious non-political crime." The serious reasons identified by the panel were the INTERPOL arrest warrant and the applicant's inexplicable wealth. An examination of the arrest warrant showed it to be credible and trustworthy, although the maximum penalty for embezzlement was incorrectly identified as life imprisonment, and not death as is stated in the statute. The panel noted the large sums of money the applicant and her daughter had in their names despite their low incomes. The applicant testified that she has 9 million RMB, which is approximately C$1.8 million, and her daughter, who is a cashier in Canada, had the equivalent of approximately C$900,000 in a Hong Kong bank account. The panel rejected the applicant's claim that the money was her share of investment income earned by her and her ex-husband, because "some of the documents provided to confirm her story were inconclusive or ambiguous." Further, the panel stated it was unclear, given the applicant's personal fortune, why she continued to work in a "relatively low paying job where she was regularly censured, humiliated, and asked to perform illegal acts."

[11] The Refugee Division then examined whether embezzlement constituted a serious non-political crime. It cited *Chan* v. *Canada (Minister of Citizenship and*

Immigration) (2000), 10 Imm. L.R. (3d) 167 at p. 173 (C.A.) as authority for equating a serious non-political crime with one where a maximum sentence of ten years could have been imposed had the offence been committed in Canada. The panel also relied on the guidance provided by paragraph 155 of the United Nations High Commissioner for Refugees' *Handbook on Procedures for Determining Refugee Status* (the "UNHCR Handbook"), which identifies a serious crime as one that "must be a capital crime or a very grave punishable act." Based on these sources, the panel concluded: "Article 1F(b) contains no prohibition against serious non-violent economic crimes being the basis for exclusion."

[12] The panel then examined the relevant provisions of Chinese and Canadian law. The Refugee Division found that the equivalent of Article 382 of the Criminal Law of China is section 380(1)(a) of the Canadian *Criminal Code*, R.S.C. 1985, c. C-34, which reads as follows:

> Fraud
>
> 380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars;
>
> Fraude
>
> 380. (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur_:
>
> a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;

[13] Based on the severe penalties for embezzlement in both Chinese and Canadian criminal law, the Refugee Division concluded that it amounted to a serious non-political crime in both states. As a result, the panel excluded the applicant from protection in accordance with section 98 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *"IRPA"*):

> Exclusion - Refugee Convention
>
> 98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

Exclusion par application de la Convention sur les réfugiés

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[14] Although it was unnecessary to do so in light of its exclusionary finding, the Refugee Division decided to examine whether the applicant fell within the scope of paragraph 97(1)(a) of the *IRPA*:

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée_:

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

[15] After an examination of the relevant documentary evidence, the panel concluded there was more than a mere possibility that the applicant would face torture if deported to China while incarcerated during the investigation leading up to the laying of charges. The panel held:

After reviewing the extensive documentary materials filed in this claim, I am of the view that there is more than a mere possibility that this claimant would face being tortured while incarcerated in the investigation leading up to any charges being laid.

Moreover, the panel was of the opinion that being tortured as a criminal suspect cannot be considered a risk inherent to the application of a lawful sanction. Therefore, if the applicant had not been excluded from the definition of a person in need of protection by reason of Article 1F(b), she would be a person described in paragraph 97(1)(a).

[16] Because the Chinese Public Security Ministry had been tipped off about the claim by the Canadian government, the applicant was afraid it might obtain access to her file and learn the details of her refugee claim. To protect herself against this

possibility, she obtained a Confidentiality Order for her file from this Court, and an order that the hearing in Vancouver be held *in camera*.

ISSUES

[17] The applicant, at the hearing, relies upon the following issues in this application before the Court:

1. Is the Refugee Division's finding that the applicant is not credible patently unreasonable?

2. Did the Refugee Division err in law by relying upon the INTERPOL warrant and the letter from the Chinese Government to the Canadian Government describing the applicant's alleged crime as sufficient evidence that the applicant committed a "serious crime"?

3. Did the Refugee Division err in law by considering an "economic crime", not including any violence, to be a "serious non-political crime" for the purpose of Article 1F(b) of the Convention?

4. Did the Refugee Division err in excluding the applicant pursuant to Article 1F(b) of the Convention because it did not balance the "seriousness of the crime" against the nature of the risk to the applicant if returned to China?

ANALYSIS

The applicable standard of review

[18] The applicable standard of review for cases concerning Article 1F(b) was discussed by Décary J.A. in *Harb* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39 at para.14:

> Insofar as these are findings of fact they can only be reviewed if they are erroneous and made in a perverse or capricious manner or without regard for the material before the Refugee Division (this standard of review is laid down in s. 18.1(4)(d) of the *Federal Court Act*, and is defined in other jurisdictions by the phrase "patently unreasonable"). These findings, insofar as they apply the law to the facts of the case, can only be reviewed if they are unreasonable. Insofar as they interpret the meaning of the exclusion clause, the findings can be reviewed if they are erroneous. (On the standard of review, see *Shrestha* v. *The Minister of Citizenship and Immigration*, 2002 FCT 886, Lemieux J. at paras. 10, 11 and 12.)

[19] As was the case in *Harb*, three different standards of review are applicable in the case at bar:

> First, the standard of patent unreasonableness will be applied to the panel's findings of fact and its credibility finding.

> Second, the Refugee Division's determination that there are serious reasons for considering the applicant to have committed embezzlement required an application of the law to the facts of the case. This is a question of mixed fact and law, and will be reviewed using reasonableness *simpliciter*: *Sharma* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 289 at para. 12.
>
> Third, correctness will be applied to the Refugee Division's finding that a purely economic offence can constitute a serious non-political crime because interpreting articles of the *Convention* is a determination of law: *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 42-50. Likewise, whether the Refugee Division was required to balance the applicant's offence against the possibility that she might be tortured while incarcerated in China is a question of law and will be reviewed using correctness.

Issue No. 1: Is the Refugee Division's finding that the applicant is not credible patently unreasonable?

[20] The applicant testified at the hearing that she has been falsely accused of embezzlement because she refused to follow illegal orders from her superiors. This explanation was rejected by the panel due to a number of credibility concerns it had with the applicant's testimony. The applicant submits the Refugee Division erred in its credibility finding and improperly relied upon inadequate evidence when it found there were serious reasons for considering her to have committed embezzlement.

[21] The applicant's story was incredibly complex and the written narrative attached to her PIF stretches to fourteen pages. The Refugee Division's analysis of the applicant's story was extensive and highlighted a large number of implausibilities, inconsistencies and contradictions in the applicant's version of events and the documentary evidence before the Board. In her submissions to the Court, the applicant has challenged most of the inconsistencies and implausibilities identified by the Refugee Division; however, her submissions simply reiterate the explanations she relied upon during her hearing. She has not demonstrated the Refugee Division made its decision in a perverse or capricious manner, or acted without regard for the material before it. In essence, the applicant is asking the Court to re-weigh the evidence that was before the Refugee Division, which is not the role of the Court on an application for judicial review. The credibility and implausibility findings of the Refugee Division are based on the evidence, supported by detailed reasons, and reasonably open to the panel. Accordingly, they are not patently unreasonable.

Issue No. 2: Did the Refugee Division err in law by relying upon the INTERPOL warrant and the letter from the Chinese Government to the Canadian Government describing the applicant's alleged crime as sufficient evidence that the applicant committed a "serious crime"?

[22] The applicant argues the INTERPOL warrant relied upon by the Refugee Division constitutes inadequate evidence of the alleged offence. The document contains errors, notably the identification of life imprisonment as the maximum punishment. While these errors are of concern, they were raised with the panel, who reviewed the document and concluded at page 24 of its decision:

As per the decision of [*Legault* v. *Canada (Secretary of State)* (1997), 42 Imm. L.R. (2d) 192 (F.C.A.)] I consider the materials put before me by the Minister's Representative credible and trustworthy evidence in the circumstances of this claim. While these materials might not be sufficient for extradition proceedings, that is not the process this panel is charged to undertake. So based on the entirety of evidence, there is [*sic*] "serious reasons for considering" the claimant committed an offence.

[23] As the panel correctly stated, the evidentiary standard in immigration proceedings to establish that the applicant committed the crime is not the same as in the arena of criminal or civil law: *Legault, supra*. The evidence of the crime must meet a threshold described as "serious reasons for considering" that the applicant committed the crime. The threshold is something "more than suspicion or conjecture" but less than evidence on the balance of probabilities: *Sivakumar* v. *Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 at para. 18 (C.A.). The panel was of the view the INTERPOL warrant was trustworthy and stated the applicant's inability to explain her considerable wealth as a corroborating factor. The applicant has failed to demonstrate the panel acted unreasonably in its assessment of the evidence. I am satisfied that the panel did not err by finding there were serious reasons for considering that the applicant committed the offence detailed in the INTERPOL warrant.

Issue No. 3: Did the Refugee Division err in law by considering an "economic crime", not including any violence, to be a "serious non-political crime" for the purpose of Article 1F(b) of the Convention?

[24] The applicant argues that the alleged offence does not qualify as a "serious non-political crime" and therefore cannot form the basis for exclusion under Article 1F(b). It is submitted that claimants should not be denied refugee protection for purely economic crimes such as embezzlement. The respondent contends that nothing precludes a claimant's exclusion for purely economic crimes and the applicant's embezzlement of a significant sum of money for personal profit constitutes a serious non-political crime for the purposes of the *Refugee Convention*.

UNHCR Handbook

[25] Somewhat surprisingly, there is no definitive answer on whether a purely economic crime qualifies as a serious non-political crime. The guidance provided by the UNHCR Handbook, that a serious non-political crime "must be a capital crime or a very grave punishable act", is of little help in answering this question. While graft is a capital crime in China, that is not the case in this country, and it would be inconsistent with the general approach taken in the *IPRA* to rely solely upon the punishment imposed in a claimant's country of origin in determining whether he or she had committed a crime that justified exclusion under Article 1F(b). As for the second half of the UNHCR Handbook's definition, it simply begs the question of whether a purely economic crime qualifies as "a very grave punishable act."

Federal Court jurisprudence

[26] While somewhat more helpful, the jurisprudence of this Court is not definitive on this question either. In deciding that graft constituted a serious non-

political crime, the Refugee Division relied upon the Federal Court of Appeal's decision in *Chan, supra*. The claimant in *Chan* had been convicted in the United States of "the offence of illegal use of a communication device (a pager) . . . an offence defined in connection with offences related to drug trafficking" and received a 14-month sentence. In the process of determining that Article 1F(b) is not applicable to a claimant who has served his or her sentence prior to arriving in Canada, Robertson J.A. faced the issue of whether the claimant's non-violent offence constituted a serious non-political crime. In that regard, he stated at paragraph 9:

> This part of my analysis begins with the presumption that the appellant's conviction in the United States constitutes a serious non-political crime within the meaning of Article 1F(b). While this presumption is contrary to the appellant's interests, it is consistent with the position articulated by the Board and adopted by the Motions Judge. In this regard, the Motions Judge held that the Board did not err in concluding that the appellant's conviction arose out of an offence involving drug trafficking and that such conduct amounted to a serious non-political crime. This was so despite the fact that the appellant was convicted not for drug trafficking per se but for the unlawful use of a communication device, an offence unknown to Canadian law. Moreover, I am going to presume that, had the appellant engaged in similar conduct in Canada, he would have been convicted of an offence such as drug trafficking for which a maximum prison term of ten years or more could have been imposed. In other words, for present purposes I will presume, without deciding, that a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada. [Emphasis added.]

[27] As can be seen, rather than linking the determination under Article 1F(b) to the nature of the crime in question, Robertson J.A. defined a serious crime by reference to the applicable maximum sentence that could have been imposed had the crime been committed in Canada. Even though Robertson J.A. did not decide this issue, his approach is a sensible one and I intend to follow it. There are several reasons why I think his approach makes sense.

IRPA definition of "serious criminality"

[28] First, it is consistent with the definition of "serious criminality" in subsection 36(1) of the *IRPA*:

> Serious criminality
>
> 36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants_:

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

This provision demonstrates Parliament's desire to exclude from Canada individuals who have committed crimes punishable in Canada by a maximum term of imprisonment of at least 10 years, even if the offence in question is a purely economic one.

Extradition Act analogy

[29] Second, Robertson J.A.'s approach also dovetails with the general principle for extradition set out in subsection 3(1) of the *Extradition Act*, S.C. 1999, c. 18. Like subsection 36(1) of the *IRPA*, subsection 3(1) does not distinguish between violent crimes and purely economic crimes, but rather is premised upon the maximum term of imprisonment associated with an offence:

General principle

3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on - or enforcing a sentence imposed on - the person if

(a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by

imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and

(b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

Principe général

3. (1) Toute personne peut être extradée du Canada, en conformité avec la présente loi et tout accord applicable, à la demande d'un partenaire pour subir son procès dans le ressort de celui-ci, se faire infliger une peine ou y purger une peine si_:

a) d'une part, l'infraction mentionnée dans la demande est, aux termes du droit applicable par le partenaire, sanctionnée, sous réserve de l'accord applicable, par une peine d'emprisonnement ou une autre forme de privation de liberté d'une durée maximale de deux ans ou plus ou par une peine plus sévère;

b) d'autre part, l'ensemble de ses actes aurait constitué, s'ils avaient été commis au Canada, une infraction sanctionnée aux termes du droit canadien_:

(i) dans le cas où un accord spécifique est applicable, par une peine d'emprisonnement maximale de cinq ans ou plus ou par une peine plus sévère,

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

(ii) dans le cas contraire, sous réserve de l'accord applicable, par une peine d'emprisonnement maximale de deux ans ou plus ou par une peine plus sévère.

[30] Consistency between Article 1F(b) and the *Extradition Act* is important because, as Bastarache J. writing for a majority of the Supreme Court of Canada stated in *Pushpanathan, supra* paragraph 73, "Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status." In *Zrig* v. *Canada (Minister of Citizenship and Immigration),* 2003 FCA 178 at paragraph 68, Nadon J.A. interpreted Bastarache J.'s comments in *Pushpanathan* as "an indication of the nature and seriousness of crimes which may fall under the Article 1F(b) exclusion." Similar comments were made by Décary J.A. in his concurring opinion in *Zrig* at paragraph 108:

> Article 1F(b) is not limited to cases of extradition or to crimes associated with extradition, although for all practical purposes it can be assumed that the crimes associated with extradition are serious crimes; [Emphasis added.]
>
> I note that the standard set for extraditable crimes in subsection 3(1) is lower than that discussed by Robertson J.A. in *Chan*, as it encompasses offences

> with maximum penalties of less than ten years. As the offence described in paragraph 380(1)(a) of the *Criminal Code* is punishable by a maximum term of ten years, there is no need for me to deal with this distinction.

Academic commentary on the subject

[31] Third, commentary concerning Article 1F(b) does not support the view that purely economic crimes should be excluded from the scope of the exclusion clause. In his discussion on Article 1F(c) in *The Definition of Convention Refugee* (Toronto: Butterworths, 2001) at _8.532 to _8.540, Lorne Waldman makes no distinction between violent crimes and purely economic ones. Instead, he states at _8.536 that the analysis should include such factors as "the gravity of the offence, the potential sentence that is likely to be imposed, existence of any previous criminal record, and any mitigating and aggravating circumstances". James C. Hathaway in *The Law of Refugee Status* (Toronto: Butterworths, 1991) at page 224 refers to a serious crime as one punishable by several years of imprisonment. Again, no distinction is made between violent offences and purely economic offences. And Guy Goodwin-Gill in *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996) at page 107 indicates that purely economic crimes such as embezzlement can constitute serious crimes if the value of the property involved is significant:

> The following offences might also be considered to constitute serious crimes, provided other factors were present: breaking and entering (burglary); stealing (theft and simple robbery); receiving stolen property; embezzlement; possession of drugs in quantities exceeding that required for personal use; an assault. Factors to support a finding of seriousness included: use of weapons, injury to person; value of property involved; type of drugs involved; evidence of habitual criminal conduct. [Emphasis added and footnotes omitted.]

Brzezinski case

[32] Finally, this approach is not at odds with *Brzezinski* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 525 (T.D.) as alleged by the applicant. In *Brzezinski*, Lufty J. (as he then was) held Article 1F(b) does not include the minor crimes of shoplifting or "theft under". Lufty J. did not base his decision on the principle that purely economic offences are excluded from Article 1F(b); rather, he found the offences were not serious because they were summary conviction offences in Canada, involved inexpensive goods and were not extraditable by treaty. The case at bar stands in stark contrast to the situation in *Brzezinski*.

Surrounding circumstances

[33] It is important to make clear that adopting Robertson J.A.'s approach does not preclude an examination of all of the relevant surrounding circumstances. That the offence in question is one punishable by a maximum sentence of ten years is not the end of the analysis. In *Chan*, Robertson J.A. relied upon a surrounding circumstance when he held that Article 1F(b) was not applicable to the claimant because he had served his sentence prior to his arrival in Canada. The academic commentators referred to above and paragraph 157 of the UNHCR Handbook also call for an examination of all of the relevant circumstances. Paragraph 157 reads as follows:

> **157.** In evaluating the nature of the crime presumed to have been committed, all the relevant factors - including any mitigating circumstances - must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

The crime in this case

[34] I now turn to the offence at issue in the case at bar. The applicant has not contested the Refugee Division's decision to equate paragraph 380(1)(a) of the *Criminal Code* with Article 382 of the Criminal Law of China. Committing the offence of fraud over $5000 described in paragraph 380(1)(a) renders an individual "liable to a term of imprisonment not exceeding ten years", meaning it meets the threshold set out by Robertson J.A. in *Chan*. It also qualifies as a extraditable offence under subsection 3(1) of the *Extradition Act*. No evidence was presented as to whether there is an extradition treaty between Canada and China, but this is of little importance because the offence in question meets all three tests set out in subsection 3(1). As Nadon J.A. stated in *Zrig* at paragraph 68, this indicates the offence is serious enough to fall under the Article 1F(b) exclusion.

[35] Furthermore, the surrounding circumstances of this case do not militate against the application of the exclusion clause to the applicant. Unlike the claimant in *Chan*, the applicant did not serve her sentence prior to her arrival in Canada. This case is also fundamentally different than *Brzezinski* as there is no doubt the applicant's alleged offence is a grave one. If the fraud in question was just over the $5000 threshold, there might be grounds for thinking otherwise. In a case of that nature, one would not expect the maximum penalty to be applied and a plea bargain to the lesser offence of fraud under $5000 would be a reasonable possibility. But the applicant has been accused of embezzling C$1.4 million while holding a position of public trust. To her credit the applicant does not appear to have a prior criminal record; nonetheless, that the embezzlement is alleged to have occurred over a 20-month period demonstrates that this was not a one-time event. There is no doubt the offence the applicant is accused of qualifies as a serious non-political offence.

[36] Consequently, the Refugee Division did not err by finding the applicant's alleged offence to be a serious non-political crime covered by Article 1F(b).

Issue No. 4: Did the Refugee Division err in excluding the applicant pursuant to Article 1F(b) of the *Convention* because it did not balance the "seriousness of the crime" against the nature of the risk to the applicant if returned to China?

[37] The Refugee Division found there was more than a mere possibility the applicant would face torture if returned to China while incarcerated during the investigation leading up to the laying of charges. On that basis, the Refugee Division concluded that <u>if</u> the applicant had <u>not</u> been excluded from the definition of "a person

in need of protection", she would be a person described in paragraph 97(1)(a). The applicant argues the panel erred by not balancing the seriousness of the applicant's alleged offence against the persecution she might suffer upon her return to China as part of its Article 1F(b) analysis.

Federal Court jurisprudence on this issue

[38] The applicant acknowledges the Federal Court of Appeal rejected the need for a balancing as part of an Article 1F(b) analysis in *Gil* v. *Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508 (C.A.) and *Malouf* v. *Canada (Minister of Citizenship and Immigration)* (1995), 190 N.R. 230 (F.C.A.). The following passage by Hugessen J.A. in *Gil* at paragraph 43 was the basis for the Court of Appeal's position in both cases:

> Another panel of this Court has already rejected the suggestion made by a number of authors that Article 1F(a) requires a kind of proportionality test which would weigh the persecution likely to be suffered by the refugee claimant against the gravity of his crime. [*Gonzalez* v. *Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646 (C.A.), per Mahoney J.A., at pp. 656-657.] Whether or not such a test may be appropriate for Article 1F(b) seems to me to be even more problematical. As I have already indicated, the claimant to whom the exclusion clause applies is *ex hypothesi* in danger of persecution; the crime which he has committed is by definition "serious" and will therefore carry with it a heavy penalty which at a minimum will entail a lengthy term of imprisonment and may well include death. This country is apparently prepared to extradite criminals to face the death penalty [*Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779] and, at least for a crime of the nature of that which the appellant has admitted committing, I can see no reason why we should take any different attitude to a refugee claimant. It is not in the public interest that this country should become a safe haven for mass bombers. [Footnotes omitted.]

[39] In *Malouf*, the Federal Court of Appeal considered the following certified question:

> "3. Where the Convention Refugee Determination Division is considering exclusion under Article 1F(b) of the Convention, is it required to consider the well-foundedness of the Convention refugee claimants' claim and then, if it is determined to be well-fouunded, to balance the seriousness of the nonpolitical crime considered to have been committed by the claimant against the persecution feared by the claimant?"

Justice Hugessen answered the question as follows:

> Paragraph (b) of Article 1F of the Convention should receive no different treatment than paragraphs (a) and (c) thereof: none of them requires the Board to balance the seriousness of the applicant's conduct against the alleged fear of persecution. In **Gil v. Minister of Employment and Immigration** (1994), 174 N.R. 292; 25 Imm. L.R. (2d) 209 (F.C.A.), we examined the issue with particular reference to paragraph 1F(b) and determined that a proportionality

> test was only appropriate for the purposes of determining whether or not a serious crime should be viewed as political. That question does not arise in this case. We are not persuaded that our decision in **Gil** was wrong.

[40] The applicant advances her balancing argument on two grounds. First, she submits the issue needs to be revisited in light of recent jurisprudence, notably *Pushpanathan, supra* and *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1. More specifically, the applicant claims the interpretation of Article 1F(b) adopted in *Gil* does not meet with the requirements of section 7 of the *Canadian Charter of Rights and Freedoms* established by *Suresh*. Second, she claims this case can be distinguished from *Gil* and *Malouf* because neither of those cases involved a purely economic crime.

New Supreme Court jurisprudence

[41] The applicant argues the Supreme Court's decisions in *Pushpanathan* and *Suresh* provide support for the balancing approach. To make this argument, the applicant relies upon paragraph 73 of *Pushpanathan*, in which Bastarache J. referred to Articles 1F(b) and 33(2) of the *Refugee Convention*:

> Article 1F(b) identifies non-political crimes committed outside the country of refuge, while Article 33(2) addresses non-political crimes committed within the country of refuge. Article 1F(b) contains a balancing mechanism insofar as the specific adjectives "serious" and "non-political" must be satisfied, while Article 33(2) as implemented in the [former *Immigration Act*, R.S.C. 1985, c. I-2] by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon refoulement. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other.
>
> Article 33 in its entirety states:
>
> Article 33. Prohibition of expulsion or return ("refoulement")
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.
>
> [Emphasis added.]

> Article 33. Défense d'expulsion et de refoulement
>
> 1. Aucun des Etats contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.
>
> 2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

[42] As support for her position, the applicant points to a statement from the Supreme Court at paragraph 75 of *Suresh*:

> We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the Charter.
>
> The Court stated that this norm informs the principles of fundamental justice under section 7 of the *Charter*, which in turn mandates balancing the risk of torture with the other interests involved before an individual can be deported to a country where they face a risk of torture. At paragraph 78, the Court stated that only in cases with "exceptional circumstances" would deportation to face torture be justified.

Distinction between *Suresh* and the case at bar

[43] The problem with the applicant's argument is that it overlooks a critical fact that distinguishes the case at bar from *Suresh*. *Suresh* was a case about removal from Canada, whereas this case is fundamentally about entry to Canada. The applicant in *Suresh* was initially recognized as a Convention refugee and it was the Minister's later decision to deport (or "refouler") him to his country of origin, Sri Lanka, that triggered the application. Unlike *Suresh*, this is not a case where the Minister is currently seeking to deport the applicant to a country where she faces a risk of torture. The Refugee Division's task was to determine whether the applicant qualified for entry into Canada as a Convention refugee or "a person in need of protection". The distinction between entry and removal is an important one because, as the Supreme Court noted at paragraph 102 of *Suresh*, the powers of a state to refuse entry are broader than its powers to deport:

> The *Refugee Convention*, and following it the *Immigration Act*, distinguish between the power of a state to refuse entry to a refugee, and its power to deport or "refouler" the refugee once the refugee is established in the country as a Convention refugee. The powers of a state to refuse entry are broader than to deport. The broader powers to refuse entry are based *inter alia* on the need to prevent criminals escaping justice in their own country from entering into

> Canada. No doubt the natural desire of states to reject unsuitable persons who by their conduct have put themselves "beyond the pale" also is a factor.

[44] This distinction originated with the *Refugee Convention*. As Hathaway points out at pages 225-226 of *The Law of Refugee Status, supra,* Article 33(2) provides a state the means to expel or return dangerous refugees and sets a more exacting standard of proof than Article 1F(b), which "is designed to afford the possibility of pre-admission exclusion on the basis of a relatively low standard of proof." Individuals caught by Article 1F(b) are excluded from the definition of a Convention refugee and cannot avail themselves of the protection offered by Article 33 or its domestic equivalents. Likewise, while the decision in *Suresh* prohibits the removal of an individual to a country where they face a risk of torture in the absence of exceptional circumstances, it does not require Canada to grant that individual a right of entry as a refugee or a person in need of protection.

Suresh applies to the PRRA process

[45] The relevant question in the case at bar is whether it would be contrary to section 7 to prevent the applicant from entering Canada because she faces a risk of torture in her country of origin. The answer is no. While the Refugee Division's negative decision prevents the applicant from entering Canada as a refugee or a person in need of protection, there are still a number of steps that must be taken before the applicant faces removal to China. Most notably, she is entitled to apply for a Pre-Removal Risk Assessment ("PRRA") under the *IRPA*. The balancing process required by section 7 of the *Charter* would then take place as part of the PRRA application. The relevant statutory provisions are set out here:

> Pre-Removal Risk Assessment
>
> Application for protection
>
> 112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).
>
> Restriction
>
> 112. (3) Refugee protection may not result from an application for protection if the person
>
> (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention;
>
> Consideration of application
>
> 113. Consideration of an application for protection shall be as follows:
>
> (d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

Effect of decision

114. (1) A decision to allow the application for protection has

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

Demande de protection

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Restriction

112. (3) L'asile ne peut être conféré au demandeur dans les cas suivants_:

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

Examen de la demande

113. Il est disposé de la demande comme il suit_:

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part_:

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

Effet de la décision

114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur;

(b) toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

[46] By virtue of paragraph 112(3)(c), the applicant is ineligible for refugee protection, but can still have her application for protection considered under subparagraph 113(d)(ii). A balancing process similar to one discussed in *Suresh* would then take place as part of an analysis conducted in accordance with

subparagraph 113(d)(ii), and if the risk of torture was found to outweigh the nature and severity of the applicant's offence, then any removal order with respect to China would be stayed by paragraph 114(1)(b). Whether these safeguards satisfy the section 7 requirement for fundamental justice is a question for another day. The point to be taken from this discussion is that before the applicant can be removed to China, she is entitled to have the nature and severity of her alleged offence balanced against the risk of torture. The presence of the PRRA protects the applicant's section 7 rights. It is unnecessary for the Refugee Division to conduct the same balancing process as part of its analysis under Article 1F(b).

[47] Accordingly, the Refugee Division did not err by failing to balance the seriousness of the applicant's alleged offence against the possibility that she would face torture upon her return to China.

DISPOSITION

[48] For these reasons, this application for judicial review is dismissed. Both parties proposed questions along the following lines for certification. I agree that these questions warrant certification, and certify the following two questions:

49. Can a refugee claimant be excluded from protection under Article 1F(b) of the *Refugee Convention* for committing a purely economic offence?

50. In light of *Suresh*, is the Refugee Division required to conduct a balancing of the nature and severity of the claimant's offence against the possibility that he or she might face torture if returned to his or her country of origin?

"Michael A. Kelen"

Judge

OTTAWA, ONTARIO

September 4, 2003

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-923-03
STYLE OF CAUSE:	ROU LAN ZIE v. MCI
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	August 21, 2003
REASONS FOR ORDER:	THE HONOURABLE MR. JUSTICE KELEN
DATED:	September 4, 2003

Hearing *in camera*

This matter has been Ordered to be Confidential

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