Federal Court  Cour fédérale

**Date: 20150608**

**Docket: IMM-7877-14**

**Citation: 2015 FC 716**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, June 8, 2015**

**Present: The Honourable Mr. Justice Shore**

**BETWEEN:**

**SERGIY PANOV**
**(ALIAS SERGIY VLADIMIROVICH PANOV)**
**(ALIAS SERGIY KHOUROZ)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Preliminary

[1] It is within the mandate and expertise of the Refugee Protection Division (RPD) to question an applicant with respect to the key aspects of his or her testimony and such an investigation may sometimes lead to questions that may be perceived to be unpleasant or

fastidious. It is not unusual for the RPD to consider further points that are considered to be contentious with respect to the genuineness of the applicant's documents or credibility.

## II. Introduction

[2] This is an application for judicial review under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) against an RPD decision dated October 24, 2014, rejecting the applicant's refugee claim and the recusal request made regarding the member during the hearing.

## III. Factual background

[3] The applicant is a 41-year-old Ukrainian citizen.

[4] Between April 2009 and February 2011, the applicant was working as a financial tax inspector in the city of Ismail, Ukraine.

[5] After the applicant reported on discussion forums the corruption of certain mayoral candidates of the city of Ismail, who were involved in tax evasion activities, the applicant was threatened.

[6] On July 20, 2010, the applicant was attacked and beaten by three individuals, who also insulted him regarding his Moldovan origins. Following this incident, the applicant contacted the police, in vain.

[7] In August 2010, a contractor and mayoral candidate, who the applicant considered to be corrupt, attributed his loss in the municipal elections to the applicant and threatened him.

[8] In February 2011, following the applicant's objections to a development project between the city of Ismail and this contractor/candidate, the applicant was fired.

[9] On February 22, 2011, the applicant was kidnapped, beaten and threatened with death by four individuals. The applicant contacted the police, who, however, stated that they could not intervene without a license plate number.

[10] On March 14, 2011, the applicant left Ukraine for Portugal to work on a commercial ship.

[11] On July 3, 2011, the applicant's spouse informed him that after an investigation on corruption that had been opened in Ismail, men came to their home and threatened to kill the applicant, who could appear as a witness, if he returned to the Ukraine.

[12] The applicant then arrived in Canada and made a refugee claim on July 8, 2011.

[13] Following a hearing that took place on June 26, 2014, the RPD found that the applicant is not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA, since he [TRANSLATION] "was not able to show credibly that his current fear of persecution is well-founded" (RPD's decision, Tribunal Record, at p 11).

IV. Statutory provisions

[14] The statutory provisions relevant to the determination of refugee status are reproduced below:

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| **Convention refugee** | **Définition de "réfugié"** |
| **96**. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, | **96**. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : |
| (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or | *a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; |
| (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country. | *b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner. |
| **Person in need of protection** | **Personne à protéger** |
| **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 | **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*) to a danger, believed on substantial grounds to exist, of | *a*) soit au risque, s'il y a des motifs sérieux de le croire, |

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| torture within the meaning of Article 1 of the Convention Against Torture; or | d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; |
| (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if | *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : |
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, | (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, |
| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, |
| (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |
| (2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection. | (2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection. |

## V. Issues

[15] The application for judicial review raises the following two issues:

1. Did the RPD raise a reasonable apprehension of bias?
2. Is the RPD's decision reasonable?

## VI. Analysis

### A. *Reasonable apprehension of bias*

[16] The applicant stated that the RPD breached its duties of procedural fairness and natural justice by showing bias.

[17] It is well established that an allegation of a breach of procedural fairness must be reviewed on a standard of correctness (*Canada (Attorney General) v Sketchley*, [2006] 3 FCR 392).

[18] The appropriate legal test is set out in *Committee for Justice and Liberty*, according to which an apprehension of bias "must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information". The criterion consists in asking oneself "what would an informed person, viewing the matter realistically and practically…conclude?" (*Committee for Justice and Liberty et al v Canada (National Energy Board)*, [1978] 1 SCR 369 at pp 394 and 395).

[19] It is not necessary to show actual bias; an appearance of bias is sufficient (*Cipak v Canada (Minister of Citizenship and Immigration)*, 2014 FC 453 at para 33). Furthermore, the

burden is on the applicant to show, on a balance of probabilities, the appearance of reasonable apprehension of bias.

[20] Such an allegation cannot be raised lightly and must be supported by concrete evidence:

> [8] It seems to me that the applicant's counsel has confused the audi alteram partem rule with the right of his client to a hearing by an impartial tribunal. An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. ...
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> (*Arthur v Canada (Attorney General)*, [2001] FCJ 1091 at para 8)

[21] The applicant criticized the RPD for showing [TRANSLATION] "disregard" toward him, specifically in its examination regarding the applicant's identity documents and his academic and professional training. The apprehension of bias, which arose during the hearing, allegedly deprived the applicant of the opportunity to fully bring forward the evidence in support of his application.

[22] The RPD's hearing transcript reveals that counsel for the applicant first asked the member to be less [TRANSLATION] "dismissive" (Hearing transcript, Tribunal Record, at p 198). Following an exchange between the member and counsel for the applicant on how a question was asked by the member, counsel then submitted a recusal request.

[23] At the hearing, counsel for the applicant raised a few reasons in support of her recusal request. Among other things, the member had called into question certain documents by [TRANSLATION] "diverting them from their purpose" and by insisting on specific points, such as variations in the applicant's name. Furthermore, counsel for the applicant criticized the member for making dismissive statements regarding the applicant, such as [TRANSLATION] "one can become a [tax inspector] just like that, without training" and [TRANSLATION] "in the Ukraine, documents can be blocked" (Hearing transcript, Tribunal Record, at p 203).

[24] The Court considers it timely to reproduce the member's reasons regarding the recusal request made against her:

> [TRANSLATION]
>
> [10] In response, first, the panel wishes to explain that Ms. Venturelli cited a list of grievances against the member without providing reasons. She did not seek to show how these allegations in support of her recusal request could illustrate an appearance of bias by the member.
>
> [11] With respect to the documents alleged by Ms. Venturelli, it appears that the panel noted that the applicant presented himself under different identities, Khoroz Sergiy, Panov Sergiy, Panov Vladimir Sergiy. Each of these names is found on a separate document from the others.
>
> [12] The panel clarified the real name of the applicant by taking the precaution of having him read his Ukrainian passport himself, in which he acknowledged that his name was Sergiy Panov. Then, he read his identity card, on which his name was Sergiy Vladimirovitch Panov.
>
> [13] The panel asked him whether his passport was based on his birth certificate. The applicant answered that this was indeed the case. Therefore, the question naturally arises as to why the applicant's passport, based on his birth certificate, does not consist of the same identity taken from the birth certificate.

[14] Moreover, the last document presented by the applicant was his workbook, in which a name was struck out and another was carried by hand. Thus, the panel legitimately asked whether he is aware that in Ukraine administrative documents are modified so simply by merely striking them out. Each time, the applicant had the opportunity to explain himself and the panel did not draw any inference at the time when counsel made her recusal request.

[15] Therefore, as the applicant himself confirmed, a person who acts reasonably and in good faith, would have asked these questions, which are considered to be legitimate, when faced with so many problems, but he or she could not, in light of the explanations noted and the lack of comment from the member, deduce that she had allegedly shown bias and a lack of respect in the applicant toward whom there is no reason to hold any adverse feelings, which he will recognize when the member asks the question directly to him. Indeed, he will answer that he did not consider that the member's attitude was arrogant, aggressive or, a fortiori, dismissive.

[16] If it had not been legitimate and, thus, reasonable to ask the question of how a person coming from a mechanical school, which could lead you to believe a mechanic or a machinist, could then have performed the profession of an accountant, as he claims, and especially that of a sailor and a cook, then suddenly becoming a tax inspector after recognizing, in his own words, after he was asked the question, that this duty would have required, even in the Ukraine, a specialization.

[17] Could a reasonable person, in good faith, avoid asking such a question? The applicant had the opportunity to explain himself, which the panel will note again, without commenting or, a fortiori, drawing an inference of any kind. All the questions asked by the panel merit being asked by a person who is vested with the same responsibilities as the panel. Ms. Venturelli could not, by the mere fact that these questions were asked, deduce that the panel would have been religious regarding the outcome of her client's request.

[18] These statements were considered to be insulting to the member. She let him know it and expressed her surprise and considered them unprofessional in a lawyer, since they were not based on objective considerations. These statements were characterized as provocative, according to the panel, for the purpose of deliberately creating an incident leading to stopping the hearing in progress. To date, the panel has maintained its integrity, calm and conducted its hearing as a reasonable person would. Ms. Venturelli also raised, without demonstrating it, the fact that

> the member refused the submission of a document, which was also without basis because all the documents filed were accepted even when they were made the day before the hearing, contrary to rule 34.3.a, i.e. within at least 10 days before holding a hearing.
>
> [19] Even these untranslated documents in the normal language of work of the panel were accepted without comment. Even better, at the end of the hearing, the panel gave him additional time to submit documents after the fact.
>
> [20] For these reasons, the only outcome for such a recusal request is rejection because it is without basis; no reasonable person could have concluded that the panel's judgment would have been issued, affected or biased to the point of allowing the appearance of a fear of partiality.
>
> (RPD's decision, Tribunal Record, at pp 5 to 7)

[25] The Court found that the RPD's conclusions regarding the allegation of apprehension of bias are anchored in the evidence on the record. Although the Court may recognize the existence of a strained environment at the hearing, it is not sufficient on its own to raise a reasonable apprehension of bias.

[26] "Extensive and energetic" questioning will not give rise to a reasonable apprehension of bias (*Bankole v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ 1942 at para 23 (*Bankole*)). Similarly, case law establishes that "harsh" or "sarcastic" language is not generally sufficient to demonstrate a panel's partiality (*Ramirez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 809 at para 23; *Varaich v Canada (Minister of Employment and Immigration)*, [1994] FCJ 336 at para 12; *Kankanagme v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ 1757 at para 19).

[27] Moreover, the Court finds that the member's statements at the hearing do not correspond to such descriptions.

[28] It falls within the RPD's mandate and expertise to question an applicant as to the key aspects of his testimony and such an investigation may sometimes lead to questions that may be perceived to be unpleasant or fastidious. It is not unusual for the RPD to consider further the points considered to be contentious with respect to the genuineness of the documents or the applicant's credibility.

[29] In this respect, the Court adopts the statements of Justice Richard G. Mosley in *Bankole*, above at para 25:

> [25] Having reviewed the transcript closely, I am not persuaded that the manner of questioning in this case amounted to a denial of procedural fairness in the conduct of the hearing despite my concerns about specific excerpts. Overall, the transcript discloses that the member went to considerable lengths to obtain the applicant's complete evidence and to attempt to clarify the contradictions and inconsistencies in his testimony. The hearing as a whole, while flawed, was not unfair.

[30] Moreover, the Court considers that the applicant had a fair hearing that allowed him to fully make his case. Following counsel for the applicant's recusal request, the hearing resumed.

[31] With respect to the foregoing, an informed person assessing the issue in a practical manner and in depth would not come to a conclusion that a reasonable apprehension of bias exists.

B. *Reasonableness of the RPD's decision*

[32] The issue relating to reasonableness of findings of fact and mixed fact and law that are within the RPD's areas of expertise must be reviewed on a standard of reasonableness. Therefore, the Court must show deference to these findings and must intervene only if the RPD's decision does not fall within the range of possible, acceptable outcomes which are defensible in respect to the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[33] The applicant alleged that the RPD conducted a microscopic analysis of the evidence and without regard for the explanations provided by the applicant, for the sole purpose of undermining his credibility, particularly with respect to his professional qualifications, his employment as a tax inspector and the use of his name. Furthermore, the applicant alleged that the RPD neglected to analyze the documentary evidence regarding corruption in the Ukraine, when this is fundamental to the applicant's refugee claim. Finally, the applicant claims that the RPD neglected to assess the personalized risk to which the applicant is exposed, to the extent that he became vulnerable following his dismissal from the government and that he was personally targeted by his agent of persecution.

[34] With respect to the RPD's analysis of the testimony and the evidentiary record before it, the Court cannot agree with these claims.

[35] The RPD's reasons reveal that the RPD considered the evidence before it and analyzed it to identify its probative value. It was reasonable for the RPD conclude that the applicant lacked

credibility with respect to the evidence on the record, which includes inconsistencies and raises doubts regarding the genuineness of some evidence that is considered key to the applicant's story.

## VII. Conclusion

[36] With respect to the foregoing, the Court dismisses the application for judicial review.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review is dismissed. There is no question of importance to be certified.

"Michel M.J. Shore"

Judge

Certified true translation
Catherine Jones, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-7877-14 |
| **STYLE OF CAUSE:** | SERGIY PANOV (ALIAS SERGIY VLADIMIROVICH PANOV) (ALIAS SERGIY KHOUROZ) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | JUNE 4, 2015 |
| **JUDGMENT AND REASONS:** | SHORE J. |
| **DATED:** | JUNE 8, 2015 |

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| Margarita Tzavelakos | FOR THE RESPONDENT |

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