

Federal Court



Cour fédérale

**Date: 20140213**

**Docket: IMM-3364-13**

**Citation: 2014 FC 113**

**Ottawa, Ontario, February 13, 2014**

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

**BETWEEN:**

**IVAN SIMKOVIC**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant left his country of origin without telling anyone that he was leaving. Recognizing that the Applicant, a university educated professional, did not attempt to regularize his status in Canada for more than sixteen years, nor did he attempt to return to his country of origin; the Applicant did not ask for refugee status during that entire sixteen year period in Canada. Allegedly unaware of his indictment and sentence for tax fraud in his country of origin, the Applicant also alleges that neither his mother nor his sister, who had come to Canada for a visit, had

shared with him their knowledge of the trial held in his regard as well as the judgment and sentence that was rendered therein.

[2] Although the counsel of the Applicant points to a Kafkaesque situation of the judicial system in Slovakia, having quoted from the Refugee Protection Division (RPD) of the Immigration and Refugee Board Certified Tribunal Record [CTR], affirmations to the effect that the Prime Minister of Slovakia, Iveta Radicova, who had said at the relevant time-frame to this matter: “I DO NOT BELIEVE IN JUDICIARY”; and, also: “we need a big judiciary reform”, in the Slovak Prime Minister’s direct reference to corruption therein (CTR, vol 3 at p 458; CTR, vol 2 at pp 230-233 inclusive; CTR, vol 2 at pp 242-244 in that regard, which includes the State Department Country Condition Report); however, in and of itself, that does not discount uncontradicted evidence in regard to the participation of the Applicant in the economic crime for which he was indicted and sentenced. A decision of this Court cannot solely take into account a Country Condition Report or other documentation in that regard without taking into account direct uncontradicted evidence in respect of an applicant. Therefore, even if problems exist with the “judicial system” in the generic, the uncontradicted evidence in regard to the Applicant has led the Court to determine that the decision of the RPD, on its face and in its substance, with regard to its reasoning on the basis of all of the evidence therein, was reasonable as interpreted within the framework of a trilogy of decisions from the Supreme Court of Canada: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

[3] The fact that the Applicant's country of origin, Czechoslovakia, was being divided into two, between the Czech and Slovak Republics, when the Applicant fled, is not sufficient as a reason to flee his former country, although changes were to take place, as the Applicant did not have any political profile, nor any political antecedents, whatsoever.

[4] Although the RPD decision has one line, at paragraph 53, wherein an inadvertence had taken place: "Although the company is noted as Slovakia's 'largest tax dodger', there is no commentary about the company being involved in any illegal activities, other than the tax arrears" [emphasis added], that does not change the reasonableness of the entire decision, which is composed of eighty seven paragraphs.

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[5] This judgment is in response to an application for judicial review of the decision of the RPD that found that the Applicant is not a "Convention Refugee" or "a person in need of protection" as defined in sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act, SC 2001 c 27 [IRPA]*, as he is excluded under 1F(b) of the Convention relating to the Status of Refugees [Convention].

[6] Article 1F(b) specifies, in part:

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

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

serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	crime grave d droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
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... [ ... ]

(Schedule to the *Immigration and Refugee Protection Act* – Sections E and F of Article 1 of the United Nations Convention relating to the Status of Refugees.)

[7] The RPD, after a hearing held on three separate days and, subsequently, written submissions, determined that the Applicant is excluded from refugee protection pursuant to Article 1F(b) for reasons that include the following:

- a) On the basis of detailed documents from Slovakia that the Applicant had committed crimes before he arrived in Canada, it was determined that the claimant was convicted of “tax diminishment” contrary to section 148, subsections (1) and (5) of the Slovak Penal Code of the government Slovakia;
- b) In the hearing before the RPD, it was determined that the above was equivalent to an act of “fraud” under subsection 380(1) of the *Criminal Code of Canada*;
- c) Although the Applicant rejected the alleged crimes attributed to his person, he did not dispute that such was the outcome of his current legal situation in Slovakia;
- d) The Applicant alleged that he was, as a partner in a business enterprise, a victim, of unscrupulous individuals who had misled him and that criminal acts had taken place unbeknownst to him through the doing of others;
- e) The RPD had had presented to it, excerpts from the Canadian *Criminal Code* which indicate that the acts of the Applicant are criminal in nature in Canada. Also, the crime is considered

“a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee”;

f) Section 98 of the *IRPA* specifies:

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.

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.

g) Section 380 of the *Criminal Code of Canada*, RCS, 1985, c C-46, reads :

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 fourteen 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; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

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 quatorze 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;

b) est coupable :

(i) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans,

(ii) soit d'une infraction

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

punissable sur déclaration de culpabilité par procédure sommaire,

si la valeur de l'objet de l'infraction ne dépasse pas cinq mille dollars.

#### Minimum punishment

(1.1) When a person is prosecuted on indictment and convicted of one or more offences referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.

#### Peine minimale

(1.1) Le tribunal qui détermine la peine à infliger à une personne qui, après avoir été poursuivie par acte d'accusation, est déclarée coupable d'une ou de plusieurs infractions prévues au paragraphe (1) est tenu de lui infliger une peine minimale d'emprisonnement de deux ans si la valeur totale de l'objet des infractions en cause dépasse un million de dollars.

#### Affecting public market

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

#### Influence sur le marché public

(2) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, avec l'intention de frauder, influe sur la cote publique des stocks, actions, marchandises ou toute chose offerte en vente au public.

h) Section 380.1 of the *Criminal Code of Canada* specifies:

Sentencing — aggravating circumstances

Détermination de la peine : circonstances aggravantes

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall consider the following as aggravating circumstances:

(a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;

(b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;

(c) the offence involved a large number of victims;

(c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;

(d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;

380.1 (1) Sans que soit limitée la portée générale de l'article 718.2, lorsque le tribunal détermine la peine à infliger à l'égard d'une infraction prévue aux articles 380, 382, 382.1 ou 400, les faits ci-après constituent des circonstances aggravantes :

a) l'ampleur, la complexité, la durée ou le niveau de planification de la fraude commise est important;

b) l'infraction a nui — ou pouvait nuire — à la stabilité de l'économie canadienne, du système financier canadien ou des marchés financiers au Canada ou à la confiance des investisseurs dans un marché financier au Canada;

c) l'infraction a causé des dommages à un nombre élevé de victimes;

c.1) l'infraction a entraîné des conséquences importantes pour les victimes étant donné la situation personnelle de celles-ci, notamment leur âge, leur état de santé et leur situation financière;

d) le délinquant a indûment tiré parti de la réputation d'intégrité dont il jouissait dans la collectivité;

(e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and

e) il n'a pas satisfait à une exigence d'un permis ou d'une licence, ou à une norme de conduite professionnelle, qui est habituellement applicable à l'activité ou à la conduite qui est à l'origine de la fraude;

(f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

f) il a dissimulé ou détruit des dossiers relatifs à la fraude ou au décaissement du produit de la fraude.

Aggravating circumstance —  
value of the fraud

Circonstance aggravante :  
valeur de la fraude

(1.1) Without limiting the generality of section 718.2, when a court imposes a sentence for an offence referred to in section 382, 382.1 or 400, it shall also consider as an aggravating circumstance the fact that the value of the fraud committed exceeded one million dollars.

(1.1) Sans que soit limitée la portée générale de l'article 718.2, lorsque le tribunal détermine la peine à infliger à l'égard d'une infraction prévue aux articles 382, 382.1 ou 400, le fait que la fraude commise ait une valeur supérieure à un million de dollars constitue également une circonstance aggravante.

Non-mitigating factors

Circonstances atténuantes

(2) When a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

(2) Lorsque le tribunal détermine la peine à infliger à l'égard d'une infraction prévue aux articles 380, 382, 382.1 ou 400, il ne prend pas en considération à titre de circonstances atténuantes l'emploi qu'occupe le délinquant, ses compétences professionnelles ni son statut ou sa réputation dans la collectivité, si ces facteurs ont contribué à la perpétration de



l'infraction, ont été utilisés pour la commettre ou y étaient liés.

Record of proceedings

Inscription obligatoire

(3) The court shall cause to be stated in the record the aggravating and mitigating circumstances it took into account when determining the sentence.

(3) Le tribunal fait inscrire au dossier de l'instance les circonstances aggravantes ou atténuantes qui ont été prises en compte pour déterminer la peine.

- i) If the criminal act as perpetrated was committed in Canada, it would be considered an indictable offence with a maximum sentence of fourteen years;
- j) The judgment from Slovakia is explicit in explaining the basis on which the conclusions were reached:
- The Applicant is said to have as a partner, in Coreco, the company with which he was associated, entered into contracts with a liquor producer/distributor for a large quantity of rum. The rum was to be exported and not sold domestically in Slovakia. Such goods would be exempt from sales tax, while domestic sales necessitate the payment of the sales tax;
  - Contrary to the laws of Slovakia, the rum was sold in Slovakia; and, thus, the Applicant “caused by these actions and by not paying sales tax, damages to the state, reported by the Revenue Office of Bratislava, in the total amount of 4,406,160,106 Sk”, by which the “criminal offense of tax evasion” was committed (at para 26). This is the equivalent of over 180,000.00 Canadian dollars. Not only was the Applicant to receive a sentence of imprisonment for five years but prohibited from performing business activities subsequently for five years. Thereby, the RPD

determined that the Minister had established that the Applicant has committed a serious non-political crime.

- k) Jurisprudence has clearly established that the “reasonable grounds to believe” standard requires something more than mere suspicion but less than the standard applicable in civil matters of proof on the balance of probabilities (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 at para 60 (CA));
- l) Furthermore, reasonable grounds exist when an objective basis exists on compelling and credible information (*Sabour v Canada (Minister of Citizenship and Immigration)* (2000), 195 FTR 59, 9 Imm LR (3d) 61 (FCTD)).

[8] It is significant that the Applicant stated that he did sign the initial contract for the purchase of rum in the company’s name to which he was a partner; he, also acknowledged that the contract was for products for export; and, he was cognizant that the exports, in question, were sold for a lesser price; and, thus not taxable at the point of purchase from the producer. The Applicant did not submit any proof that the rum had been, in fact, for export; and the Applicant, also, acknowledged that his company had been paid for the transactions in which he was engaged.

[9] The Federal Court of Appeal in *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2004] 1 FCR 304, has held that the RPD can rely upon an indictment on an arrest warrant to conclude that reasonable grounds exist whereby a refugee claimant has committed a crime. The Slovakian Court extracts, in this case, do have details of the allegations themselves, and, evidence in that respect, finding that the Applicant had evaded taxes, after having heard witnesses who had testified thereon, and, subsequent, also, to documentary evidence in that regard.

[10] Although the Applicant argues as to weaknesses in the evidence in respect of the Slovakian indictment and judgment, the evidence on file does establish a prima facie case or “serious reasons to consider” that the Applicant had committed a serious non-political crime in Slovakia.

[11] It is not for the RPD to conduct a criminal trial beyond a reasonable doubt or on a balance of probabilities. The indictment and the judgment from Slovakia do support the RPD’s determination of serious reasons for considering that the Applicant had committed a crime (*Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125).

[12] The RPD’s decision, further to analysis by this Court, does demonstrate that the RPD, in this case, deserves deference (*Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324).

[13] An offence punishable by a term of ten years, if committed in Canada, is a serious crime. A serious crime can include an economic crime (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164).

[14] The Applicant was convicted of defrauding the Slovakian government the equivalent of more than \$180,000 in taxes. That was not contradicted with any substantial evidence from the Applicant.

[15] It is important to clearly specify that the RPD had conducted a thorough and clear analysis in its assessment of the seriousness of the crime:

- a) The elements of the crime;
- b) The mode of prosecution;
- c) The penalty prescribed;
- d) The facts of the conviction;
- e) Any mitigating and aggravating circumstances in respect of the conviction.

(*Jayasekara*, above, at para 44).

[16] The elements of the crime had been established. Although the trial was conducted in absentia, that was due to the Applicant having left Slovakia in 1992 to come to Canada. The Applicant's personal circumstances had been considered as had the fact that he had participated with others in the crime, including the potential for rehabilitation and the fact that he had had no previous criminal record. In reaching its sentence of five years, the serious social nature of the crime was taken into consideration. All of the above factors, including the fact that the Applicant left Slovakia avoiding prosecution, had been under consideration.

[17] In addition, the Applicant could not provide anything to support his allegation that the RPD erred in finding he could be excluded as Slovakia could not enforce the judgment due to prescription as to the time sequence which had elapsed. That had not been established by the Applicant. That argument does not, in essence, assist the Applicant as that would mean he could return to Slovakia, with the criminal matter in question in Slovakia, no longer to his detriment due to the prescription which was raised by the Applicant in respect of discounting the sentence, even if

it is existed. That prescription issue works both ways in this case, both to his detriment if he states that he cannot go back, the matter is not prescribed; if it is prescribed, then he could go back. The Applicant cannot have it both ways.

[18] The RPD conducted “a full and proper hearing”. The RPD has an inquisitorial role, given to its members to ensure that clarity is obtained on issues within the RPD’s jurisdiction in conduct that is conducive to such a hearing (*Arica v Canada (Minister of Employment and Immigration)* (1995), 182 NR 392 (FCA)).

[19] As to an allegation of bias of the RPD’s member, as expressed by the Applicant, the transcript clearly demonstrates that extensive and energetic questioning took place without any reasonable apprehension of bias on the part of the RPD member. The RPD member, as per the transcript, simply did all that was possible to understand the evidence for the purposes of analysis and determination.

[20] The RPD did not err in its determination. Serious reasons for consideration do exist that the Applicant had committed a serious non-political crime prior to his admission to Canada. Also, the Applicant failed to show that the RPD was either biased or had engaged in irrelevant considerations in his regard as per his allegation (*Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259; *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369).

[21] For all of the above reasons, the Applicant’s application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT ORDERS that** the Applicant's application for judicial review be dismissed with no question of general importance for certification.

"Michel M.J. Shore"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-3364-13

**STYLE OF CAUSE:** IVAN SIMKOVIC v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

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AND JUDGMENT:** SHORE J.

**DATED:** FEBRUARY 13, 2014

**APPEARANCES:**

Andrew Z. Wlodyka

FOR THE APPLICANT

Helen Park

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Wlodyka MacDonald Teng  
Barristers and Solicitors  
Vancouver, British Columbia

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT