



IMM-1113-96

BETWEEN:

**VASILY MUZYCHKA**

Applicant

- and -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

Respondent

**REASONS FOR DECISION**

**TREMBLAY-LAMER J.**

This is an application by Vasily Muzychka for judicial review of a decision of the Immigration and Refugee Board, Refugee Division (hereinafter the "Refugee Division"), denying him refugee status.

The applicant was born in Borshiv, Ukraine, in 1967. He was domiciled in Ukraine until 1988. In 1989, after staying in Lithuania for a year, he settled in Murmansk, Russia.

The Refugee Division ruled that since the applicant was able to obtain Ukrainian citizenship simply by applying for it, Ukraine could be considered, in the context of his claim, his country of nationality. In the factum he filed in support of his application for judicial review, the applicant does not challenge this

finding. In fact, he does not address the issue, and the incidents he reports are relevant only insofar as they occurred in that country, that is, Ukraine.

Essentially, the applicant complains of persecution he suffered in Ukraine on account of his homosexuality. In 1987, he was the victim of verbal and physical attacks. These persisted until his departure in 1988. He returned in 1992. He appeared at a cultural centre, and was severely beaten by persons who ordered him to leave Ukraine because of his sexual orientation.

The record indicates that the applicant filed a complaint with the chief of police of the village of Borshiv in 1988, when some insults were written on the wall of his residence. Subsequently, in 1992, the applicant complained of the attack on him at the cultural centre. This time, he applied not only to the village police chief but to the local Prosecutor's office. On each occasion, the police chief told him he was unable to change the prevailing public opinion in the village and that ultimately his best option was to leave Borshiv. The local Prosecutor advised the applicant that processing complaints of this nature was not one of his duties.

Since, in this case, the Refugee Division had to decide the applicant's refugee status in regard to Ukraine, it took some pains to distinguish between the evidence pertaining to the general situation and the incidents occurring in Ukraine and those occurring in Russia:

We find the evidence more equivocal, however, with regard to the issue of the ability of the Ukrainian police to protect the claimant and the claimant's unwillingness to avail himself of that protection. The claimant's testimony with respect to treatment he received at the hands of Ukrainian police authorities suggests that an attitude on the part of the police which might be characterized as benign passivity or ineffectiveness rather than outright hostility, such as he experienced at the hands of the police in Murmansk.

The ILGHRC report and the affidavit of Julia Dorf are quite specific with regard to abusive police conduct toward gays and lesbians in Russia. We find Ms. Dorf's statements with regard to the situation in Ukraine to be less substantiated than are her statements with respect to Russia. We are therefore unwilling to accord her comments concerning the situation in Ukraine the same weight as we would her comments concerning Russia.

Thus, in the opinion of the Refugee Division, the documentary evidence submitted by the applicant constitutes a valid indicator of the treatment meted out to homosexuals in Russia. But this evidence is not persuasive insofar as the situation in Ukraine is concerned. Having reviewed the evidence, I am of the opinion that it was unreasonable for the Refugee Division to reach this conclusion.<sup>1</sup>

The ILGHRC Report and Ms. Dorf's affidavit are very specific and demonstrate beyond a doubt the persecution suffered by homosexual men and women in Ukraine. The evidence indicates very clearly that the Ukrainian authorities act abusively toward homosexual citizens. In this regard, I think it is appropriate to refer to some paragraphs in Ms. Dorf's affidavit. She concludes as follows:<sup>2</sup>

It is my opinion that the persecution of lesbians and gay men in the Ukraine has not changed much since 1991 or since the repeal of article 122. What has changed is the openness of a few courageous leaders to organize political and social groups to work for their protection and basic human rights. This does not mean that life for a lesbian or gay man is less full of fear than before. In fact, it may even be worse due to increased social stigma and targeting by nationalist groups and government's inability and disinterest in protecting its gay citizens from violent hate crimes and misuse of both psychiatric and criminal justice systems. [emphasis added]

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<sup>1</sup> See, *inter alia*, *Singh and Narang v. Canada (M.E.I.)* (1993), 69 F.T.R. 142 (F.C.T.D.) and *Romero Minero v. Canada (M.E.I.)* (1994), 75 F.T.R. 156 (F.C.T.D.).

<sup>2</sup> Record of the Refugee Division, at page ?.

Although the Refugee Division cites this passage from Ms. Dorf's affidavit, it omits the most relevant passage, the one reporting the inability of the Ukrainian authorities to protect lesbian and gay citizens from violent crimes.<sup>3</sup>

The Refugee Division could not refer to Ms. Dorf's affidavit and then exclude the most relevant passages. Indeed, it is clear law that overlooking or excluding relevant evidence constitutes a reviewable error of fact.<sup>4</sup> Similarly, the Refugee Division can be faulted for not taking into account the content of a document it cites in support of its reasons.<sup>5</sup> Furthermore, this Court has expressly ruled that the Refugee Division cannot divide up the contents of one and the same document in order to use some paragraphs while ignoring the others:

There is a perverse or capricious finding of fact when the Board referred to a last arrest in February 1992. As stated above, there was a subsequent arrest. This omission is very important because the Board did not quote the following two paragraphs, which were included in the record before the Board, and which immediately follow the above noted quote which was included in the Board's reasons.<sup>6</sup>

I was unable to find anything in the record that could justify the Refugee Division's conclusion that the evidence submitted by the applicant is less conclusive regarding the conduct of the Ukrainian authorities than it is regarding that of the Russian authorities. Accordingly, because it was made without regard

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<sup>3</sup> Record of the Refugee Division, at page 13.

<sup>4</sup> See, *inter alia*, the following cases: *Sikder v. M.E.I.*, (October 8, 1992), A-718-91 (F.C.A.); *Djama v. M.E.I.*, (June 5, 1992), A-738-90 (F.C.A.); *Aujla v. M.E.I.*, (March 4, 1991), A-520-89 (F.C.A.); *Mensah v. M.E.I.*, (November 23, 1989), A-1173-88; *Jeyachandran v. Canada (Solicitor General)*, (March 30, 1995), IMM-779-94 (F.C.T.D.); *Mannan v. M.E.I.*, (March 8, 1994), IMM-2892-93 (F.C.T.D.); *Cabrera v. M.C.I.*, (February 9, 1996), IMM-1991-95 (F.C.T.D.); *Andemariam v. M.E.I.*, (September 28, 1994), IMM-5815-93 (F.C.T.D.); *Ayad v. M.C.I.*, (April 26, 1996), IMM-2820-95 (F.C.T.D.) and *Vielma v. M.C.I.*, (November 10, 1994), IMM-786-94 (F.C.T.D.).

<sup>5</sup> *Freda Serwaa Offei v. The Minister of Citizenship and Immigration* (February 8, 1996), IMM-821-95 (F.C.T.D.).

<sup>6</sup> *Mir v. Canada (Minister of Citizenship and Immigration)* (January 26, 1996), IMM-1837-95 (F.C.T.D.).

for the uncontradicted evidence submitted by the applicant, this conclusion was unreasonable.

The application for judicial review is consequently allowed and the applicant's claim shall be sent back to the Board for redetermination by a newly constituted panel.

OTTAWA, ONTARIO  
This 7th day of March, 1997

Danièle Tremblay-Lamer

J.

Certified true translation



Christiane Delon

FEDERAL COURT OF CANADA  
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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