Federal Court  Cour fédérale

Date: 20150115

Docket: IMM-1720-14

Citation: 2015 FC 60

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 15, 2015

Present: The Honourable Mr. Justice Annis

BETWEEN:

SALVADOR ANTONIO COREAS VILLALOBOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for leave and judicial review filed under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board made on February 21, 2014,

by member Michel Colin, who found that the applicant was [TRANSLATION] "excluded from claiming Canada's protection under article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* (the Convention). The applicant requests that the Court set aside the decision made by the RPD and refer the file back before a differently constituted panel.

[2] For the reasons outlined below, the application will be dismissed.

II. The facts

[3] The applicant is a citizen of Mexico. Since he was an orphan, he was raised by the Hernandez family. In 2011, when the applicant was 15 years old, his custody was awarded to Pedro Gomez and his spouse Alicia, who gave him a job in their clothing sales business.

[4] The Gomez family was involved in drug trafficking and Mr. Gomez was the [TRANSLATION] "regional leader". Thus, the applicant was involved in drug trafficking by collecting money owed to the Gomez family.

[5] In August 2008, the applicant accompanied Mr. Gomez to a meeting of gang leaders during which three persons considered to be traitors were killed and the applicant was threatened by a former federal officer who put a gun to his head. Three days later, the applicant and another collaborator called Edgar were kidnapped and beaten. Edgar was killed and the applicant fainted. The next day, the applicant consulted a priest, who advised him to flee to Canada. On September 5, 2008, the applicant left Mexico for Canada.

[6] The applicant arrived in Canada on September 8, 2008. In April 2011, after the Canada Border Services Agency (CBSA) became aware of the applicant's presence in Canada, a removal order was issued against him. The stay of the removal order was authorized by the Federal Court. In March 2012, the CBSA set aside the deportation order against the applicant. Therefore, on March 26, 2012, the applicant filed a refugee claim in Canada.

III. Impugned decision

[7] The RPD found that the applicant was generally credible despite certain contradictions relating mainly to secondary areas of interest. The RPD rejected the applicant's allegation that there was a reasonable possibility that he would suffer persecution because he belonged to the Gomez family's social group, within the meaning of s. 96 of the IRPA. The Gomez family members' fear for their lives is connected to their failure to pay an amount of part of their income to some of their drug trafficking accomplices and this fear has no connection to the Convention.

[8] The RPD found that the evidence showed that the applicant's life would personally be in danger because of a conflict between the drug traffickers and their accomplices and, thus, that he is covered by paragraph 97(1)(*b*).

[9] The RPD also found that the applicant could not seek state protection without being exposed to a very great risk to his life and that, in addition, he does not have an internal flight alternative.

[10] The RPD also considered the question of the applicant's exclusion from Canada's protection, as a result of the intervention of the Minister of Public Safety and Emergency Preparedness, on the basis that there would be serious reasons for considering that the applicant had committed outside Canada the crime of trafficking in cocaine or that of conspiracy to traffic in cocaine, a substance recorded in Schedule I, described in subsection 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. Applying the criteria established in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 (*Jayasekara*) and in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 (*Ezokola*), the RPD held that the applicant was excluded under article 1(b) of the Convention.

IV. Issues

[11] The applicant argued that this case raises the following questions:

1. Did the RPD err in applying the exclusion clause of article 1F(b) without establishing the elements of the offence?

2. Is the analysis relating to the mitigating circumstances unreasonable?

3. Did the RPD err in its application of the test established by the Supreme Court in *Ezokola*, above?

4. Did the RPD err in not interpreting the exclusion clause at article 1F(b) restrictively?

[12] In this case, the Court is of the view that these questions may be reworded in a single question, as follows:

1. Did the RPD err in finding that the applicant was excluded within the meaning of article 1F(b) of the Convention?

V. Standard of review

[13] The determination of exclusion from the Convention in application of article 1F(b) is a question of mixed fact and law and, therefore, must be subject to judicial review in terms of reasonableness (*Roberts v Canada (Minister of Citizenship and Immigration)*, 2011 FC 632 at paras 26-27; *Jayasekara*, above).

[14] Therefore, the Court must examine whether the RPD's decision meets the test of transparency and intelligibility and whether its finding falls within the range of possible outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 (*Dunsmuir*)).

VI. Parties' position

[15] First, the applicant argued that the elements of the offense of trafficking in cocaine were not established and that consequently, the RPD erred in applying article 1F(b) of the Convention. According to the applicant, the RPD erroneously found that once the applicant learned that the network that he was co-operating with was trafficking drugs, he continued to act as he did before, that is, co-operating without trying to get out of it. However, the applicant alleged that the evidence shows that at the time, he conducted his daily activities in fear, increasingly went to church more often and no longer wished to stay with Mr. Gomez. According the applicant, the

evidence in this case does not establish that he truly intended to come to an agreement so as to participate in cocaine trafficking. In this sense, the RPD could not reasonably apply the tests provided in *Ezokola*, above and *Jayasekara*, above. Moreover, the applicant alleged that the RPD applied an erroneous test when it indicated at paragraph 47 of its decision that the standard of proof relating to exclusion is that of "reasonable grounds to suspect", while it is actually "serious reasons for considering". The applicant also alleged that the RPD did not actually take into consideration the mitigating circumstances. Finally, the applicant argued that the RPD had to interpret article 1F(b) restrictively and that such an interpretation would not have resulted in the applicant's exclusion, especially that there is a threat to his life in Mexico.

[16] The respondent argued that the RPD's analysis of the relevant factors with respect to the seriousness of the crime in application of the factors established in *Jayasekara*, above is reasonable. Given that the applicant was of legal age at the time of the alleged facts and considering its decision to continue to co-operate with the traffickers even after being present at the killing of three people during a meeting, it was reasonable for the RPD to find that the circumstances in which the applicant found himself were not significant mitigating circumstances. It was reasonable for the RPD to find that the applicant [TRANSLATION] "had adopted his family's criminal design as his own" since it was only when his own safety was seriously threatened that he sought the means to live elsewhere.

[17] The respondent pointed out that the Supreme Court in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 set out that exclusion clauses should not be interpreted too narrowly. Similarly, the respondent argued that although the RPD erred in wording the test at paragraph 47

when it noted that the standard of proof for the exclusion as set out in *Ezokola*, above, is that of "reasonable grounds to suspect", that is not important because the RPD repeated five times in its decision the correct standard, that of "serious reasons for considering" and that, furthermore, it correctly applied this test (*Kadiosha v Canada (Minister of Citizenship and Immigration)* (2000), 194 FTR 153). Finally, the respondent argued that the RPD clearly stated its findings of fact and reasonably determined that the applicant must be excluded from the protection offered by Canada under the Convention.

VII. Analysis

A. *The criteria for conspiracy to traffic*

[18] So as to appreciate the seriousness of the crime committed by the applicant, the RPD had to review the criteria for conspiracy to traffic set out in *Jayasekara*, above, i.e. the elements of the crime, the mode of prosecution, the penalty prescribed and the facts and the mitigating and aggravating circumstances underlying the conviction (*Jayasekara*, above at para 44).

[19] The applicant claimed that he did not intend to reach an agreement to carry out an unlawful purpose because he was not free to act, for two reasons: first, he followed the advice of the first priest who encouraged him to remain silent regarding his situation with the authorities or anyone and he was also subjected to coercion by violence by Mr. Gomez and his network of drug traffickers.

[20] With respect to the first reason alleged by the applicant, that he was following the advice of the first priest, I note paragraph 45 of the RPD's reasons where the member stated that after consulting the priest, [TRANSLATION] "the applicant continued to come to the aid of a large network of traffickers, even after he saw several summary killings during a meeting. He stated that he did not know what to do, but in the facts, he chose to co-operate without making serious efforts to stop doing it before he was personally kidnapped and his life was in imminent danger". In the view of the Court, it was reasonable for the RPD to find, as evidenced at paragraph 38 of the decision that the applicant had the required intention and had made a voluntary contribution to Mr. Gomez's criminal design.

[21] As regards the coercion by violence, I am of the view that the panel was right to state that the defense of coercion is only allowed when the accused has participated in a conspiracy or association. In this respect, I distinguish *La Reine c Kéophokham*, [2003] JQ no 4651 where the Court explained that the defence of moral coercion, of the nature of an excuse, is a common law defence that is available when certain conditions are established as described in paragraphs 51 to 53 of that decision. However, these conditions provide that there must be a close temporal connection between the threat of harm and the commission of the offence and that there must not be another reasonable safe avenue of escape. These conditions are not fulfilled in this case.

B. *Analysis of mitigating and unreasonable circumstances*

[22] The applicant argued that the RPD's characterization of his situation as [TRANSLATION] "difficult" at paragraph 45 of its decision is unreasonable, given that his life was in imminent danger at that time. Similarly, he claimed that it was unrealistic to find that he had a choice in

whether to co-operate with Mr. Gomez and the other members of the organization of drug traffickers. According to the applicant, the RPD in its analysis, allegedly moved the determinative issues away from the mitigating circumstances of the crime, although they were compelling.

[23] I do not agree. The panel clearly described the significant and imminent danger that the applicant was facing and, nevertheless, was [TRANSLATION] "of the view that these circumstances [did not mitigate] significantly the crimes committed, given their seriousness". The RPD's reasons are also reasonable with respect to the description of the choice that the applicant had in continuing his unlawful conduct or stopping it, as he did once he was personally kidnapped and his life was in imminent danger.

VIII. Conclusion

[24] For the reasons stated above, the Court is of the view to dismiss the application for judicial review. The RPD's findings are reasonable in that they fall within the range of possible outcomes, defensible in fact and law and the RPD's decision is justified in a manner that meets the test of transparency and intelligibility of the decision-making process (*Dunsmuir*, at para 47). The parties have not submitted any question for certification and none arise in this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. No question is certified.

"Peter Annis"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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