

Federal Court



Cour fédérale

Date: 20200417

Docket: IMM-4438-19

Citation: 2020 FC 528

Ottawa, Ontario, April 17, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

DEWI MARITA

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant, Dewi Marita [Ms. Marita], and her minor daughter are citizens of Indonesia and no other country. She contends the events upon which she based her claim for refugee protection occurred between September 30, 2006 and November 7, 2008. Essentially, she says that prior to her arrival in Canada on November 7, 2008, her adoptive father, a General in the Indonesian military, loaned her between \$300,000 and \$350,000 CAD to start a business in

Indonesia, with one of his sons. Her adoptive father then requested she become his third wife. Following her refusal to marry him, she contends the adoptive father harassed, threatened and assaulted her. The harassment, according to her, culminated in an attempted kidnapping of her daughter. She and her daughter fled to Canada where Ms. Marita, following expiration of her visitor's visa and a failed inland application for permanent residency, made a claim for refugee protection on her own behalf and as her daughter's designated representative, pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The facts underlying the daughter's claim for refugee protection constitute those alleged by her mother. The Refugee Protection Division [the RPD] of the Immigration and Refugee Board dismissed the claims on June 18, 2019 [the Decision]. The RPD concluded Ms. Marita is excluded from refugee protection by operation of section F(b) of Article 1 of the *United Nations Convention Relating to the Status of Refugees* [Convention] which reads as follows:

**Section F of Article 1 of the
*United Nations Convention
Relating to the Status of
Refugees***

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;

**Section F de l'article
premier de la *Convention des
Nations Unies relative au
statut des réfugiés***

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;

[2] Ms. Marita seeks judicial review pursuant to subsection 72(1) of the *IRPA* of the Decision. For the reasons set out below, I grant the application for judicial review.

II. Intervention by the Minister of Public Safety and Emergency Preparedness Canada

[3] The Minister of Public Safety and Emergency Preparedness Canada [the Minister] intervened before the RPD. He contended there were serious grounds to believe section F(b) of Article 1 of the *Convention* applied in the circumstances. The Minister submitted the following additional facts. On October 29, 2008, the Canadian embassy in Jakarta issued a visitor visa to Ms. Marita and her daughter, which authorized them to enter Canada for a holiday. On November 7, 2008, she and her daughter entered Canada. That authorization was set to expire on May 6, 2009. On April 24, 2009, Ms. Marita married a Canadian citizen. On December 22, 2009, an immigration officer of Citizenship and Immigration Canada refused to extend Ms. Marita's visitor status in Canada. However, she remained here. On February 2, 2011, a Canada Border Services Agency (CBSA) officer arrested and detained her at a CBSA Holding Centre. Ms. Marita's arrest resulted from the issuance of an international arrest warrant for fraud and embezzlement issued on February 17, 2009 by the Indonesian police. A CBSA officer interviewed Ms. Marita on February 3, 2011. At that interview, Ms. Marita indicated she wished to make a claim for refugee protection. On February 11, 2011, the CBSA released her. On August 8, 2011, Citizenship and Immigration Canada refused her husband's application to sponsor her as a permanent resident. On December 29, 2011, following an inadmissibility hearing, a deportation order was issued against Ms. Marita. At the inadmissibility hearing, Ms. Marita denied she committed fraud. She maintained the charges against her were a vengeful act

by her adoptive father, a General and hence, a powerful individual in Indonesia, for her refusal to marry him.

[4] The Minister contended before the RPD that section F(b) of Article 1 of the *Convention* applied, in part, for the following reasons. Ms. Marita was the subject of an international warrant identifying her as having committed fraud and embezzlement. There was evidence that her adoptive father agreed to lend her money on condition that it be repaid by March 25, 2008. There existed no evidence that Ms. Marita had repaid all the money. There was some evidence she had used it for personal purposes. On March 27, 2009, Interpol Jakarta issued a “Red Notice warrant” for her arrest. If committed in Canada, the alleged offence would constitute fraud as described at section 380 of the *Criminal Code*, RSC 1985, c C-46, punishable by a term of imprisonment not exceeding 14 years.

III. Decision Under Review

[5] It is fair to say that the RPD believed very little, if any, of what Ms. Marita had to say. The member referred to parts of Ms. Marita’s testimony about events that were not included in the Basis of Claim form to justify, in part, his rejection of her testimony. The RPD rejected Ms. Marita’s explanations for having failed to include some of those facts in her narrative. The member was also troubled by the fact that when the CBSA officer interviewed Ms. Marita on February 3, 2011, she denied any “problems in her country of origin”. The member found this denial militated against her credibility given the warrant for her arrest in Indonesia. I note here that the Officer informed Ms. Marita about the arrest warrant only *after* she told him that she had

no problems in Indonesia. Upon learning about the arrest warrant, she, not surprisingly, requested refugee protection from Canadian authorities.

[6] While I have doubts about the reasonableness of the credibility finding, I need not address that issue to dispose of this application for judicial review.

[7] The RPD appears to have assumed the warrant, due to its characteristics as an official document, constituted *prima facie* proof Ms. Marita committed the crimes with which she was charged. The RPD also presumed the charges to be serious and non-political in nature, a presumption which may be rebutted (*Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 [*Jayasekara*]). Given Ms. Marita's entire testimony, the documentary evidence and the submissions made by the parties, the RPD concluded Ms. Marita had failed to rebut the presumption. As a consequence, the RPD dismissed her refugee claim, as well as that of her minor daughter, by applying section F(b) of Article 1 of the *Convention*.

IV. Relevant Provisions

[8] The relevant provisions are sections 96, 97, and 98 of the *IRPA* as well as section F(b) of Article 1 of the *Convention*, all of which are set out in the attached schedule.

V. Question to be Determined

[9] While Ms. Marita raises several issues, I am of the view this application may be decided based upon whether the RPD reasonably assessed the exclusion under section F(b) of Article 1 of

the *Convention*. When reviewing a decision based upon reasonableness review, “a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15, 441 DLR (4th) 1).

VI. Positions of the Parties

[10] Although the parties took positions on two (2) other issues, I will limit my observations to their positions on the issue of the exclusion from refugee protection by operation of section F(b) of Article 1 of the *Convention*.

[11] Ms. Marita contends the RPD failed to justify its finding that she committed a serious, non-political crime. She asserts as follows. First, if the RPD believed she borrowed money and did not repay it, such conduct constitutes a default on a loan and not a crime. Second, the RPD erred in its analysis of the factors referred to in *Jayaskera*, which include the elements of the crime, the mode of prosecution, the penalty prescribed, the facts, and the mitigating and aggravating circumstances underlying the conviction. See also, *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 [*Febles*]). In the event she committed a crime, which she denies, Ms. Marita contends the RPD failed to consider the evidence that she repaid part of the loan; there was no violence involved in the crime; this was a first accusation against her; and, there is a family relationship between her and the complainant. Third, in support of her contention she did not commit a crime, Ms. Marita says the RPD failed to consider the *mens rea* of fraud, that the events alleged in the Red Notice from Interpol remain unproven, and

a letter from her lawyer that states that authorities in Indonesia are considering withdrawing the charges against her.

[12] The Respondent contends the only issue the RPD was required to determine was whether the alleged crime was serious based upon the language of the *Convention*. The seriousness of a crime may be measured by reference to the nature of the punishment prescribed in the *Criminal Code* (*Jayasekara*, at para 43). The Respondent says Canada, as a receiving state, considers a crime that may be punishable by a maximum term of at least 10 years to be a “serious” one (*Jayasekara*, at para 40; *Febles*). Furthermore, embezzlement, equivalent to paragraph 380(1)(a) of the *Criminal Code*, may be the basis for an exclusion from refugee protection (*Xie v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1023, 34 Imm LR (3d) 220, aff’d 2004 FCA 250, 37 Imm LR (3d) 163; *Xu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 970 at para 29, 48 Imm LR (3d) 140; *Ma v Canada (Citizenship and Immigration)*, 2018 FC 252 at paras 16-18).

[13] The Respondent accepts that once the Minister has established the presumption of seriousness, an applicant may rebut the presumption by application of the criteria in *Jayasekara*. The Respondent contends Ms. Marita failed to rebut the presumption in the circumstances.

VII. Analysis

Did the RPD err in its assessment of the exclusion under Section F(b) of Article 1 of the Convention?

[14] As noted in paragraph 7, *supra*, the RPD presumed the charges were proven. While I acknowledge that a conviction is unnecessary to establish an exclusion under section F(b) of Article 1 of the *Convention*, it is incumbent upon the RPD to consider whether there are, in fact, serious reasons to conclude an individual has committed the crime alleged against him or her. See, *Hersy v Canada (Citizenship and Immigration)*, 2016 FC 190, 39 Imm LR (4th) 32 and *Mohamad Jawad v Canada (Citizenship and Immigration)*, 2012 FC 232. In this case, the RPD failed to undertake any such analysis. For example, it did not consider how the charges came about or the nature of the evidence against Ms. Marita. It appears to assume the accuracy of the allegations set out in the warrant. Based on this assumption, the RPD concluded the alleged crime, if committed in Canada, could have led to a term of imprisonment of 10 or more years. Such an approach is, with respect, unsatisfactory. Some analysis, which demonstrates why the RPD believed the allegations set out in the warrant, is required.

[15] After acknowledging that the presumption of seriousness could be rebutted, the RPD unreasonably assessed the exclusion under section F(b) of Article 1 of the *Convention*. Instead of considering the circumstances of the alleged crime and the *Jayasekara* factors, the RPD proceeded directly to the finding, at paragraph 26 of its reasons, that the presumption was not rebutted:

In light of the principal claimant's entire testimony, the documentary evidence and the submissions made by both the Minister's representative and counsel for the principal claimant, the panel concludes that the presumption of the crime allegedly committed by the latter – fraud and embezzlement – is a serious non political crime was not rebutted.

In my view, it was incumbent upon the RPD to explain why, given the position advanced by Ms. Marita, she had not rebutted the presumption. The perfunctory observations set out above do little to justify, in a transparent manner, why she failed to rebut the presumption. While the RPD's finding regarding Ms. Marita's credibility may justify, in part, its conclusion regarding her failure to rebut the presumption, the following considerations remain unaddressed, all of which are unrelated to any issue of credibility:

- i. this would have been a first offence for Ms. Marita;
- ii. there is a familial relationship between the accused and the complainant;
- iii. there was no violence involved in the offence; and
- iv. some of the money was returned.

These factors, all relevant to whether the presumption was rebutted, merited consideration by the RPD. In my view this failure, in addition to the RPD's apparent assumption that the warrant constitutes proof Ms. Marita committed the crimes, results in an unreasonable decision.

VIII. Conclusion

[16] The application for judicial review is granted, without costs. The matter is re-mitted to the RPD for redetermination by another member. Neither party proposed a question for consideration by the Federal Court of Appeal, and none arises in the circumstances.

JUDGMENT in File IMM-4438-19

THIS COURT'S JUDGMENT is that the application for judicial review is granted, without costs. The matter is re-mitted to the Refugee Protection Division for redetermination by another member. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"

Judge

SCHEDULE

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

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

Définition de réfugié

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) 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) 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.

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

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

motifs sérieux de le croire, 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 themselves 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.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons

(2) A également qualité de personne à protéger la

prescribed by the regulations as being in need of protection is also a person in need of protection.

personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusion — Refugee Convention

Exclusion par application de la Convention sur les réfugiés

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.

[...]

[...]

Section F of Article 1 of the United Nations Convention Relating to the Status of Refugees

Section F de l'article premier de la Convention des Nations Unies relative au statut des réfugiés

F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

F Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

[...]

[...]

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

FEDERAL COURT
SOLICITORS OF RECORD

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