Federal Court  Cour fédérale

Date: 20100412

Docket: IMM-2723-09

Citation: 2010 FC 384

Ottawa, Ontario, April 12, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

GUSTAVO ADOLFO POGGIO GUERRERO

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated April 17, 2009 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Colombia. He alleges he is wanted by the Fuerzas Armadas Revolucionarias de Colombia (FARC) because they believe he is a member of the Autodefensas Unidas de Colombia (AUC), due to his brother-in-law's membership in that group.

[3] Upon the advice of an uncle, the Applicant left Colombia. In October, 2006, the Applicant traveled to the U.S. using a Spanish passport. He did not claim asylum in the U.S. because of his entry into the U.S. on a false passport.

[4] On December 6, 2006 the Applicant entered Canada illegally. He claimed refugee protection the following day.

[5] The Minister of Public Safety and Emergency Preparedness (Minister) intervened in the Applicant's claim for refugee protection. The Minister alleged that the Applicant had committed a serious non-political crime in the U.S., because the Applicant had been convicted in the early 1990s of possession of cocaine for the purpose of trafficking. Such a crime, if committed in Canada, is punishable by life imprisonment.

[6] The Applicant was given a prison sentence of eight years to life. He was deported from the U.S. after having served a little over six years of his sentence. At that time, the Applicant believed his sentence was no longer for life. However, the Minister's delegate supplied documents to the

RPD from American authorities which stated that the Applicant was still liable to serve the sentence.

DECISION UNDER REVIEW

[7] The RPD found that the main intention of Article 1F(*b*) of the Refugee Convention is to "ensure that perpetrators of serious non-political crimes are not entitled to international protection in the country in which they are seeking asylum." As such, an applicant who falls under this section is excluded from receiving Convention refugee status.

[8] The standard of proof for determining whether a person has committed crimes or acts contemplated in Article 1(F) is "serious reasons for considering." This standard is more than a mere suspicion, but less than a balance of probabilities.

[9] With regard to the Applicant's offence, the RPD found as follows:

> Under Canadian law, according to the evidence and the submissions presented by the Minister, the offences for which the claimant was convicted in the United States of America in 1991, if committed in Canada, could have resulted in a sentence of life imprisonment.

Furthermore, the RPD noted that "Canadian case law indicates that this reference to the manner in which Canada treats this crime establishes a presumption that this is a serious non-political crime." Nevertheless, the RPD found that this presumption could be rebutted.

[10] The RPD considered the Applicant's claims that "it was not until later in life that he realized the significance and consequences of his actions," and that he was not "fully aware of the gravity" of his decision to plead guilty to the charge of trafficking. The Applicant's lawyer focused on the eighteen years which had passed since these events, as well as the Applicant's lack of criminal record since this time.

[11] The Minister's delegate focused on the seriousness of the sentence imposed in 1991, and noted that this sentence had followed a previous conviction in 1987 for similar charges. Furthermore, the Applicant had also violated an order he was given not to return to the U.S.

[12] The Applicant's counsel explained the Applicant's 2006 return to the U.S. as necessary to "flee the persecution and risks that he faced in Colombia."

[13] The RPD determined that "in light of the claimant's testimony and the submissions made by both the Minister's delegate and the claimant's lawyer…that the presumption that the offences of which the claimant was convicted…are serious non-political crimes was not rebutted." The RPD did not consider it necessary to determine whether the Applicant completed his prison sentence of eight years or more in the U.S.

[14] In summary, the RPD found that

> the Minister has discharged his burden and that…there are serious reasons for considering that the claimant committed a serious non-political crime – possession of cocaine for the purposes of trafficking

– outside Canada, a crime that, if committed in Canada, would be punishable by a sentence of life imprisonment.

ISSUES

[15] The issues on the application can be summarized as follows:

1. Did the RPD fail to provide adequate reasons for its Decision?

2. Did the RPD err in failing to provide an analysis for its determination that the Applicant was excluded pursuant to Article 1F(*b*)?

STATUTORY PROVISIONS

[16] The following provisions of the *United Nations Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 are applicable in these proceedings:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.
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 :
(*a*) he has committed a crime against peace, a war crime, or	*a*) Qu'elles ont commis un crime contre la paix, un crime

a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(*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;
(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	*c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[17] The following provisions of the Act are applicable in these proceedings:

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	*b*) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

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 torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des 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 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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and	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 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.
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.

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search

proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] Correctness is the appropriate standard of review when approaching issues of procedural fairness and natural justice. See *Weekes (Litigation guardian) v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 293, 71 Imm. L.R. (3d) 4. As such, the consideration of the adequacy of the RPD's reasons is reviewable on a standard of correctness.

ARGUMENTS

The Applicant

Reasons were Inadequate

[20] The Applicant submits that the RPD's analysis of Article 1F(*b*) was "utterly deficient." According to *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, 305 D.L.R. (4th) 630 at paragraph 44:

> …there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(*b*) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction [citations omitted].

[21] Although the RPD made reference to *Jayasekara*, it simply summarized the Applicant's testimony and submissions of counsel and concluded that the presumption was not rebutted. The

RPD erred in failing to analyze the factors enumerated in *Jayasekara*. The Decision fails to demonstrate how the RPD reached its conclusion.

[22] The Applicant contends that the duty to provide reasons is set out in *VIA Rail Canada Inc. v. Lemonde*, [2001] 2 F.C. 25, [2000] F.C.J. No. 1685 at paragraphs 21-22:

> The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."
>
> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[23] In this case, the RPD did precisely what *VIA Rail* said it should not do: it simply recited the submissions and evidence before it and then stated a conclusion. The RPD neglected to address the major issues before it, set out its process of reasoning, or show its consideration of relevant factors.

[24] The Applicant submits that it is not evident that the RPD determined that the Applicant's mitigating circumstances were "'rebutted' by the evidence and arguments of the Minister." While the Respondent may attempt to undertake the analysis that ought to have been done by the RPD, the

Applicant contends that the Respondent cannot defend the RPD's reasons by making "reference to findings and analyses which the RPD itself did not make or undertake."

[25] In the alternative, the Applicant suggests that the RPD erred in failing to conduct the proper analysis under Article 1F(*b*), and that as a result, its decision was made in reviewable error.

The Respondent

[26] The RPD began its Decision by recognizing the presumption that the crime committed by the Applicant in 1991 was a "serious non-political crime." It then considered that, if committed in Canada, the crime committed by the Applicant would have resulted in a sentence of life imprisonment.

[27] After a consideration of the evidence before it, the RPD determined that the Applicant had not rebutted the presumption that the crime he had committed was a serious non-political crime. The RPD's reasons show that it considered the mitigating factors put forward by the Applicant. However, it is evident from reviewing the Decision that these mitigating circumstances were rebutted by the evidence and argument presented by the Minister's delegate.

[28] The Respondent contends that the Decision addresses the factors listed in *Jayasekara*. For example, the RPD considered the following:

a. Seriousness of the crime

i. The crime was possession of 5 ounces of cocaine for the purpose of distribution;

ii. The Applicant was sentenced to eight years to life, but was deported after about 6 years;

iii. The Minister proved that the Applicant was liable to serve the sentence which could last for life;

b. Mitigating circumstances

i. The amount of time that had elapsed since the crime;

ii. The Applicant was not aware of the gravity of his decision of pleading guilty;

c. Aggravating circumstances

i. The Applicant had another drug trafficking conviction;

ii. The Applicant violated an order not to return to the U.S.;

It was only after a full consideration of these factors that the RPD determined that the Applicant had failed to rebut the presumption that the crime he had committed was a serious non-political crime.

[29] Moreover, in the similar case of *Liang v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1501, 33 Imm. L.R. (3d) 262 at paragraph 42, the Court determined that reasons are “not to be read microscopically and held to a standard of perfection.” Instead, reasons must be read as a whole. The Respondent submits that the reasons provided by the RPD, when read as a whole, are adequate and support its conclusion.

ANALYSIS

[30] I accept the Respondent's proposition that reasons cannot be perfect and need to be examined in the full context of the Decision and the particular circumstances of each case. See *Via Rail*, above, at paragraphs 21 and 22.

[31] In the present case, the RPD certainly refers to and lists the *Jayasekara* factors and I think the Respondent is correct to say that, implicitly at least, a weighing process is evident and, in the end, the RPD decided that the mitigating factors put forward by the Applicant were not persuasive in rebutting the presumption of a serious, non-political crime. But that is as far as the Decision goes.

[32] What we do not know is why the RPD found some factors more persuasive than others. There is no real evaluation of the various factors or explanation of how or why, in the end, the conclusion was reached. The Decision remains a list of factors followed by a bald conclusion, even though it is implicitly clear that the RPD did not find the Applicant's mitigating points persuasive in overcoming the presumption.

[33] Hence, in my view, the Decision falls on the procedurally unfair side of the line because neither the Applicant or the Court can tell why the mitigating factors, when evaluated against the other aspects of the crime, did not have the weight to rebut the presumption. The Decision remains a recitation of submissions and evidence of the parties followed by a bald conclusion. As such, this

Decision cannot stand. See, for example, *S.A. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 515, [2006] F.C.J. No. 659 at paragraphs 17-18.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The Decision is set aside and returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2723-09
STYLE OF CAUSE:	GUSTAVO ADOLFO POGGIO GUERRERO APPLICANT - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION RESPONDENT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	MARCH 3, 2010
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	April 12, 2010

APPEARANCES:

Mr. Clifford Luyt	APPLICANT
Ms. Ladan Shahrooz	RESPONDENT

SOLICITORS OF RECORD:

D. Clifford Luyt Toronto, Ontario	APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	RESPONDENT