Federal Court  Cour fédérale

Date: 20120730

Docket: IMM-8733-11

Citation: 2012 FC 937

Ottawa, Ontario, July 30, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

GUSTAVO ADOLFO POGGIO GUERRERO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated October 28, 2011 made after a *de novo* hearing pursuant to the decision of Justice James Russell dated April 12, 2010 (2010 FC 384, [2010] FCJ no 448), in which he quashed the Board's decision because its reasons were inadequate. The Board determined that the Applicant is excluded from refugee protection pursuant to

Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6 (Convention) because he has been convicted of a serious, non-political crime.

I. Facts

[2] The Applicant, Gustavo Adolfo Poggio Guerrero, is a citizen of Colombia born on November 25, 1962. In October 2006, he fled Colombia for the United States, where his brother lives. He stayed there for two months before coming to Canada, where his sister lives. He arrived on December 6, 2006 and sought refugee protection the next day.

[3] Although it is unclear when he arrived, it appears that he also lived in the United States for some time in the 1980s and 1990s. He was arrested in New York State on November 26, 1990 (erroneously shown as 1994) and charged with the possession and sale of cocaine. He was sentenced to incarceration for eight years to life for the offence. On his release in January 1997, he was deported to Colombia and ordered not to return to the United States. According to his Personal Information Form (PIF) narrative, he had previously been arrested for possessing cocaine in 1987 and was sentenced to probation.

[4] After being deported to Colombia, he began a romantic relationship in 2005 with the woman who became his common-law wife. He then began experiencing problems with the Fuerzas Armadas Revolucionarias de Colombia (FARC) because of her brother's involvement with the Autodefensas Unidas de Colombia (AUC). He then fled to the United States, where he did not claim asylum, and then to Canada.

II. Decision under Review

[5] The Board noted that the Minister did not appear at the hearing, but did make documentary submissions. The Board found that this was a factor to be weighed, although it was insufficient to make any finding that the Minister did not believe the Applicant should be excluded.

[6] The Board found that there was no evidence the crime was political, and noted that the Canadian equivalent of the Applicant's crime is subsection 5(3)(a) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, which carries a maximum penalty of life imprisonment. The Board therefore found that the presumption of seriousness was satisfied.

[7] The Board then turned to the factors enumerated in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2008] FCJ no 1740, for rebutting the presumption of seriousness. The Board again noted that the equivalent Canadian offence carries a maximum punishment of life imprisonment and that the Applicant was sentenced to eight years to life after prosecution by indictment presented by a Grand Jury. The Board found that there was no evidence the Applicant was motivated by anything other than personal profit. The Board rejected the argument that there were mitigating circumstances because the Applicant was not aware of the consequences of pleading guilty, as it was contradicted by the record from the original refugee hearing, which showed that he had been informed of and had agreed to a plea bargain.

[8] The Board rejected the Applicant's contention that his clean record since his incarceration should be considered a mitigating circumstance, citing *Canada (Minister of Citizenship and Immigration) v Pulido Diaz*, 2011 FC 738, [2011] FCJ no 926 and *Rojas Camacho v Canada (Minister of Citizenship and Immigration)*, 2011 FC 789, [2011] FCJ no 994, both of which found that the *Jayasekara* analysis does not involve post-conviction circumstances as a mitigating factor. The Board further found that, even if the post-conviction conduct was considered a mitigating factor, it was outweighed by the aggravating factors; namely, that he had sold cocaine to police officers on three separate occasions, violated an order not to return to the United States, and had a previous conviction for which he received probation.

III. Issue

[9] The sole issue in this application is whether the decision is reasonable.

IV. Standard of Review

[10] The question raised by the Applicant should now be reviewed according to the reasonableness standard. The Supreme Court recently reaffirmed that administrative bodies' interpretation of their home statute always requires deference unless the question falls into one of the categories that requires correctness, such as constitutional questions (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 30). The interpretation of the criminality exclusion is not a question of general importance, and therefore deference is required.

V. Analysis

[11] The Applicant submits that the Board erred in ignoring evidence, misconstruing the evidence before it, making findings not supported by the evidence in the record, and failing to properly analyze Article 1F(b) of the Convention.

[12] The Applicant submits that the Board erred by relying on decisions of this Court stating that post-conviction circumstances are not a relevant factor. He cites two other decisions of this Court with certified questions about whether post-conviction rehabilitation can be considered and argues that the law is therefore unsettled. He also cites two decisions of this Court that considered post-conviction evidence, although both of those decisions upheld the Board's finding of exclusion and in neither case did the Board or the Court actually consider rehabilitation specifically. He also cites Australian decisions that consider rehabilitation.

[13] The Applicant claims that, since Justice Russell quashed the first decision because the Board did not adequately explain why the mitigating factors were not sufficient, it was "implicit in Justice Russel's [sic] reasoning [that] post-conviction mitigating factors are relevant."

[14] The Respondent submits that a claimant's personal circumstances after the conviction are not a relevant consideration. The Respondent argues that the jurisprudence has established this principle and that it is clear from both the Act and the Convention as well. It cites *Rojas Camacho*, above, and other decisions. The Respondent also notes that excluded persons can apply for

protection pursuant to section 113(d) of the Act, citing *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2004] FCJ no 1142, which affirmed that applications under that section can take into account factors that cannot be considered in the exclusion analysis. The Respondent also notes that the cases cited by the Applicant in which questions were certified actually found the Board's refusal to consider rehabilitation to be reasonable.

[15] The Respondent notes that the Australian cases cited by the Applicant are not binding on this Court, in contrast to *Jayasekara* and *Xie*, both above. The Respondent notes that Parliament could have specifically referenced rehabilitation if it was meant to be considered.

[16] In his reply, the Applicant notes that Parliament could have expressly excluded rehabilitation if it was not meant to be considered.

[17] In his further memorandum, the Applicant cites two decisions in which the Federal Court of Appeal has considered international decisions to aid its interpretation of Article 1F(b), apparently to validate his reliance on similar foreign jurisprudence. He also cites *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 390, [2000] FCJ no 1180 (CA) for the principle that interpreting Article 1F(b) to exclude those who have served their sentence was inconsistent with the law's contemplation of rehabilitation, and argues that a similar inconsistency is created here if rehabilitation is ignored. He further submits that the Board's interpretation renders section 104(1)(b) of the Act meaningless, as that provision was included in the Act in recognition of the fact that a conviction does not automatically preclude someone from refugee protection. He also cites a Regulatory Impact Analysis Statement without providing any citation information or clarifying

which section of the Act the statement discusses, although the quoted passage seems to refer to the criminal inadmissibility provisions in section 36.

[18] In its further memorandum, the Respondent notes that the Act provides for sequential decisions about eligibility, exclusion and removal and argues that the fact that a claimant is found eligible to have their claim heard pursuant to section 101 of the Act does not prevent the Board from finding that they are excluded from refugee protection. The Respondent also distinguishes between exclusion from refugee protection and total exclusion from protection, noting that those excluded from refugee protection can still apply for a Pre-Removal Risk Assessment prior to their removal.

[19] The Applicant also submits that, in the alternative, the Board erred in finding that the aggravating factors outweighed the mitigating ones, as it committed the same error as in the previous decision: its reasons are inadequate with respect to how the conclusion was reached. He argues that the Board also erred by treating the crime itself as an aggravating factor, as evidenced by its reference to the three occasions on which he sold cocaine to a police officer. Finally, he submits that the Board misconstrued evidence about his guilty plea and ignored the reason for his violation of the order not to return to the United States – that is, the persecution by FARC.

[20] The Respondent submits that the Board's reasons demonstrate its consideration of all relevant factors. It argues that the fact that the Applicant sold cocaine on three separate occasions is relevant, as it is directly related to the offence in question.

[21] The Respondent notes that the Board's statement about the mitigating factors being outweighed by the aggravating ones was made in the alternative to the previous finding that the rehabilitation was not relevant, and that this argument therefore need not be considered further. It argues that the Applicant is merely disputing the weight given to the evidence, which is not a basis for the Court's intervention.

[22] Although the Federal Court of Appeal has yet to answer the certified questions noted by the Applicant, the general principle in litigation is that a decision stands until such time as it is overturned on appeal. The existence of a pending appeal or a certified question does not alter the final nature of the decision. This is not an instance where the appellate court granted leave to bring the appeal and where it can therefore be inferred that the appeal is likely to change the law; here, there is nothing to indicate how the Federal Court of Appeal will respond to the certified questions. If the Applicant believed that the law was unsettled and wanted to have the benefit of the Federal Court of Appeal's decision, he could have sought to adjourn his refugee hearing until the appeals are decided.

[23] None of the Applicant's statutory interpretation arguments are of assistance. The question is whether the Board's determination was unreasonable. He has not established that this was the case. Further, the Court in *Jayasekara* at paras 25-27, 31-33 found that *Chan*, both above, did not create a general principle that claimants who were rehabilitated could not be excluded and explicitly found that the inconsistency from *Chan* no longer existed under the current Act:

> In order to give meaning to the rehabilitation provisions of the former Act, Robertson J.A. found in *Chan* that Article 1F(b) of the Convention could not be given an interpretation which would have resulted in a blanket exclusion of those who had been found guilty of

serious crimes as defined in the Act. **Such interpretation would have deprived a claimant of the protection offered by the exception to the inadmissibility rule. I should add, it would have also divested the Minister of his discretionary power under paragraph 19(1)(c.1) of that Act.**

In my respectful view, the decision in *Chan* stands for the proposition that, under the existing law at the time, which, as we will see, has now been modified by the IRPA, a claimant who was convicted of a serious non-political crime and who served his sentence was not necessarily excluded from a refugee hearing or rendered ineligible to apply for the refugee protection afforded by the Convention. He or she remained entitled to have their refugee claim determined by the Refugee Division if the Minister concluded that the claimant was rehabilitated and was not a danger to the public.

While the decision in *Chan* afforded some protection to a claimant and safeguarded the Minister's discretion, **it did not then, nor does it now, in my respectful view, stand for the proposition that, whatever the circumstances, a country cannot exclude an applicant who was convicted and served his sentence.**

[…]

There is, however, a notable difference between the IRPA and the former Act. Under paragraph 46.01(1)(e) and subparagraph 19(1)(c.1)(i) of the former Act, a claimant was ineligible for a refugee hearing if he was inadmissible to Canada on account of serious criminality unless, as previously stated, the Minister was satisfied that the claimant had rehabilitated himself or herself and five years had elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission.

Under the IRPA, the rule as to ineligibility has changed. By virtue of subsections 101(2), a claimant, who is inadmissible by reason of serious criminality, now remains eligible for a refugee hearing unless the "Minister is of the opinion that the person is a danger to the public in Canada and the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years".

In other words, under the former Act, there was a rule of ineligibility for a refugee hearing if a claimant was inadmissible on account of serious criminality. That rule operated unless the exception applied.

> Under the IRPA the rule is reversed. A claimant remains eligible unless the exception applies.
>
> [Emphasis added]

[24] It is clear from this passage that the inconsistency from *Chan*, above, is no longer an issue under the current Act, and that the Applicant's argument must therefore fail.

[25] The Board did not err in its weighing of the factors before it. Contrary to the Applicant's argument, the repeated nature of his offence was reasonably considered an aggravating factor, especially when taken together with the prior conviction for the same crime.

VI. Conclusion

[26] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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