Federal Court  Cour fédérale

Date: 20140320

Docket: IMM-4710-13

Citation: 2014 FC 271

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, March 20, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

OSWAL NOE HERNANDEZ GOMEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated June 4, 2013, rejecting the applicant's refugee claim pursuant to section 98 of the Act, as the applicant is subject to paragraph 1F(b) of the *Convention Relating to the Status of Refugees* (the Convention).

FACTUAL BACKGROUND

[2] The applicant is a citizen of Honduras. He apparently lived in the United States for a few spells in the 1990s. However, it was not until November 1998 that he left Honduras for good. The applicant is then purported to have lived in the United States illegally until he arrived in Canada on July 1, 2009. He filed his refugee protection claim in Canada on August 24, 2009.

[3] The applicant alleges a fear of returning to Honduras following threats that were initially issued against members of his family, but that are now ostensibly directed at him.

[4] On July 31, 2001, his brother Oscar Armando was allegedly kidnapped and a ransom of one million lempiras was demanded. He was apparently released after the family paid 600,000 lempiras.

[5] It would appear that similar scenarios were played out when his brother Milton, who was kidnapped on April 15, 2003, was purportedly released following a payment of 300,000 lempiras, and when his brother Carlos was allegedly kidnapped on May 1, 2006. However, Carlos is still reported as missing because the family does not have the means to pay the ransom. The body of Marco Armando, another of the applicant's brothers, was also reportedly discovered.

[6] Upon his arrival in Canada, the applicant stated that he had been arrested and detained for 24 hours in the United States for driving without a licence. The year of the arrest was not given. He is also reported as declaring that he has no criminal record. The same statements were made in his Personal Information Form (PIF).

[7] On December 3, 2012, a few days prior to the hearing before the RPD, which was scheduled for December 12, 2012, the applicant amended his PIF to include the fact that he had received a three-year sentence for non-premeditated conspiracy after having loaned his car to his brother Milton, who subsequently used it to commit illegal acts. The hearing was postponed in order to provide the applicant with enough time to file his criminal record, which he did on January 15, 2013.

[8] The applicant's criminal record shows that he committed a number of offences, including failure to register a firearm (1995), complicity in weapons trafficking (1997), driving with a suspended licence (2006) and lack of a valid driver's licence (2007).

PANEL'S DECISION

[9] The RPD analyzed the applicant's exclusion under section 98 of the Act on the ground that he is subject to paragraph 1F(b) of the Convention.

[10] In order to determine whether the crime committed by the applicant can be characterized as serious, the RPD argues that one simply needs to transpose the crime to a Canadian legal context. Citing the Federal Court of Appeal decision in *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 390, the panel stated that "a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada."

[11] In this case, although the applicant states that he was with his brother when he procured the weapons, he emphasizes that he himself never purchased or sold any weapons. He further maintains that he was unaware that any criminal acts had been perpetrated.

[12] The applicant had nonetheless pleaded guilty in 1997 to an offence committed in the United States, an offence equivalent to weapons trafficking and the importing or exporting of firearms knowing it is unauthorized, under sections 99 and 103 of Canada's *Criminal Code*. In Canada, these offences carry a maximum sentence of 10 years. Therefore, the offences committed would be considered as serious crimes and the applicant would be subject to an exclusion order.

[13] Invited by the RPD at the hearing to explain why he had not declared his criminal history right from the start, the applicant stated that it had not crossed his mind and that he had not been asked about it. The RPD found these assertions unconvincing and determined that the applicant's amendments to his PIF had been made to deliberately minimize his participation in the offences with which he was charged.

[14] The RPD then analyzed other factors that could be taken into consideration in determining the seriousness of a crime, namely, the elements of the crime and the mode of prosecution (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 (*Jayasekara*)) as well as the harm inflicted and the nature of the penalty for such a crime.

[15] The RPD was of the opinion that, although the U.S. prosecutor had dropped some of the charges, the fact that Canada's *Criminal Code* provides for minimum penalties for the crimes

committed further attests to the seriousness of these crimes. Moreover, the RPD notes that the applicant did not establish that he was not given a fair trial. Thus, the RPD found there was sufficient evidence demonstrating the existence of serious grounds to consider that the applicant had committed a serious non-political crime before entering Canada.

[16] Despite the finding that the applicant was excluded from refugee protection, the RPD proceeded with its analysis of the applicant's claims with regard to fearing a return to Honduras.

[17] The RPD was of the view that the applicant had failed to establish, on a balance of probabilities, that he was linked to individuals who had been kidnapped and threatened. The RPD further concluded that the applicant was not credible after finding several inconsistencies between his testimony, newspaper articles adduced into evidence and the information in his PIF.

[18] Weighing all of these factors taken together, the RPD determined that the applicant was not a credible witness, and that he had therefore not discharged his burden of proving that he was a victim of persecution, under section 96 of the Act, or that he faced a risk to his life, under section 97 of the Act.

ISSUES

[19] A. Did the panel err in finding that the applicant was subject to paragraph 1F(b) of the Convention and that he was caught by the exclusionary provision?

B. Did the panel err in dismissing the applicant's refugee claim on the basis of his lack of credibility?

STANDARD OF REVIEW

[20] The first issue that arises from this judicial review is the interpretation and application of paragraph 1F(b) of the Convention. The Federal Court of Appeal recently held that the relevant standard is correctness (*Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 at paragraphs 24-25).

[21] The second issue, however, addresses the RPD's findings with regard to the applicant's credibility. Consequently, the applicable standard is reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at paragraph 4 (*Aguebor*)). This Court must therefore exercise deference and great restraint in determining whether the findings are justified, transparent and intelligible, and whether they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47).

ANALYSIS

[22] In the case at bar, the applicant does not dispute the fact that he did commit the alleged offence. Nor is there any dispute that the offence committed by the applicant, had it been committed in Canada, could lead to 10 years' imprisonment.

[23] The applicant submits that the RPD did not assess the sentence, the mode of prosecution or the constituent elements of the crime, as well as the mitigating circumstances, factors established in *Jayasekara*, above. **In his view, such errors are sufficient to set aside the decision.**

[24] **First, contrary to the applicant's assertions, the RPD did consider the fact that** some of the charges had been dropped by the U.S. prosecutor. The RPD stated the following at paragraph 38 of its decision:

> In this claim for refugee protection, the panel has sufficient evidence to conclude that the claimant was convicted of weapons trafficking in the United States, even though the American prosecutor dropped certain charges.

[25] Thus, the RPD was of the view that the seriousness of the crime was the key factor, regardless of the fact that the prosecutor had dropped some of the charges.

[26] What is more, the actual sentence imposed on the applicant cannot by itself determine the seriousness of the crime. As the Federal Court of Appeal noted in *Jayasekara*, above, examining the sentence in an isolated manner could affect the analysis of the seriousness of the crime. Thus, as paragraph 41 of the Court of Appeal's reasons indicate,

> if the length or completion of a sentence imposed is to be considered, it should not be considered in isolation. There are many reasons why a lenient sentence may actually be imposed even for a serious crime. That sentence, however, would not diminish the seriousness of the crime committed.

[27] The RPD therefore correctly considered the actual sentence that was imposed as one of the factors to assess, but not as a determinative factor, particularly in regard to the seriousness of the offence.

[28] The applicant further submits that the mode of prosecution was not taken into account. I disagree.

[29] Although the RPD makes no specific reference to this factor, it notes at paragraph 39 that "[t]he provisions of the *Criminal Code* also set out a minimum penalty for a first offence, which makes it possible to consider that this type of crime is serious". That distinguishes this case from *Vucaj v Canada (Minister of Citizenship and Immigration)*, 2013 FC 381, in which the offences committed were prosecuted by way of summary conviction, but in which this mode of prosecution had not been considered by the RPD. In this case, not only was prosecution by way of summary conviction not possible, but minimum sentences are prescribed for the offences committed by the applicant.

[30] The RPD also considered the applicant's statements regarding the context and the circumstances surrounding the offence. But inconsistencies and omissions in the applicant's testimony and the implausibility of several statements led the RPD to question the applicant's account of events and the veracity of the alleged mitigating circumstances. It is true that applicant pleaded guilty to avoid a lengthy trial, but that factor in itself cannot outweigh the seriousness of the crime with which the applicant was charged.

[31] Although the RPD did not conduct a "point-by-point" description of the factors analyzed, I find that the reasons as a whole show that the criteria in *Jayasekara*, above, were examined on the basis of the facts of this case (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 14 and 16).

[32] Therefore, I am of the view that the RPD correctly found that the applicant was subject to the exclusion clause.

[33] Given that the panel's decision with regard to the exclusion clause is correct, there is no need to review the second issue.

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

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4710-13

STYLE OF CAUSE: OSWAL NOE HERNANDEZ GOMEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: MARCH 19, 2014

REASONS FOR JUDGMENT AND JUDGMENT: TREMBLAY-

LAMER J.

DATED: MARCH 20, 2014

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