Federal Court  Cour fédérale

Date: 20201208

Docket: IMM-2121-19

Citation: 2020 FC 1120

Montréal, Quebec, December 8, 2020

PRESENT: The Honourable Madam Justice St-Louis

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RUBEN CLERJEAU

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Minister of Citizenship and Immigration [the Minister] seeks judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [the RAD], dismissing his appeal.

[2] The RAD confirmed the decision of the Refugee Protection Division [the RPD], finding that Mr. Ruben Clerjeau, the Respondent, is not excluded from refugee protection and is a

Convention refugee. Particularly relevant to these proceedings is the fact that the RAD found that the crimes committed by Mr. Clerjeau did not rise to the level of seriousness required to exclude him under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Immigration Act*].

[3] Section 98 of the *Immigration Act* provides that a person referred to in section E or F of Article 1 of the Convention Relating to the Status of Refugees, 28 July 1951, Can TS 1969 No 6 [the *Refugee Convention*] is not a Convention refugee or a person in need of protection.

[4] Article 1F(b) of the *Refugee Convention* states that the provisions of the Convention do not apply to any person with respect to whom there are serious reasons for considering that "he has committed a serious non-political crime […] outside the country of refuge prior to his admission to that country as a refugee" [emphasis added].

[5] For the reasons set out below, the Application for judicial review will be granted.

II. Relevant Factual Background

[6] Mr. Clerjeau is a citizen of Haiti. From around 1982, Mr. Clerjeau lived in the United States, where he obtained permanent resident status.

[7] In 2007, he lost his status in the United States because of criminal convictions, and he was deported to Haiti. Per the evidence on record, Mr. Clerjeau was known under multiple aliases in the United States, and has been arrested, charged, and/or convicted in the states of New

York, Maryland, Virginia, Texas, Georgia, and Wisconsin (pages 213 and following of the Certified Tribunal Record [CTR]).

[8] Mr. Clerjeau declares having entered Canada on November 30, 2015, under a different name. On December 1st, 2015, he was arrested near Montréal and charged with robbery. He subsequently pleaded guilty.

[9] On December 14, 2015, Mr. Clerjeau's refugee protection claim was received by the Immigration and Refugee Board. He based his claim on his fear of the police in Haiti, which persecuted him because of his homosexuality.

[10] The Minister of Public Safety and Emergency Preparedness [the Minister of Public Safety] intervened before the RPD. In his Notice of Intervention, the Minister of Public Safety provided an overview of Mr. Clerjeau's criminal history as outlined in the National Crime Information Center (NCIC) and, in particular, submitted (1) an Incident Report from the Houston Police department detailing Mr. Clerjeau's July 27, 2005 arrest for robbery, a charge subsequently reduced to theft from person as a result of a plea bargain and for which Mr. Clerjeau was sentenced to a 7-month prison term; and (2) a true excerpt of the court documents relating to Mr. Clerjeau's arrest on December 5, 2006 for robbery and possession of burglar's tools. Under the latter charges, Mr. Clerjeau pleaded guilty to possession of burglar's tools and the reduced charge of petit larceny. For these crimes, he received prison sentences of, respectively, 160 days and 80 days.

[11] Before the RPD, the Minister of Public Safety outlined various pieces of legislation pertaining to the issue of exclusion under section 98 of the *Immigration Act*, referred to the laws of Texas and New York, and noted that robbery is a crime, punishable "in any other case" by imprisonment for life (sections 343 and 344 of the Criminal Code of Canada (the CCC). The Minister of Public Safety also outlined the guiding principles to assess whether the crime is a "serious" crime under article 1F(b) of the *Refugee Convention* and cited the Federal Court of Appeal's decision in *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*]. The Minister of Public Safety confirmed that he bears the burden of establishing that the claimant should be excluded from protection because there are serious reasons for considering that he has committed a serious non-political crime. The Minister of Public Safety thus asked the RPD to conclude that article 1F(b) applied to Mr. Clerjeau and that he is a person described at section 98 of the *Immigration Act*, and to dismiss his refugee claim.

[12] The RDP found that the Minister of Public Safety had not credibly established the facts supporting his application for exclusion in regards to the 2005 and 2006 incidents. The RPD concluded that Mr. Clerjeau is a convention refugee and accepted his claim.

[13] The Minister of Public Safety appealed the RPD decision before the RAD. He argued that the RPD erred in finding that he had not credibly established the facts supporting the application for exclusion. The Minister of Public Safety outlined again his burden under article 1F(b), the standard of evidence, and the presumption set by the Supreme Court of Canada in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*], whereby any offence for which a maximum sentence of ten years could be imposed under Canadian law will generally be

considered a “serious” crime for the purposes of the exclusion clause. The Minister of Public Safety did not take issue with the RDP’s conclusion on the claim.

[14] Mr. Clerjeau presented no argument in response before the RAD.

III. The RAD Decision

[15] The RAD found overriding errors in the RPD’s assessment of the documentary evidence underpinning the application for exclusion, and turned to correct the error by conducting its own analysis of the claim. It first concluded that, on a balance of probabilities, the documents provided by the Minister, including police incident reports, court documents, and court decisions, are credible and trustworthy documents. It thus confirmed that the Minister’s evidence should be considered along with the rest of the evidence in assessing the merits of the case.

[16] The RAD examined the law regarding exclusion under Article 1F(b) of the *Refugee Convention*, and particularly assessed what constitutes a “serious” non-political crime, citing *Jayasekara* and *Febles* as cautioning against a mechanistic, rigid application of the presumption of seriousness for crimes punishable by a maximum of at least 10 years of imprisonment.

[17] In applying the law to the facts, the RAD first found that the documentary evidence produced by the Minister established that there were serious reasons for considering that Mr. Clerjeau was involved in non-political crimes in Texas in July 2005 and in New York in 2006.

[18] It then proceeded to examine if the crimes were “serious” ones. Regarding both offences, the RAD outlined the factors it considered in its analysis of the seriousness of the crimes.

[19] The RAD acknowledged that the offense of robbery is presumptively serious, as it is liable to imprisonment for life under section 344 of the CCC. However, the RAD noted that there is a wide sentencing range for such a crime and found that the nature of the crime in both cases would fall at the lower end of the sentencing range (paragraphs 60 and 68 of the RAD decision). The RAD thus found that the crimes were not sufficiently serious to support the application for exclusion.

[20] The RAD thus confirmed the decision of the RPD that Mr. Clerjeau is not excluded from refugee protection and is a Convention refugee.

IV. Discussion

[21] The Minister raises two arguments, but one suffices for the Court to dispose of the matter. For the reasons exposed below, I am satisfied that the RAD breached a principle of procedural fairness by failing to provide the Minister an opportunity to respond to its opinion that the crime of robbery in Canada is subject to a wide sentencing range.

[22] The Minister submits that the RAD breached procedural fairness when concluding that the crime of robbery in Canada is subject to a wide sentencing range. He submits there was no evidence that such is the case, and that the RAD speculated on the issue – while section 344 of the CCC states that robbery is subject to imprisonment for life. He adds that the spectrum of

sentences ordered by Canadian courts for robberies committed in similar circumstances was not in evidence and that, as it does not constitute common knowledge, it must be proven.

[23] The Minister adds that it also does not constitute specialised knowledge of the RAD under section 171(b) of the *Immigration Act* and that, in any event, the RAD did not comply with rule 24(1) of the *Refugee Appeal Division Rules* (SOR/2012-257 [the *Refugee Appeal Division Rules*]), which requires it to notify the parties of its intent to rely on specialised knowledge and provide them with an opportunity to make representations. The Minister submits that the fact that the Supreme Court of Canada held in *Febles* that a crime subject to a wide sentencing range should not be presumptively excluded if it falls at the lower end of the sentencing range does not allow the RAD to speculate on this issue, in the absence of specific evidence.

[24] Mr. Clerjeau responds that there was no breach of procedural fairness, as the RAD had the evidence on file that there is a wide sentencing range for the crime of robbery in Canada. He adds that this "evidence" consists of the actual text of section 344 of the CCC, and that the RAD therefore had the tools necessary to conclude that the crime committed by Mr. Clerjeau falls at the lower end of the sentencing range under section 344 of the CCC. Mr. Clerjeau adds that the RAD did not have an obligation to provide the parties with an opportunity to respond and provide evidence because the burden falls on the Minister and the test of Article 1F(b) of the *Refugee Convention* is inherent to the RAD's analysis.

[25] The court assessing a procedural fairness argument is required "to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors"

(*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). The Federal Court of Appeal states: “A reviewing court does that which reviewing courts have done since Nicholson; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed” (*Canadian Pacific* at para 54 [references omitted]). The Court adds: “No matter how much deference is accorded [*sic*] administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an a priori decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference” (*Canadian Pacific* at para 56).

[26] The RAD’s finding that the crime of robbery in Canada is subject to a wide sentencing range is determinative of its conclusion on the issue of Mr. Clerjeau’s exclusion. However, it is undisputable that the record contains no evidence on the sentencing range for the crime of robbery in Canada, and that the text of section 344 of the CCC does not speak to the actual sentencing range for the crime of robbery in Canada.

[27] I have not been convinced that this information is common knowledge which should be subject to judicial notice. It remains to be demonstrated that this information is within the RAD’s specialised knowledge; however, if it were so, and the RAD intended on using it, the RAD should have respected rule 24(1) of the *Refugee Appeal Division Rules* and should thus have

notified the parties and given them an opportunity to make oral or written representations on the reliability and use of the information or opinion and provide evidence in support of their representations.

[28] The RAD failed to do so and in the circumstances, this error is fatal.

JUDGMENT in IMM-2121-19

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted.
2. The file is returned to the RAD for a new determination.
3. No question is certified.
4. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2121-19
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND RUBEN CLERJEAU
PLACE OF HEARING:	MONTRÉAL (QUÉBEC) (BY WAY OF VIDEO CONFERENCE VIA ZOOM)
DATE OF HEARING:	DECEMBER 2, 2020
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	DECEMBER 8, 2020

APPEARANCES:

Me Émilie Tremblay	FOR THE APPLICANT
Me Meryam Haddad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Montréal (Québec)	FOR THE APPLICANT
Meryam Haddad Attorney at Law Montréal (Québec)	FOR THE RESPONDENT