Federal Court Cour fédérale

Date: 20220331

Docket: IMM-6447-21

Citation: 2022 FC 455

Vancouver, British Columbia, March 31, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

FAWAD AHMAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, a citizen of Afghanistan, seeks judicial review of an August 31, 2021 decision [the Decision] of the Refugee Appeal Division [the RAD], concluding that, while in the United States [US], he committed a serious non-political crime and that he was therefore

excluded from refugee protection pursuant to Article 1F(b) of the *Convention Relating to the Status of Refugees* [the *Convention*], as incorporated in s 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] As explained in more detail below, this application is dismissed, because the Applicant's arguments do not undermine the reasonableness of the Decision.

II. Background

[3] The Applicant married his former wife in September 2012, subsequently left Afghanistan, and joined her in the US in or around January 2013. The couple divorced in 2014. He subsequently entered Canada in April 2017 and claimed refugee status, asserting fear of Taliban extremists in Afghanistan.

[4] In a decision dated January 17, 2019, the Refugee Protection Division [RPD] denied the Applicant's refugee claim. He appealed to the RAD, which dismissed his appeal on October 20, 2020. The Applicant sought judicial review of that decision in Court file IMM-5632-20, and on February 3, 2021, upon consent of the parties, the Court set it aside and returned the matter to the RAD, resulting in issuance of the Decision that is presently under review.

[5] As explained in the Decision, the RAD focused on an individual act of criminality, which it described as follows:

> …This is a crime of domestic violence which was committed by the Appellant on July 31, 2013, in Meridian Township, Michigan whereby the relevant police report indicates that the Appellant choked his wife and threatened to choke her again if she called the police. The police observed light redness around the victim's neck. The Applicant was arrested and charged with a non-sexual Assault and states on his Schedule A that he was convicted of this offence. He testified that following a plea bargain he was sentenced for the offence of disturbing the peace and given a disposition of 12 months of probation, a monetary penalty and required to complete an education program.

[6] The issue on appeal to the RAD was whether the RPD had properly analyzed whether the crime committed by the Applicant was serious for purposes of Article 1F(b) of the *Convention*. The RAD agreed with the Applicant's position that the RPD had erred in failing to consider explicitly the factors prescribed in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] as relevant to determining the seriousness of a crime. However, the RAD found that it could remedy that error by undertaking that analysis on appeal.

[7] Following consideration of the factors prescribed by *Jayasekara*, the RAD found that the RPD did not err in concluding that there were serious reasons for considering that, prior to arriving in Canada, the Applicant committed a serious non-political crime and that the exclusion under Article 1F(b) applied to him.

[8] The Applicant now seeks judicial review of this Decision by the RAD.

III. Issue and Standard of Review

[9] The sole issue raised by the Applicant is whether the RAD's finding, that the Applicant's crime was serious for purposes of the Article 1F(b) exclusion pursuant to s 98 of *IRPA*, was reasonable. As suggested by this articulation of the issue, the applicable standard of review is reasonableness.

IV. Analysis

[10] As I will canvass below, the Applicant raises a number of arguments in support of his position that the Decision is unreasonable.

A. *Presumption of Seriousness*

[11] First, the Applicant raises concern about the intelligibility of the RAD's analysis as to which provision of the Canadian *Criminal Code*, RSC 1985, c C-46 [the *Criminal Code*] would have applied had the Applicant's crime been committed in Canada. As explained in *Febles v Canada (Citizenship and Immigration),* 2014 SCC 68 [*Febles*] at para 62, there is a rebuttable presumption that a crime is serious if a maximum sentence of 10 years or more could have been imposed had the crime been committed in Canada. The *Jayasekara* factors provide a framework for considering whether the presumption of seriousness has been rebutted. However, consistent with the jurisprudence, the RAD commenced its analysis by considering which *Criminal Code* offence or offences would have applied had the incident occurred in Canada, so as to assess whether the presumption of seriousness applied.

[12] Like the RPD, the RAD identified that s 265 of the *Criminal Code* provides that anyone who commits an assault is guilty of an indictable offence liable to imprisonment for a term not exceeding five years or an offence punishable on summary conviction. However, the RAD also agreed with the RPD that, given that the victim had a noticeable mark around her neck and her complaint that she had been choked, the Applicant could also have been charged under s 267(b) of the *Criminal Code* for assault causing bodily harm. This is a hybrid offence that, if proceeded with as an indictable offence carries a maximum term of imprisonment of 10 years or, if punishable on summary conviction, carries a maximum term of imprisonment of 18 months.

[13] The Applicant notes the Decision's reference to these two *Criminal Code* offences, only one of which would carry a presumption of seriousness. However, in his submission, the RAD relied on s 265, which does not trigger the presumption of seriousness. The Applicant therefore argues that the Decision is unintelligible in that later portions of the analysis are framed as conclusions on the question whether the presumption of seriousness has been rebutted.

[14] I disagree with the Applicant's interpretation of the RAD's analysis. As I read the Decision, the RAD concluded that the Applicant that could have been charged under either s 265 or s 267(b) of the *Criminal Code*. As the latter offence carries a maximum prison term of 10 years, the presumption of seriousness applied. The RAD's subsequent analysis as to whether application of the *Jayasekara* factors serves to rebut this presumption is therefore intelligible.

[15] I note that, while the Applicant did not pursue this point in oral argument, his written submissions also take the position that the RAD did not consider the point that the definition of

"bodily harm" in s 2 of the *Criminal Code* refers to "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". In the context of this definition, the Applicant's written submissions raise concern about the reasonableness of the RAD's conclusion that s 267(b) applies.

[16] The Decision does not disclose an analysis of whether the Applicant's crime caused bodily harm to his wife within the meaning of the *Criminal Code* definition of that term. However, reading the Decision as a whole, this shortcoming does not constitute a reviewable error. Following its conclusion that either s 265 or s 267(b) could apply, the RAD explained that, even if the Applicant had been charged and convicted with assault under s 265 (for which the maximum sentence is 5 years, such that the presumption of seriousness would not apply), the RAD would nevertheless find the event serious after weighing the *Jayasekara* factors canvassed later in the Decision.

[17] In the context of this alternative analysis by the RAD, the Applicant's counsel confirmed at the hearing of this application for judicial review that the Applicant is not taking the position that it would be an error for the RAD to conclude that a crime, to which the presumption of seriousness did not apply, was indeed serious based on an application of the *Jayasekara* factors. In other words, proper application of those factors can serve either to rebut the presumption of seriousness or to elevate as serious an offence that is presumptively not serious. Therefore, given the RAD's alternative analysis on which *Criminal Code* offence to consider, the reasonableness of the Decision turns not on whether the presumption of seriousness applies, but rather on the reasonableness of the manner in which the RAD analysed the *Jayasekara* factors. In the

remainder of these Reasons, I will consider the principal arguments raised by the Applicant in challenging that analysis.

B. *Mode of Prosecution*

[18] The Applicant argues that, in analyzing the *Jayasekara* factors, the RAD erred by reasoning, contrary to that jurisprudence, that one of the factors (the mode of prosecution) is not relevant to determining the seriousness of the crime.

[19] *Jayasekara* explains as follows the factors relevant to analyzing the seriousness of a crime (at para 44):

> 44. I believe 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: … . In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors. There is no balancing, however, with factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin: … .

[20] In the case at hand, the US authorities in the state of Michigan charged the Applicant with misdemeanour domestic violence, and that charge was in turn dropped when he pled guilty to a lesser misdemeanour offence of disturbing the peace. As such, the Applicant submits that the mode of prosecution is a factor clearly weighing against a finding of seriousness. However, he argues that the RAD failed to acknowledge this favourable factor and balance it against the other *Jayasekara* factors as it was required to do.

[21] In this component of the Decision, the RAD noted that the Applicant was charged with misdemeanour domestic violence, and, as part of a plea bargain deal, pled guilty to disturbing the peace. The RAD also noted the Applicant's submission that, as the prosecutor can authorize felony charges under Michigan law but chose not to do so, his offence lacks the requisite seriousness to be considered under Article 1F(b).

[22] In considering these submissions, the RAD referred to there being any number of reasons the prosecution elected not to charge the Applicant with a more serious offence and offered him a plea deal. The RAD explained that the view the US authorities take of the offence is not solely determinative of whether the offence is a serious crime but is only one factor to be considered. The RAD also noted that, in Canada, because of the nature of the harm in an offence involving abuse of a spouse or common-law partner, s 718.2 of the *Criminal Code* makes the context of domestic violence an aggravating factor for sentencing purposes. The RAD ultimately concluded that, even though the offence was proceeded with by way of a misdemeanour, the sentence imposed was light, and a plea bargain was reportedly accepted, these factors did not detract from the seriousness of the offence.

[23] I disagree with the Applicant's characterization of this analysis as suggesting that the RAD regarded the mode of prosecution as irrelevant to the assessment of the seriousness of his offence. To the contrary, this analysis demonstrates the RAD weighing the required factors and providing reasons for its conclusion that the offence is serious. Indeed, the RAD expressly states that it gives little weight to the mode of prosecution. While it does not explicitly state that the mode of prosecution is favourable to the Applicant, that determination is clearly implicit in the

RAD's explanation that it gives little weight to that factor in rebutting the seriousness of the offence.

C. *Lack of Remorse*

[24] The Applicant notes that, in analysing the aggravating and mitigating circumstances surrounding the offence, the RAD devoted considerable attention to analysing whether the Applicant showed remorse for his actions, concluding that he did not and that this was an aggravating factor.

[25] The Applicant states that he pled guilty to the charge that he faced, the misdemeanour of disturbing the peace, and served out his probationary sentence. He denies assaulting his former spouse and submits that he was not charged by the US authorities with that offence. He therefore argues that it is unreasonable for the RAD to expect that he show remorse for something he has denied and for which he has not been charged or convicted.

[26] I find little merit to this argument. While the Applicant takes issue with the RAD's reliance on the police report's description of the incident (an additional argument that I will consider below), the RAD found the Applicant not credible, preferred the evidence of the police report, and concluded that the Applicant had physically assaulted his wife. Moreover, in concluding that the RPD had not erred in observing the Applicant's minimization of his responsibility, the RAD also relied on the Applicant's initial failure to disclose his criminal record in the US to Canadian immigration officials. Relying in part on the Applicant's educational background, including having studied law, the RAD rejected the Applicant's

explanation that he misunderstood the questions on the relevant immigration forms. I find no reviewable error in the RAD's analysis surrounding the Applicant's failure to accept responsibility for his criminal conduct.

D. *Reliance on Police Report*

[27] As noted above, the Applicant takes issue with the RAD's reliance on the notes of the police officer who attended the incident that gave rise to the Applicant's conviction. He argues that, contrary to applicable jurisprudence, the Decision does not demonstrate that the RAD independently assessed the credibility of these notes (see, e.g., *Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751 at para 29; *Skelton v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1373 at paras 12-13).

[28] I find that, reading the Decision as a whole, it demonstrates an intelligible assessment and conclusion on the credibility of the police documentation. The Decision states that, "as noted below", the RAD found the Applicant's evidence regarding what occurred during the relevant incident to be unreliable, it found the version of events identified in the police information to be reliable, and it therefore placed greater weight on the latter version of events. I read the "as noted below" reference as related to the RAD's explanation, later in the Decision, that it accepted the RPD's analysis of the Applicant's credibility.

[29] In assessing the RPD's analysis, the RAD refers to the RPD's questioning of the Applicant about the incident and the observations by the police, including asking the Applicant if there was any reason the police would make observations of events that had not happened. The

Applicant responded that he believed that his wife had frustrated the police by the number of complaints she had made, following which the RPD asked a number of follow-up questions. As the RAD endorsed the RPD's adverse credibility finding against the Applicant, I read the Decision as explicitly demonstrating the RAD's consideration of the opportunity the RPD afforded the Applicant to impugn the credibility of the police information and implicitly concluding that he had failed to do so. In my view, this analysis represents sufficient consideration of the credibility of the police information to withstand reasonableness review.

E. *Sentencing*

[30] Finally, the Applicant relies on the recent decision in *Ayorinde v Canada (Citizenship and Immigration)*, 2022 FC 113 [*Ayorinde*] in support of an argument that, when considering whether a crime is serious within the meaning of Article 1F(b), and where the offence has a large potential sentencing range, a decision-maker must consider where on the sentencing spectrum the applicant's sentence may have fallen and that the failure to do so renders the decision unreasonable. The Applicant notes that, at paragraph 25 of *Ayorinde*, after canvassing jurisprudence applicable to the sentencing factor identified in *Jayasekara*, the Court wrote:

> 25. The above-cited jurisprudence required the RPD to consider and address whether the Applicant's sentence would fall at the lower end of a large sentencing range. The failure to do so renders the decision unreasonable.

[31] The Applicant submits that the RAD failed to conduct this element of the analysis and, contrary to the jurisprudence, held that such an analysis was not required. In advancing this submission, the Applicant references the following paragraph in the Decision:

> I note that the Appellant makes the broad statement that the RPD committed an error by failing to consider sentencing case law decisions. Beyond this statement and a reference to the Federal Court decision of *Hersy*, the Appellant does not provide any evidence relating to sentencing law decisions, nor did he seek to enter such evidence for this Appeal. In relation to sentencing, I note that in the *Parchomchuk* case, which involved a conviction under Section 267 of the Criminal Code, the Saskatchewan Court of Appeal commented that "the determination of a fit sentence requires much more than finding a comparable case" and that "there is no one sentence for any given offence. Rather, sentencing is an individualized process that depends on a consideration of a wide variety of factors, including the relevant legislative provisions, the circumstances of the offence and the circumstances of the offender. " The RPD, as an administrative tribunal which is expected to make decisions fairly and efficiently, does not possess the time or expertise to conduct and validate a sentencing data analysis study nor do I agree should it be expected to undertake such a complicated research endeavour for the purposes of every exclusion analysis. Furthermore, an analysis of seriousness does not focus on one factor, such as penalty prescribed and sentence, but the RPD should consider a number of factors. The fact that the RPD did not reference sentencing error is not a fatal error as I do not see this as a fundamental requirement for the purposes of every Article 1F(b) exclusion analysis. Further, in the Appellant's case, even if the offence committed by the Appellant were to be on the lower end of the sentencing range, I nevertheless find the offence serious for the purposes of exclusion when I consider all the factors.
>
> [Footnotes omitted]

[32] The Respondent argues that *Ayorinde* is distinguishable, as that case involved an applicant who had fled the US, where his crime was committed, and thereby avoided prosecution and sentencing. In contrast, the Applicant in the case at hand was prosecuted and sentenced in the US. As the RPD and RAD therefore knew and considered his actual sentence, the Respondent submits that the tribunal was not required to undertake a theoretical sentencing exercise as the Applicant advocates.

[33] The distinction identified by the Respondent between *Ayorinde* and the case at hand is accurate, and the Respondent's submission is consistent with the following explanations by the Court at paragraphs 21 and 23 of *Ayorinde*:

> 21. *Jayasekara* recognizes that sentencing and the circumstances surrounding the commission of an offence are relevant factors when assessing whether the presumption of serious criminality is rebutted. In the absence of a sentence, the *Jayasekara* factors do not, exclude consideration of where within the sentencing range the conduct may fall. As noted above, the Supreme Court has held that conduct that would result in a sentence at the low end of the spectrum is relevant in assessing the seriousness of a crime (*Febles* at para 62).
>
> ….
>
> 23. The Respondent argues the jurisprudence is distinguishable on the basis that none of the *Jayasekara* factors were overlooked by the RPD in this instance. I disagree. Those factors must be considered in light of the jurisprudence that has followed. Where no sentence has been imposed and there is a wide sentencing range available, *Febles* requires a consideration of where in the sentencing range a claimant's impugned conduct might fall. While I agree with the Respondent's submission that many factors will influence a sentence, this does not alleviate the RPD of its obligation to grapple with whether a claimant's conduct would result in a sentence at the low end of a wide sentencing range.
>
> [Emphases added]

[34] I am conscious that one of the authorities on which *Ayorinde* relies is Justice de Montigny's decision in *Jung v Canada (Citizenship and Immigration)*, 2015 FC 464, a case in which the applicant had been convicted for fraud in South Korea and had a sentence imposed. The Court found that the tribunal had erred in failing to consider as a relevant factor the wide Canadian sentencing range and the fact that applicant's sentence fell at the low end of the range. However, the Court's analysis turned on the tribunal's failure to consider the actual sentence that

had been imposed in South Korea, not failure to conduct an analysis as to where in the applicable Canadian sentencing range a Canadian court may have imposed a sentence.

[35] More broadly, I agree with the Respondent's submission that *Ayorinde* and the jurisprudence upon which it relies, commencing with *Febles*, focus upon the importance of considering sentencing as a factor in determining whether a serious crime has been committed. In that respect, I find no shortcoming in the RAD's analysis. The Decision states that the Applicant's sentence was light, but it afforded less weight to that factor and others that favoured the Applicant than to the seriousness with which Canadian law regards domestic violence.

V. Conclusion

[36] Having considered the Applicant's arguments, I find the Decision reasonable and will therefore dismiss this application for judicial review. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6447-21

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

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6447-21
STYLE OF CAUSE:	FAWAD AHMAD V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	MARCH 23, 2022
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	MARCH 31, 2022

APPEARANCES:

Robin D. Bajer	FOR THE APPLICANT
Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robin D. Bajer Law Office Vancouver British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver British Columbia	FOR THE RESPONDENT