Federal Court Cour fédérale

Date: 20231122

Docket: IMM-10659-22

Citation: 2023 FC 1546

Toronto, Ontario, November 22, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ZANETA ABKAROVICOVA
MARTIN ABKAROVIC
JESIKA ABKAROVICOVA

Applicants

and

THE MINISTER OF PUBLIC SAFEY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD] dated October 6, 2022 [Decision], in which the RPD vacated the Applicants' refugee protection status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and found they were excluded from protection under Article 1F(b) of the

United Nations Convention Relating to the Status of Refugees, 1951, CTS 1969/6; 189 UNTS 150 [Convention] and section 98 of the IRPA.

[2] For the reasons explained in greater detail below, this application is allowed.

II. Background

[3] The first Applicant named above [Principal Applicant] and the other Applicants who are her children and were minors at the time of their original refugee determination [Associate Applicants] are citizens of Slovakia and are of Roma ethnicity. They entered Canada on February 11, 2016. The Applicants were granted Convention refugee status on August 14, 2017.

[4] During her refugee intake with Immigration, Refugees and Citizenship Canada [IRCC], the Principal Applicant indicated that she had never been convicted of, charged with, on trial for, or subject to any criminal proceeding in any country. She also indicated that she had never been detained, incarcerated, or put in jail. During her eligibility interview, in response to the question whether she had ever been charged with or convicted of a criminal offence, the Principal Applicant answered in the negative.

[5] By application filed on January 7, 2020, the Minister of Public Safety and Emergency Preparedness Canada [the Minister] applied to the RPD to vacate the Applicants' refugee status. The Minister's application alleged that the Principal Applicant misrepresented or withheld material facts concerning a matter relevant to the Applicants' claims for refugee status. In particular, the Minister alleged that the Principal Applicant concealed having a criminal history spanning 17 years in Slovakia. The Minister argued that, had the Principal Applicant's criminal

history been revealed to the RPD, it is more likely than not that she would have been excluded from refugee protection based on section 98 of the IRPA and Article 1F(b) of the Convention. These provisions specify that a person is not a Convention refugee if they have committed a serious non-political crime outside the country of refuge prior to entry.

[6] In support of the application to vacate, the Minister relied on an International Arrest Warrant issued by Slovakia [Warrant] and a criminal record check provided by the Slovak Police Attaché in Ottawa. The Warrant indicates the Principal Applicant is guilty of the following offences under the *Slovak Criminal Code*: the criminal repeat offence of theft under s. 212; and the criminal offence of unlawful counterfeiting and use of means of payment, electronic currency, or other credit and debit cards in forms of complicity under s. 219(1). The Warrant also indicates that the Principal Applicant has served 18 months of her 28 month sentence for those offences. The criminal record check states the Principal Applicant has 17 crimes registered between 1995 and 2012.

III. Decision under Review

[7] The RPD noted that the Principal Applicant did not dispute the fact that she failed to disclose her history of criminal activities to the IRCC or to the original RPD panel that granted her application for refugee status, although she disputed the extent of her criminal history as stated in the Minister's disclosure. The Principal Applicant confirmed that she served a prison sentence for theft in 2005 or 2006 and in 2015 and that she had been convicted of causing bodily injury, for which she received probation. The Principal Applicant provided reasons for why she

had resorted to theft, but the RPD found that a decision under 109(1) of IRPA does not require consideration of motives or intention.

[8] The RPD was not persuaded by the Applicants' submissions in response to the Minister's application, and it found that the Principal Applicant's withholding of her history of criminality had been established by her testimony and the Minister's evidence. The RPD found there was a causal connection between the misrepresentation and the favourable result in her refugee claim. The RPD further found, on a balance of probabilities, that had the Principal Applicant's history of criminality been before the original RPD panel, it would have had to determine if the Applicants were excluded under section 98 of the IRPA and the Convention prior to considering whether they should be included under sections 96 and 97(1) of the IRPA.

[9] In reassessing the credibility of the evidence considered at the first RPD hearing, the RPD also found that the original RPD panel likely would have found the Principal Applicant's narrative of persecution to be not credible.

[10] In connection with the Associate Applicants, the RPD relied on *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 to find that, while a minor claimant may have been badly served by a parent who acted as a designated representative and misled the RPD, that does not mean that the minor claimant was denied a fair hearing. The RPD concluded that the Principal Applicant's misrepresentations were made not only in respect of her claim for refugee protection, but also on behalf of the (then minor) Associate Applicants. As such, the RPD found the Associate Applicants' refugee claims to be vacated.

[11] Turning to section 98 of the IRPA and Article IF(b) of the Convention, the RPD considered the UNHCR Handbook, *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 [*Febles*], and *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 [*Jayasekara*], which set out the analytical process for determining whether an applicant had committed a serious non-political crime.

[12] The RPD found that the evidence did not support the Principal Applicant's submission that the charges against her were fabricated and that she had been treated unfairly by the Slovak judicial system. Rather, the RPD was satisfied that the Minister met the standard of proof for establishing that there were serious reasons for considering that the Principal Applicant has committed excludable crimes.

[13] The RPD found that the Associate Applicants were also excluded under section 98 of the IRPA and Article 1F(b) of the Convention. The RPD relied on *Karicka v Canada (MCI)*, 2021 FC 1005 [*Karicka*] in response to the Applicants' submission that the question of exclusion is not relevant to the Associate Applicants, as they were innocent of the crimes committed by the Principal Applicant. The RPD found that, because the Associate Applicants relied on the Principal Applicant's narrative of persecution, the Principal Applicant's finding of exclusion should be extended to the minor children.

IV. Issues and Standard of Review

[14] The Applicants raise the following issues for consideration by the Court:

A. Did the RPD err by vacating the Associate Applicants' refugee status and by excluding them from protection under Article 1F(b) of the Convention?

B. Did the RPD err in finding the Principal Applicant had committed serious non-political crimes?

C. Should the Applicants be awarded costs?

[15] The first two issues are reviewable on the standard of reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

[16] The Respondent also raises a preliminary issue, submitting that the style of cause should be amended to name the Minister of Public Safety and Emergency Preparedness as the correct Respondent. The Applicants agree that this change should be made. I concur, and my Judgment will so provide.

V. Analysis

A. *Did the RPD err by vacating the Associate Applicants' refugee status and by excluding them from protection under Article 1F(b) of the Convention?*

[17] In its Further Memorandum of Argument, the Respondent concedes that the RPD erred in excluding the Applicants from protection under Article 1F(b) of the Convention and therefore vacating their refugee status. As such, the Respondent agrees that the Court should set aside the RPD's vacation and exclusion findings with respect to the Associate Applicants.

[18] I agree with this concession, as the RPD erred in relying on *Karicka* for its exclusion finding (and therefore its vacation finding) with respect to the Associate Applicants. The Decision does not set out a rational analysis as to how the Associate Applicants could be

excluded (and their refugee status therefore vacated) as a result of their mother's criminality. My Judgment will therefore allow this application as it applies to the Associate Applicants.

B. *Did the RPD err in finding the Principal Applicant had committed serious non-political crimes?*

[19] My decision to allow this application as it applies to the Principal Applicant turns on her argument that the RPD did not conduct an analysis as to whether the particular penalties imposed upon her as a result of her offences serve to rebut the presumption of seriousness in relation to those offences.

[20] In arriving at its conclusion that there were serious reasons for considering that the Principal Applicant had committed serious non-political crimes in Slovakia, the RPD relied on her convictions for theft, unlawful payment, and bodily injury. In relation to the theft and unlawful payment offences (although not the bodily injury offence), the Principal Applicant acknowledges that, because they could give rise to a sentence of 10 years if the offences had been committed in Canada, the RPD reasonably concluded that the offences gave rise to the presumption of seriousness explained in *Febles*. However, the Principal Applicant argues that the RPD failed to conduct the analysis, contemplated by *Febles* and other jurisprudence, as to whether the actual sentences imposed upon her serve to rebut the presumption.

[21] The Principal Applicant cites the following explanation in paragraph 62 of *Febles*:

> 62. The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been

> committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut**. Where a provision of the Canadian Criminal Code, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(b) is designed to exclude only those whose crimes are serious.** The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.

[Applicants' emphasis]

[22] To similar effect, the Federal Court of Appeal explained as follows in paragraph 44 of *Jayasekara*:

> 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: see *S v. Refugee Status Appeals Authority*, (N.Z. C.A.), *supra; S and Others v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); *Miguel-Miguel v. Gonzales*, no. 05-15900, (U.S. Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. 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: see *Xie v. Canada*, *supra*, at paragraph 38; *INS v. Aguirre-Aguirre, supra*, at page 11; *T v. Home Secretary* (1995), 1 WLR 545, at pages 554-555 (English C.A.); *Dhayakpa v. The Minister of Immigration and Ethnic Affairs, supra*, at paragraph 24.

[23] The Principal Applicant submits that she argued before the RPD a limited number of factors intended to rebut the presumption of seriousness, including what she submits were penalties imposed for her offences at the lower end of the sentencing range, i.e., a cumulative 28 months for the theft and unlawful payment convictions and probation for the bodily injury conviction. However, she argues that the RPD failed to consider that submission. I find this argument compelling. The Decision identifies the penalties that were imposed upon the Principal Applicant. However, it discloses no analysis as to the effect of this consideration upon the rebuttable presumption of seriousness.

[24] In arguing that the RPD reasonably concluded that these convictions represent serious non-political crimes, the Respondent relies on authorities including *Santha v Canada (Citizenship and Immigration)*, 2021 FC 1353, in which the Court rejected an argument that the RPD erred in failing to take into account that an applicant's sentence fell at the low end of the Canadian sentencing range for the crime. However, the Court in that case found that the RPD had properly considered the ultimate sentence imposed for the convictions at issue (at para 47).

[25] The Principal Applicant emphasizes a statement by the RPD that it did not find persuasive the Applicants' counsel's submission that it should examine sentencing ranges in making its determination, as sentencing is the function of the criminal courts. The Respondent's

submissions do not directly address this finding. It could be that the RPD was stating that it was not tasked with assessing the sentence that a Canadian court would impose in similar circumstances. That is not the same task as considering the effect of the penalties actually imposed by the Slovak court. However, regardless of how this finding is interpreted, the Decision did not carry out that latter task. I find the absence of that analysis to undermine the reasonableness of the Decision as it relates to the Principal Applicant.

[26] Having arrived at this conclusion, it is not necessary for the Court to consider the Principal Applicant's other arguments challenging the reasonableness of the Decision. As in relation to the Associate Applicants, although for different reasons, my Judgment will allow this application for judicial review, set aside the RPD's vacation and exclusion findings in relation to the Principal Applicant, and return the matter to a different member of the RPD for re-determination.

[27] Neither party proposed any question for certification for appeal, and none is stated.

C. *Should the Applicants be awarded costs?*

[28] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, states that no costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review, or an appeal under those Rules unless the Court, for special reasons, so orders. As for when such special reasons exist, the Applicants rely on authorities including *Chirmatsion v. Canada (Citizenship and Immigration)*, 2011 FC 773 [*Chirmatsion*], in which the Court found that special reasons may be found where a party

has unnecessarily or unreasonably prolonged proceedings or where it could be apparent from a review of the file that the officer's reasons for decision would not withstand judicial review and that the proceedings should therefore be brought to a rapid conclusion (at para 5).

[29] The Applicants submit that special reasons exist for an award of costs in the case at hand, because the RPD's error (in relying on the Principal Applicant's criminality to find that the Associate Applicants were also excluded) represents an error so obvious that the Respondent should not have opposed this application for judicial review by the Associate Applicants.

[30] The Applicants asserted their costs claim in their Memorandum of Argument dated November 20, 2022, which was filed in the leave stage of this application. At that stage, the Respondent had not yet conceded that the Decision was unreasonable in relation to the Associate Applicants. As explained earlier in these Reasons, the Respondent did ultimately make that concession, as reflected in its Further Memorandum of Argument dated November 2, 2023, filed in preparation for the hearing. However, notwithstanding that concession, the Applicant argued at the hearing that costs should still be awarded, because the Respondent opposed the application at the leave stage.

[31] The Applicants did not identify for the Court any precedent for an award of costs in circumstances where a party opposes leave but later concedes before the hearing that an application for judicial review should be granted. Recognizing the reference in *Chirmatsion* to considering whether it is apparent that a judicial review should be brought to a "rapid

conclusion", I would not rule out the possibility that there could be cases where such circumstances would warrant an award of costs.

[32] However, I do not find such a result warranted in the case at hand. As the Respondent notes, the Applicants did not file either further affidavits or a further memorandum of fact and law after leave was granted. As such, it does not appear that the Applicants were put to extra effort or cost as a result of the timing of the Respondent's concession. The Applicants argue that the Associate Applicants were at risk of removal until the time of the Respondent's concession. However, they also acknowledge, and the Respondent emphasizes, that there were no efforts to remove the Associate Applicants.

[33] I find that the circumstances of this case do not represent special reasons that warrant an award of costs.

JUDGMENT IN IMM-10659-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision is set aside, and this matter is returned to a different member of the RPD for re-determination.
2. No costs are awarded.
3. No question is certified for appeal.
4. The style of cause in this matter is changed as set out above, to reflect the Minister of Public Safety and Emergency Preparedness as the Respondent.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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