Federal Court  Cour fédérale

Date: 20110728

Docket: IMM-6580-10

Citation: 2011 FC 959

Ottawa, Ontario, July 28, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

YESENIA NELLY AGUILAR VALDES
and
ESTEBAN GUADALUPE HERNANDEZ JIMENEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 14 October 2010 (Decision), which excluded the Applicants from refugee protection pursuant to section 98 of the Act.

BACKGROUND

[2] Both the Female Applicant and the Male Applicant are citizens of Mexico. They allege that they have both suffered persecution at the hands of the Female Applicant's former common-law partner, Carlos, whom she met and with whom she began a relationship in 1999 in the U.S. The Female Applicant and Carlos have a child together. She alleges that he verbally, physically and sexually abused her throughout their six-year relationship and that he has continued to harass and threaten her despite the fact that they ended their relationship in 2005. Sometime thereafter, she and the Male Applicant began a relationship and took up residence, together with a roommate, in Ohio.

[3] The Applicants separated for a period but, eventually, they reconciled and the Female Applicant moved back into their apartment. Two days later, they were arrested for drug-related offences. They pled guilty to the charges. They admit that the Male Applicant kept drugs in their apartment for his personal use and that their roommate also kept drugs there, likely for sale, but they claim that the Female Applicant knew nothing about them.

[4] The Applicants pled guilty for various reasons explained in their Personal Information Form (PIF) narratives. In particular, the Female Applicant was pregnant and had been advised by counsel that, if she waited for a trial, she would have to stay in jail for so long that she would have to give birth there. She was advised that the trial itself would be long and expensive with little chance of success and that, if she remained detained, Carlos might get custody of her son.

[5] In February 2007, the Female Applicant was convicted of conspiracy to traffic in cocaine, possession of cocaine (two counts) and aggravated possession of drugs. She was sentenced to a prison term of nine months for each count to be served concurrently in the U.S. Similarly, in March 2007, the Male Applicant was convicted of trafficking in cocaine (three counts), possession of cocaine and aggravated possession of drugs and was sentenced to a prison term of nine months for each count to be served concurrently in the U.S.

[6] Upon their release from prison, each Applicant was deported to Mexico, where they reunited and settled. The Female Applicant alleges that, a few months later, Carlos' family informed her that Carlos was, himself, soon to be deported to Mexico and was threatening to kill both Applicants. Eventually, Carlos did return and continued to threaten the Applicants. They reported the threats to the Mexican police, who advised them that nothing could be done until the Applicants incurred physical injury. They moved to another state but were forced to return to Mexico City because the Female Applicant's eldest child requires specialized medical treatment.

[7] The Applicants fled to Canada in October 2008. Carlos currently lives with the Female Applicant's relatives and, therefore, would easily be able to locate the Applicants. For this reason, they cannot return to Mexico.

[8] The Applicants appeared before the RPD on 23 February, 26 May and 22 July in 2010. They were represented by counsel and an interpreter was present. The Minister intervened in the claims, being of the opinion that Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* was engaged due to the Applicants' criminal activities in the U.S.

[9] The RPD concluded that the Applicants should be excluded from the refugee protection afforded to Convention refugees and persons in need of protection because there were "serious reasons for considering that [they] committed a serious non-political crime (or crimes) within the meaning of Article 1F(b)." This is the Decision under review.

DECISION UNDER REVIEW

[10] The RPD acknowledges the position of the Minister's counsel that the convictions alone amount to serious reasons for considering that the Applicants committed the crimes. However, there is additional evidence in the form of statements by two cooperating defendants implicating the Female Applicant.

[11] Nevertheless, the Applicants cannot be excluded if their evidence of the circumstances of their convictions is credible. The RPD concludes, however, that the Applicants' evidence is not credible for the following reasons.

[12] First, the Applicants did not mount a defense against the drug-related charges. If the Applicants had had evidence to establish their innocence, it is reasonable to expect that they would have mounted a defense in the Ohio criminal court. The RPD drew a negative inference from the Applicant's failure to present such evidence to the criminal court and from their failure to explain why they did not present such evidence.

[13] Second, the RPD acknowledges the Applicants' claim that their legal representation in the U.S. was inadequate but notes that this claim is unsupported by any evidence such as, for example, a complaint to the U.S. authorities. Regardless of the competency of counsel, the Applicants could have themselves presented exculpatory evidence to the criminal court.

[14] Third, regarding the seriousness of the crimes, the RPD finds that they are crimes for which a maximum sentence of ten years or more could have been imposed had the crimes been committed in Canada. Although the amount of drugs in question was not large, a small quantity of drugs can amount to a serious crime in the context of Article 1F(b).

[15] On this basis, the RPD determined that the Applicants were excluded from the protection afforded Convention refugees and persons in need of protection.

ISSUES

[16] The Applicants formally raise the following issues:

i. Whether the RPD's credibility and plausibility findings were in error; and
ii. Whether the RPD's assessment of the seriousness of the offence was flawed, specifically with respect to its treatment of the factors relevant to this assessment.

[17] The Applicants also raise the following issue in their argument:

Whether the RPD unfairly deprived them of an opportunity to respond to its concerns.

STATUTORY PROVISIONS

[18] The following provision of the Act is applicable in these proceedings:

Exclusion — Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[19] The following provision of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1, is applicable in these proceedings:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
[…]	[…]
(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; […]	*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés; […]

STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] Credibility and plausibility findings are within the RPD's areas of expertise and, therefore, deserving of deference. They are reviewable on a standard of reasonableness. See *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); and *Dunsmuir*, above, at paragraphs 51 and 53.

[22] On a question of exclusion under Article 1F of the *Convention*, the standard is reasonableness. This accords with *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238 at paragraph 10 [*Jayasekara FC*], wherein Justice Barry Strayer of this Court found:

> In the matter of the standard of review, I respectfully concur with other judges of this Court in the view that on a question of exclusion under Article 1F, the standard should be that of reasonableness. The decision which the Board must make is as to whether "there are serious reasons for considering that ... he has committed a serious non-political crime outside the country ...." This is a mixed question of fact and law and involves some discretion in assessing what is a "serious" reason: see *Médina v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 86 at paragraph 9, and other cases referred to therein.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[24] In their arguments the Applicants contend that the RPD deprived them of their rightful opportunity to respond to its concerns. This is a question of fair process and is reviewable on a standard of correctness. See *Khosa*, above, at paragraph 43.

ARGUMENTS

The Applicants

[25] The Applicants argue that the RPD erred in three ways. First, its credibility and plausibility findings were unreasonable. Second, it deprived the Applicants of the opportunity to respond to these credibility and plausibility concerns. Third, it failed to consider most of the factors relevant to an assessment of the seriousness of the offences.

Credibility Findings

[26] The Applicants submit that the RPD's credibility findings are perverse. They fail to consider any of the traditional credibility factors such as contradictions, inconsistencies or evasion. Rather, the RPD's reasons for excluding the Applicants under Article 1F(b) of the Convention are based almost entirely on a single plausibility finding: that, had the Applicants been innocent, they would not have pled guilty in the Ohio criminal court.

[27] The RPD's finding that the Applicants "did not provide a reasonable explanation" for failing to present to the Ohio criminal court evidence of their innocence, and choosing instead to plead guilty, wholly ignores the detailed evidence presented in the Female Applicant's PIF, which addresses this very point. It indicates that the Female Applicant pled guilty because: she was pregnant and did not want to give birth in jail; she had been advised that a trial would be long and expensive with little chance of success; and she had been told and believed that, if she remained in detention too long, Carlos might get custody of their child. The Applicants submit that the spirit of the *Gender Guidelines* and the Supreme Court decision in *R v Lavallee*, [1990] 1 SCR 852, [1990] SCJ No 36 (QL), should have led the RPD to consider the actions of the Female Applicant in her unique circumstances rather than on a reasonable person standard.

[28] The Applicant contends that the RPD finds these explanations implausible because innocent people do not plead guilty. This is absurd. It is a "well-known reality" that, in a "slow and overburdened" justice system, people sometimes plead guilty even though they are innocent, as the

Applicants' evidence indicates. The RPD offers no explanation for why it adopts the contrary view, but it relies on this view as a justification for excluding the Applicants from refugee protection.

[29] The presumption of the truth of the Applicants' explanations was not rebutted. Indeed their explanations were never challenged. In light of this, the RPD's finding that the Applicants were not credible is tantamount to ignoring evidence without explanation.

Credibility Concerns Demanded an Opportunity to Respond

[30] The RPD clearly had concerns regarding the Applicants' credibility and the plausibility of their explanations but it failed to raise them despite ample opportunity to do so during the three days of hearings. This represents a violation of the principles of natural justice. Had the RPD advised the Applicants of its concerns with respect to the Applicants' reasons for pleading guilty and for not filing a formal complaint against their U.S. counsel, the Applicants could have sought to address these concerns at the hearing.

[31] The Applicants, however, having decided to rely on their unchallenged written evidence, had no way of knowing that the RPD doubted them and no opportunity to dispose of these doubts. To find the Applicants not credible, despite the fact that their credibility was never tested, is a violation of the principles of natural justice.

Assessment of the Seriousness of the Offence

[32] The Applicants argue that the RPD's assessment of the seriousness of the offences is "truly minimal." The *Handbook on Procedures and Criteria for Determining Refugee Status* published by the United Nations High Commissioner for Refugees (UNHCR) states that to qualify as a serious crime pursuant to Article 1F(b), an offence must be a capital crime or a very grave punishable act. It also states that one of the main purposes of Article 1F(b) is to protect the community of the receiving country. Tribunals such as the RPD, in evaluating the seriousness of the offence, must consider "all relevant factors," including mitigating circumstances and whether the claimant has served his or her sentence. The Federal Court of Appeal, in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara FCA*], above, at paragraphs 27-29, held that, although the mere serving of the sentence does not mean that Article 1F(b) could not apply, the factors that govern the assessment are the continuing dangerousness of the claimant and the protection of the public. It further stated at paragraph 44 that:

> 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.

The RPD's assessment is inadequate. The only factor it considered was the length of the sentence that would have been imposed in Canada had such an offence been committed here.

[33] Factors that should have been considered but were disregarded include: the Female Applicant's completion of her sentence; the Male Applicant's subsequent abstention from drugs; the four years that have passed since the offences were committed; the Applicants' lack of dangerousness and "criminal character"; the brevity of their actual sentences; and the Female Applicant's ignorance of the presence of drugs in the apartment. Moreover, the RPD's flawed credibility findings taint the assessment of the seriousness of the offence as they prevented the RPD from properly assessing the true character of each Applicant and the circumstances of the offences.

The Respondent

The Applicants Improperly Invite the Court to Re-Weigh the Evidence

[34] The Respondent contends that the RPD's exclusion finding was reasonable. The crimes for which the Applicants were convicted met the requisite level of seriousness because of the length of sentence that could have been imposed under Canadian law. The RPD found that the Applicants had offered no persuasive evidence that the crimes were not serious, despite the fact that the amount of drugs involved was relatively small.

[35] Although the Applicants claimed that they were innocent, they offered no evidence of their innocence or of the failure of the Ohio criminal court properly to carry out its duties with respect to the adjudication of the Applicants' guilt or innocence. It was reasonably open to the RPD to prefer the documentary evidence establishing the Applicants' convictions for serious criminality over their assertions of innocence.

The Applicants' Reply

[36] The Applicants argue that the Respondent's submissions are unresponsive to the substance of their arguments. The Respondent merely re-states the RPD's findings but in no way addresses the Applicants' challenges to the findings.

[37] The Applicants' submissions do not invite the Court to re-weigh the evidence. The Applicants acknowledge that they were convicted of their offences. The issue is that the RPD failed to consider factors beyond their convictions, factors which this Court has held must be considered, such as the circumstances of the offence. The Respondent has been unable to point to any part of the Decision that addresses the circumstances of the offence.

The Respondent's Further Memorandum

[38] The Respondent further submits that the purpose of Article 1F(b) is not limited to protecting the community of the receiving country from dangerous persons. It also aims to ensure that the refugee system is not abused by criminals and that signatory nations should not become havens for those who have committed serious non-political offences. See *Jayasekara FCA*, above, at paragraphs 28-29; and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, [1998] SCJ No 46 (QL) at paragraph 73.

[39] The Federal Court of Appeal in *Jayasekara FCA*, above, at paragraph 40, recognized that, for the purposes of excluding a person from refugee protection on the basis of serious criminality,

paragraph 101(2)(*b*) of the Act requires a conviction outside Canada which under Canadian law would be punishable by a maximum term of at least ten years. This, in the Federal Court of Appeal's view, was a "strong indication from Parliament that Canada, as a receiving state, considers crimes for which this kind of penalty is prescribed as serious crimes."

[40] The presumption of the seriousness of the crime can be rebutted based on an assessment of certain factors. See *Jayasekara FCA*, above, at paragraph 44. The Applicants argue that the evidence of convictions is rebuttable, relying on *Rihan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 123, *Gurajena v Canada (Minister of Citizenship and Immigration)*, 2008 FC 724, and *Zeng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 956. However, these cases concern claimants who were excluded from refugee protection based on an outstanding *warrant*. In the instant case, the Applicants were excluded on the basis of *conviction* by a court of competent jurisdiction. It was reasonable for the RPD to rely on these convictions as serious reasons for considering that the Applicants had committed serious non-political crimes.

[41] Although the Applicants claim to be innocent, it was reasonable for the RPD to expect them to support their assertions with evidence of their lack of involvement in the drug-related offences for which they were charged.

[42] As the transcript of the hearing demonstrates, the Applicants elected not to present oral evidence on the issue of exclusion, preferring to rely instead on their PIF narratives and post-hearing submissions. They cannot now be heard to complain that they did not have an opportunity to address the exclusion issue at the hearing before the RPD. The jurisprudence of this Court indicates

that the RPD is under no obligation to provide an applicant with the opportunity to address its plausibility findings. As Justice Edmond Blanchard stated in *Khorasani v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 936 at paragraph 35:

> With respect to the argument that the applicants were not confronted with the Panel's credibility concerns, I agree with the respondent's submission that the Panel is under no obligation to alert an applicant, at the time of their hearing, of its concerns about weakness in testimony giving rise to implausibilities.

ANALYSIS

[43] The Decision is based upon narrow grounds. The RPD rejects the Applicants' evidence of non-involvement in the drug-related crimes as being non-credible for the following reasons:

a. "Had there been evidence which established that the claimants were not involved in the crimes with which they were charged, it is reasonable to expect that the claimants would have presented this evidence to support a not guilty finding by the Ohio Courts." (Paragraph 12 of the Decision);

b. "The claimants did not provide a reasonable explanation for why such evidence was not presented in their defence." (Paragraph 12 of the Decision);

c. "Had there been exculpatory evidence that demonstrated the claimants were not involved in drug activities, I find that the Ohio court would not have ignored such evidence and thus, I find that it is reasonable to expect that the claimants would have presented such evidence in their own defence regardless of the competency of their counsel." (Paragraph 13 of the Decision);

d. "As submitted by Minister's counsel, in order for Ohio courts to accept guilty pleas by these claimants, the elements of the crime must be made out, the plea must be voluntary and understood, and there must be no miscarriage of justice in accepting the plea. The claimants did not provide any evidence that the Ohio court ignored these conditions in accepting their guilty pleas." (Paragraph 13 of the Decision);

e. The Applicants "did not provide a reasonable explanation for failing to present such evidence to support their innocence during the criminal proceedings in Ohio but, instead only presented such evidence in relation to the Minister's intervention seeking to exclude them from refugee protection in Canada." (Paragraph 13 of the Decision).

[44] Taken as a whole, very little is being said here to support the finding by the RPD that the Applicants' evidence of non-involvement was not credible.

[45] Essentially, the RPD is saying that, if there was evidence of non-involvement in the crimes, the Applicants would not have pleaded guilty but would have presented that evidence to the Ohio court and pleaded not guilty. Without mentioning the explanations provided by the Applicants as to why they pleaded guilty to the charges in Ohio, the RPD simply says the "claimants did not provide a reasonable explanation for why such evidence was not presented in their defence." This misses the point because some of the reasons were not related to evidentiary issues.

[46] The RPD's finding of no "reasonable explanation" is a conclusion without reasons. It appears to be based upon the unproven and speculative premise that if the Applicants had not been

involved in serious crimes they would not have pleaded guilty in Ohio but would have proceeded with the trials and placed their evidence for non-involvement before the Ohio court. This premise is entirely speculative and unreasonable and cannot be the basis for a negative credibility finding. See *Douglas v Canada (Minister of Citizenship and Immigration)*, 2007 FC 740 at paragraph 21. Innocent people sometimes plead guilty for all kinds of reasons. The Applicants provided several reasons as to why they had chosen to plead guilty to the crimes in question. The RPD did not have to accept their evidence or the reasons that they gave for pleading guilty, but the RPD did have to say why their evidence and their explanations were unacceptable. A blanket statement that the "claimants did not provide a reasonable explanation for why such evidence was not presented in their defence" is not enough. It tells the Applicants and the Court nothing about why their evidence on this point was unacceptable. In the end, the RPD is simply saying that, if the Applicants had evidence of non-involvement in the crimes, they would not have pleaded guilty in Ohio, but no reason or evidentiary basis is given for this finding.

[47] The Female Applicant's amended narrative included numerous compelling reasons for pleading guilty despite her innocence. She explained that she pleaded guilty while detained and pregnant, and on the advice of counsel. Her lawyer told her that since both her name and Esteban's name were on the lease of the apartment, they would be found guilty "for sure." He told her that waiting for trial would require her to remain in detention for a long time, would be expensive and had no chance of success anyway. He advised her that pleading guilty would allow her to be released before she was due to give birth. He advised that pleading guilty would help reduce the sentence of her common-law spouse, Mr. Hernandez. She also decided to plead guilty because a

detective had warned her that if she remained in detention too long, her son's father (the agent of persecution) would get custody of their son.

[48] In *Jayasekara FCA*, above, the Federal Court of Appeal provides at paragraph 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.

[49] The RPD's approach in the present case, its reliance upon speculative and unproven assumptions and its failure to address the evidence and reasons put forward by the Applicants as to why, notwithstanding their guilty pleas, they were not guilty of serious crimes, means that an appropriate analysis with reasons that accord with *Jayasekara*, above, was not conducted. Also, it means that there was no assessing and weighing of the competing factors. See *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraph 25; and *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250. This alone renders the Decision unreasonable and it should be returned for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6580-10
STYLE OF CAUSE:	**YESENIA NELLY AGUILAR VALDES and ESTEBAN GUADALUPE HERNANDEZ JIMENEZ** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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APPEARANCES:

Leigh Salsberg	FOR THE APPLICANTS
Ian Hicks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman and Associates Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT