Federal Court  Cour fédérale

Date: 20120105

Docket: IMM-2928-11

Citation: 2012 FC 16

Ottawa, Ontario, January 5, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

SPARTAK RADI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 25, 2011. The Board excluded the Applicant from status as a Convention refugee or person in need of protection based on Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6 (Refugee Convention) and section 98 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 (IRPA) for the commission of a serious non-political crime in the United States.

[2] For the following reasons, this application is dismissed.

I. Facts

[3] The Applicant, Spartak Radi, is a citizen of Albania. In 2007, he made a claim for refugee protection in Canada fearing persecution linked to a blood feud involving his family. His previous attempt to seek asylum in the United States was unsuccessful.

[4] The Applicant's name appears on a list of fugitives being sought by American authorities. He has been arrested and charged on a number of occasions for offences including domestic violence, disorderly conduct and assault and battery.

[5] More specifically, on or about September 28, 2006, he was accused of domestic assault. The victim characterized her relationship with the Applicant as "abusive in the past" and suggested that he was "an extremely 'violent' person."

[6] On October 16, 2006, the Applicant pleaded *nolo contendere* and was found guilty of the misdemeanour of being a disorderly person.

II. Decision Under Review

[7] The Board assessed whether there were serious reasons for considering that the Applicant committed a serious non-political crime outside Canada. It was acknowledged that he did not contest his conviction for an offence ultimately categorized as a misdemeanour in the United States. Based on the report of the police officers, however, the Board was of the opinion that he could have been accused and possibility found guilty of assault causing bodily harm to his common-law partner in Canada.

[8] Subsequent violent behaviour toward his common-law partner, as documented in a police report, constituted aggravating circumstances. This was supported by additional evidence from the Minister's representative regarding his criminal activities in the United States.

[9] The Board therefore concluded at paragraph 25 of its reasons:

> In light of all the evidence, including the claimant's testimony, and having taken into account the submissions of claimant's counsel, I am of the opinion that the Minister met his burden of proof and that there are serious reasons for considering that the claimant committed a serious non-political crime outside Canada. In particular, I refer to the incident that occurred on or about September 28, 2006, which, in my opinion, might have resulted in a charge against the claimant in Canada of assault causing bodily harm to his common-law partner at the time. Striking his spouse as the claimant did during this incident with the immediate consequence that she lost at least four teeth, threatening to kill her, being found guilty of an offence as a result and subsequently continuing to act violently toward the same spouse constitutes behaviour that is not taken lightly in Canada. And I am of the opinion that it is legitimate for a receiving country to protect its own people by closing its borders to a criminal whom it regards as undesirable because of the seriousness of the ordinary crime that he is suspected of having committed.

III. Issue

[10] This application raises the following issue:

(a) Did the Board err in concluding that the Applicant committed a serious non-political crime that excluded him from refugee protection?

IV. Standard of Review

[11] To the extent that the interpretation of Article 1F(b) and section 98 is considered, the correctness standard is applicable. However, the Board's decision to exclude the Applicant as having committed a serious non-political crime is an issue of mixed fact and law reviewed on a standard of reasonableness (see *Canada (Minister of Citizenship and Immigration) v PAPD*, 2011 FC 738, [2011] FCJ no 926 at para 10; *Ryivuze v Canada (Minister of Citizenship and Immigration)*, 2007 FC 134, [2007] FCJ no 186 at para 15; *Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, [2003] FCJ no 108 at para 14).

[12] Reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

[13] Article 1F(b) of the Refugee Convention excludes perpetrators of serious non-political crimes from refugee protection as follows:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(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;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.	c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.
[Emphasis added]	[Je souligne]

[14] Canadian law recognizes this principle by way of section 98 of the IRPA that states:

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.

[15] In assessing the seriousness of a crime under Article 1F(b), *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2008] FCJ no 1740 at para 44 "requires an evaluation of the elements of the crime, the mode of persecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction." Reference to these factors may rebut any presumption as to the seriousness attached to that crime internationally or under the legislation of the receiving state.

[16] The Applicant asserts that the Board was deficient in its analysis of these factors, particularly the elements of the crime and mode of prosecution. He was convicted for the misdemeanour of being a disorderly person – equivalent to a summary conviction offence in Canada – not domestic assault. According to the Applicant, the prosecutor must not have been satisfied that there was sufficient evidence to pursue the domestic assault charge, given competing credibility claims. By relying on the statement of the complainant, he insists the Board jumped to the conclusion that he could be convicted of assault causing bodily harm under section 267 of the *Criminal Code of Canada*, RSC 1985, c C-46.

[17] However, I am unable to accept the Applicant's position. The Board directed its attention to the factors referred to in *Jayasekara*, above. In considering the police report and statement of the complainant, the Board examined the factual basis underlying the conviction. It was entitled to weigh the evidence and reject claims by the Applicant that he was not violent in favour of details regarding his actions towards his common-law partner. Irrespective of the Applicant's speculation regarding the mindset of the prosecutor, it was open to the Board to infer that the complainant's decision not to cooperate may have impeded the pursuit of the original charge.

[18] The Federal Court of Appeal has recognized that an Article 1F(b) finding is possible even in instances where the claimant has not been convicted (*Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] FCJ no 565). Paragraph 129 states:

> [129] [...] it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a States feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or not they have been convicted of those crimes and whether or not they have served the sentences imposed on them in respect of those crimes.

[19] In *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454, [2010] FCJ no 538 at para 25, Justice Johanne Gauthier commented:

> [25] This makes good sense given that charges can be dismissed for a variety of reasons including procedural issues, rejection of crucial evidence for technical reasons, or simply because the accused raised a reasonable doubt. The Convention does not adopt the stringent standard applicable in criminal proceedings and the RPD may indeed be satisfied that evidence produced by the Minister, which may not be admissible in a court of law, is sufficient to raise a serious possibility that the applicant has indeed committed a serious crime.

[20] More recently, Justice Russel Zinn acknowledged that dismissed charges can be relied on to make this finding, albeit with greater caution. He accepted the argument that "there is nothing improper in considering and relying on charges laid; even where those charges do not subsequently result in a conviction and particularly where there is a plea agreement entered into by the accused which results in the initial charges not being further pursued" (*Naranjo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1127, 2011 CarswellNat 3941 at para 15).

[21] In *Ganem v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147, [2011] FCJ no 1404 at para 24, Justice Donald Rennie asserted that "[n]either the fact of conviction nor the service of the sentence can be determinative of the exclusion analysis."

[22] These conclusions suggest that the Board has sufficient latitude in the assessment of the evidence presented by the Minister and ascertaining whether a particular charge or conviction would constitute a serious non-political crime for the purposes of Article 1F(b), provided it considers the factors identified in *Jayasekara*, above. It is not constrained by the exact characterization of the conviction, or whether there was any conviction at all. There must simply be "serious reasons for considering" that this type of crime was committed.

[23] It was also appropriate, indeed expected, that the Board would look to Canadian criminal law in its assessment of the crime. In *PAPD*, above at paragraph 12, this Court faulted the Board for not asking "what would be the result if those facts were heard by a Canadian court" and instead looking "for equivalent criminal provisions to those of the U.S. offences."

[24] As a consequence, I cannot find that the Board erred by looking at the gravity of the underlying incident and determining that, based on the nature of offence, the Applicant was likely to have been charged and possibly convicted of aggravated assault in Canada, thereby falling under the exclusion as a serious non-political crime.

[25] It would be inconsistent with *PAPD*, above, to rely on the Applicant's assertion that a misdemeanour is *prima facie* equivalent to a summary conviction offence in Canada. As it did in this instance, the Board was required to consider the facts in the Canadian context.

[26] In addition, the Board's emphasis on aggravating circumstances was in accordance with *Jayasekara*, above. The Applicant's continued violent behaviour toward his common-law partner and other criminal activity further supported his exclusion from protection for a serious non-political crime.

[27] As an alternative argument, the Applicant has proposed that even if the categorization of his offence in Canada is appropriate, his conduct should not be considered a serious non-political crime. Based on the decisions in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ no 74 and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, [1998] SCJ no 46, he insists that only crimes related to human rights would give rise to the exclusion.

[28] With respect, this is not the case. As the Respondent noted, no specifics have been provided to support this argument. More significantly, Justice Robert Décary concluded in *Zrig*, above at

paragraph 108 that "the crimes to which Article 1F(b) applies are ordinary crimes which are recognized by traditional criminal law." The Court rejected slightly different arguments that *Ward* or *Pushpanathan*, above, limited the scope of crimes that would be relevant to the exclusion.

VI. Conclusion

[29] The crime committed by the Applicant as assessed according to *Jayasekara*, above, and in light of Canadian criminal law was reasonably found to have excluded him from refugee protection according to Article 1F(b) of the Refugee Convention and section 98 of the IRPA. Despite the Applicant's claims to the contrary, the Board was entitled to weigh evidence of the underlying factual circumstances.

[30] The Applicant proposed the following question for certification:

> If on the facts of the case a person was convicted of a non-serious offence, may the Immigration and Refugee Board determine on the same facts that the person has committed a serious non-political offence and therefore is excluded from refugee protection pursuant to Article 1F(b) of the Convention relating to the Status of Refugees.

[31] The Respondent opposes certification of this question because it turns on the facts of the case and does not qualify as one of general importance (see *Kunkel v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347, [2009] FCJ no 1700 at paras 8-10). More significantly, it is not dispositive of this application as the Board is expected to engage in an analysis of the relevant factors in *Jayasekara*, above.

[32] The jurisprudence I referred to clearly establishes that the nature of the charges or conviction is not determinative. It follows that the Board can assess the same set of facts as leading to an exclusion under Article 1F(b). Despite the Applicant's suggestion, there is no need for further clarity on this aspect of the provision.

[33] Accordingly, the application for judicial review is dismissed. No question is certified.

JUDGMENT

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

No question is certified.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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