Federal Court  Cour fédérale

**Date: 20120221**

**Docket: IMM-2414-11**

**Citation: 2012 FC 232**

**Ottawa, Ontario, February 21, 2012**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**WISSAM MOHAMAD JAWAD**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION** **Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Wissam Mohamad Jawad, seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division which found that the applicant was excluded from the definition of a Convention Refugee by reason of serious criminality and, in the alternative, that he was not a person in need of protection because he had internal flight alternatives in Lebanon.

[2] I find that the Board erred in its exclusion decision but reached a reasonable determination on the existence of internal flight alternatives. For that reason, the application is dismissed.

**BACKGROUND:**

[3] Mr. Jawad is a citizen of Lebanon. He was born and raised in a neighbourhood of Beirut controlled by the Shi'a Muslim militant group and political party, Hezbollah. His father was Shi'a but his Egyptian mother belonged to the Sunni branch of Islam. The applicant and his siblings followed the mother's tradition. He says that they were harassed by their neighbours for that reason. The mother continues to live in the same neighbourhood with the applicant's sister. His brother also continues to live in Beirut.

[4] The applicant says he encountered difficulties with Hezbollah following the death of his father in 1989. He claims that a death threat was issued against him for having defaced posters of the Hezbollah leader. In 1995 he went to the United States of America as a visitor and obtained a work permit. He was married in1996 and received permanent residence status in 1997. He divorced his first wife in 2000 and remarried in 2002.

[5] In 2004, the applicant was charged in Florida with trafficking in cocaine following the search of his car on a tip from an informant. The applicant was found in possession of an amount variably referenced in the arresting officers' reports as 83 and 70 grams. In court, the charge was amended by the state prosecutor and the applicant pleaded no contest to possession of 70 grams. Under a procedure known as "adjudication withheld", no formal finding of guilt was made but a term of probation with a recommendation for drug treatment was imposed. The applicant also had to make a payment of US $50.00. It is not clear whether that was a fine or for costs.

[6] In April 2006, Mr. Jawad was arrested by US immigration authorities and detained for several months pending removal from the United States because of the possession offence. Deportation was deferred due to the situation at that time in Lebanon. He was released pending a change in the country conditions and informed that he had the option to voluntarily leave the USA. The applicant chose to do so notwithstanding that he was still under a State probation order requiring regular reporting.

[7] In August 2006 the applicant entered Canada with his wife and first child. He did not disclose his status in the US to an immigration officer at the Port of Entry but later sought legal advice in Montreal regarding his options. A second child was born to the couple in Canada. The applicant's wife attempted to obtain residency in Canada for herself and the children by applying from the United States. When that was unsuccessful, she remained there with the children. Jawad stayed in Canada without status.

[8] When he did not report as required, an arrest warrant was issued against Mr. Jawad for breach of the probation order in Florida. In April 2009, he was arrested after being stopped for running a traffic light in Surrey B.C. and turned over to the Canada Border Services Agency. He then applied for refugee status.

[9] The applicant claims that if required to return to any place in Lebanon he would be persecuted by Hezbollah due to his prior activities and recent public statements. In 2010, he posted negative comments on the social media website Facebook criticizing Hezbollah and its leader, Nesrallah.

[10] Following his arrest in 2009, the Minister initially sought an order of inadmissibility against the applicant under s. 36 (2) (b) of the *Immigration and Refugee Protection Act* ,SC 2001, c 27 on the ground that he had been convicted of an offence outside Canada that would constitute an indictable offence in Canada. That application was withdrawn. Thus there was no determination of inadmissibility precluding referral of the claim to the Refugee Protection Division.

**DECISION UNDER REVIEW:**

[11] The Board noted that for the applicant to be excluded under Article 1 F (b) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 ("the Convention") required a finding of serious reasons for considering that he had committed a serious, non-political crime prior to his entry into Canada. The Board gave the applicant the benefit of the doubt arising from the discrepancies as to the quantity of cocaine in question and accepted that it was 70 grams.

[12] Based on the applicant's evidence, the Board found that the value of 70 grams was about $1200.00 and that such quantity was sufficient for approximately six months of personal consumption. The Board found the applicant's explanation that he would buy 6 months worth of cocaine for personal consumption to be implausible, considering his financial situation at the time. The Board determined that the applicant's possession of cocaine was for the purpose of trafficking notwithstanding that the disposition by the Florida court was for the lesser offence of simple possession. The Board justified this on the ground that the language of Article 1 F (b) refers to "commission" not "conviction".

[13] The Board found that the equivalent crime in Canada was trafficking in a controlled substance pursuant to s. 5 (1) of the *Controlled Drugs and Substances Act,* SC 1996, c 19 ("CDSA"). S. 5 (3) of the CDSA provides that the maximum sentence for an offence under s. 5 (1) is imprisonment for life.

[14] The Board also looked at the criteria for seriousness set out in *Jayasekara v Canada (Minister of Citizenship and Immigration)* 2008 FCA 404 at paragraph 44. The Board found that the amendment of the charge was an element in favour of the applicant, but his failure to complete his sentence in the USA and the type of crime initially charged were elements pointing to the seriousness of the crime. The Board thus concluded that the applicant was excluded pursuant to Article 1 F (b) of the Convention.

[15] The Board considered that the applicant's failure to claim asylum in the USA and delay in claiming refugee status in Canada raised concerns regarding his credibility. It found that his evidence was not credible with regard to whether his fear of persecution or harm upon a return to Lebanon was well-founded.

[16] The Board found that the applicant had an internal flight alternative in the Lebanese cities of Halba, Tripoli and Albirah. The Board noted the violence in Lebanon and the omnipresence of the Hezbollah. Nevertheless, the Board found that because the applicant was not well known, was not politically involved and was well educated, it was reasonable for him to move to one of those cities.

**ISSUES:**

[17] The issues arising from the Board's decision are:

a. Was the Board's decision relating to its exclusion findings reasonable?
b. Was the Board's decision relating to the merits of the refugee claim reasonable?

**RELEVANT LEGISLATION:**

[18] Section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 reads as follows:

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| 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] Article 1 F (b) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, found in schedule 1 of the IRPA, states:

| | |
|---|---|
| Article 1 | Article 1 |
| 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; |

**ANALYSIS:**

*Standard of Review*

[20] The standards of review for the questions of fact and law before this Court have been satisfactorily determined by the jurisprudence and a further analysis applying the factors set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 is not necessary.

[21] The standard of review for the application of Article 1 F (b) of the Convention is reasonableness: *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, aff'd by 2008 FCA 404; and *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1147 at para 27.

[22] Decisions determining the existence of an internal flight alternative are also reviewed on the reasonableness standard: *Soto v Canada (Minister of Citizenship and Immigration)*, 2011 FC 360 at para 19; and *Guerilus v Canada (Minister of Citizenship and Immigration)*, 2010 FC 394 at para 10.

[23] Reasonableness is premised on the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir*, above, at para 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.

*Was the Board's finding of exclusion reasonable?*

[24] The applicant argues that there was no evidence to support an Article 1 F (b) finding. The sole indicium of trafficking was the quantity of cocaine found in his possession. There is no presumption in law that quantity alone is sufficient to establish trafficking: *R v McCallum*, 2006 SKQB 287 at para 28. Unresolved criminal charges are, until proven otherwise, mere allegations: *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 at para 35; and *Bakchiev v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16489 (FC), 196 FTR 306 at para 12. Further, the applicant contends, the fact that the original charge was reduced should be considered *prima facie* evidence that the applicant did not commit the crime: *Arevalo Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454 at para 31.

[25] The respondent submits that it was reasonable for the Board to conclude, considering the applicant's financial situation, that the purchase of a quantity of cocaine worth approximately $1200.00 (the applicant's estimate) for personal consumption was not credible. It was also open to the Board to take into account the original charge of trafficking. Considering that the maximum penalty in Canada for trafficking in a controlled substance is life imprisonment, it was reasonable for the Board to conclude that the applicant had committed a serious crime. According to *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 390 (CA), a serious crime is to be equated with a crime which has a maximum sentence of at least 10 years of imprisonment.

[26] Exclusion hearings under Article 1 F (b) of the Convention are not in the nature of a criminal trial: *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 23;

and *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, leave to appeal refused, [2004] SCCA No 418, at para 23.

[27] The test of serious reasons for considering that a refugee claimant has committed a serious non-political offence within the scope of Article 1 F (b) is similar to the evidentiary standard of reasonable grounds to believe. It is more than mere suspicion but less than the civil standard of a balance of probabilities: *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA) at para 4-6. The test requires compelling and credible information: *Mugeresa v Canada (Minister of Employment and Immigration)*, 2005 SCC 40 at para 114.

[28] At the hearing of the refugee claim, counsel for the applicant filed excerpts from the Florida statutes regarding the punishment for simple possession of cocaine in that state. The offence is described as a third degree felony punishable by a term of imprisonment not exceeding five years and a $5000 fine. It was argued that the equivalent offence in Canada under the *Controlled Drugs and Substances Act* is simple possession of a Schedule I substance for which the penalty on indictment is seven years or less and on summary conviction, no more than six months and a fine of up to $1000.

[29] The informant's untested disclosure to the police was not in itself compelling and credible information on which to make a finding that the applicant possessed the cocaine for the purpose of trafficking. At best, it gave rise to suspicion calling for further investigation. It appears from the arrest that the extent of the further investigation conducted was the search of the applicant's vehicle.

The applicant denied having the cocaine in his possession for the purpose of trafficking at the time of his arrest.

[30] It was open to the Board to consider the quantity found in the applicant's possession and to find his explanation for why he had such a large quantity implausible. The Board erred in finding that the equivalent offence in Canada was trafficking under s. 5 (1) of the CDSA. The equivalent offence in Canada is possession for the purpose of trafficking under s. 5 (2). This error would not, in itself, have been material as the maximum penalty for the offence of possession for the purpose of a Schedule I substance under the CDSA is the same as that for trafficking in such a substance; life imprisonment.

[31] I note that the Board also erred in finding that the accused pleaded guilty. The actual plea was no contest, a practice in the USA that has no direct equivalent in Canada but amounts to a concession by the defendant that on the evidence disclosed the charge can be proven. This is done without an admission of guilt. Again, the error was not material. However, the Board failed to properly take into account the disposition of the offence by the foreign court in considering whether the offence committed was serious.

[32] Notwithstanding the seizure of a significant amount, the Florida prosecutor and court accepted a no contest plea to simple possession and imposed a suspended sentence that would be satisfied by the completion of five years of probation, drug treatment and payment of a minimal fine. The applicant testified that this was done because he was not in fact trafficking and was prepared to contest the warrantless search of his automobile. That evidence was, of course, self-

serving but there is no evidence in the record to the contrary, other than the informant's untested statement.

[33] While I don't agree with the applicant that the reduction of the charge is *prima facie* proof that he was not trafficking, the laying of a charge by the police does not establish that the crime charged was committed, as the Board appears to have assumed. In exclusion cases, police arrest reports may serve as credible and compelling evidence. But here there was no evidence of trafficking in the reports other than the informant's untested statement and none of the usual indicia of trafficking such as prior convictions or the separation of the drug into quantities suitable for sale.

[34] The Board correctly noted that in applying the criteria set out in *Jayasekara*, above, to interpret the seriousness of the foreign offence, it was required to take into account the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction. In referring to these criteria, the Board acknowledged that the reduction of the original charge and the "relative lighter punishment for that offence" weighs in favour of the crime being less serious.

[35] The Board then states that the "circumstances surrounding the commission of the offence and the initial charges [sic] weigh in favour of the crime being serious." The Board does not identify the circumstances to which it is referring. Nor does it explain why the initial charge should be given greater weight than the ultimate disposition. The "relative lighter punishment" is in stark contrast with the mandatory minimum term of three years imprisonment and substantial fine that Florida

imposes for trafficking in cocaine. I acknowledge that in *Jayasekara*, at paragraph 54, the Federal Court of Appeal noted that a probation order, particularly one of five years, is not necessarily a light sentence because of the restrictions on liberty and possibility of further consequences if breached. In this instance, however, the probation order coupled with the withheld adjudication appears to have been a lenient disposition for possession of a substantial amount of cocaine.

[36] I find that the Board's decision with respect to exclusion lacks the justification, transparency and intelligibility that would make it reasonable within the meaning of the standard set out by the Supreme Court of Canada in *Dunsmuir*, above, at paragraph 47.

[37] In the event that its decision as to exclusion was in error, as I have found, the Board proceeded to an analysis of the merits of the refugee claim. This Court must do the same.

*Was the Board's decision relating to the merits of the refugee claim reasonable?*

[38] The applicant submits that the Board did not explain why it did not accept the reasons he provided with regard to his delay in claiming refugee status in Canada and his failure to claim asylum in the USA. In addition, the applicant submits, the Board erred in finding that his 2010 anti-Hezbollah posts on the social media site Facebook were not public and accessible by Hezbollah militants.

[39] In its internal flight alternative analysis, the applicant contends, the Board did not consider the small size of Lebanon, ignored letters from his friends and family in Lebanon and did not

address his concern about the documented Hezbollah presence at the Beirut airport where he would arrive if deported. Overall, the applicant submits, the Board minimized the factional violence between Sunni and Shi'a Muslims in Lebanon and Hezbollah's role in controlling large portions of the country and much of the state apparatus.

[40] It was open to the Board to consider the applicant's failure to claim asylum in the USA and his delay in claiming in Canada: *Djouadou v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1568 at para 8. Contrary to the applicant's submissions, the Board did consider his explanation for failing to claim in the USA. The Board also considered that his delay in Canada was an informed choice made by the applicant after he had received the advice of a lawyer as to his available options. The Board found that these omissions raised concerns about the validity of his allegations of fear.

[41] The Board considered the letters from family and friends which indicated that the applicant continued to be sought by Hezbollah and the documentary evidence about country conditions submitted by the applicant. It was open to the Board to give this evidence little weight and to make its own assessment of the country conditions based on all of the evidence.

[42] The Board did err in finding that the Facebook posts were not publicly accessible. That error was not material in the context of the Board's overall finding that the applicant would not be a person of interest to Hezbollah fifteen years after he had left Beirut simply because he had posted criticisms online. The Board recognized that "Hezbollah generally poses a threat to people who are

not supporters of their agenda" and targets certain people. However, it found that the applicant had not been politically active and posed no threat to the organization.

[43] The determinative issue for the Board was the availability of internal flight alternatives in several cities in the north of Lebanon. The Board considered whether there was a serious possibility of persecution or harm in other parts of the country on a balance of probabilities and whether it was unreasonable, considering the circumstances, for the applicant to live in those areas: *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA). The Board found that the applicant's previous problems with Hezbollah were localized to the neighbourhood in which he had been raised. While the Board did not expressly deal with the question of identification at the airport it considered the applicant's concern that he would be recognized if he returned to the south to visit his family, the main concern raised by the applicant during the hearing.

[44] The Board was not persuaded that the applicant would face persecution or harm in the proposed internal flight alternatives or that moving to those cities would be unreasonable. I am unable to find that the Board erred in reaching those conclusions.

[45] In conclusion, while I may have arrived at a different conclusion on the evidence I find that the Board's decision that the applicant is not a Convention refugee or a person in need of protection was within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[46] No serious questions of general importance were proposed by the parties and none will be certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2414-11 |
| **STYLE OF CAUSE:** | WISSAM MOHAMAD JAWAD<br><br>and<br><br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | February 2, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MOSLEY J. |
| **DATED:** | February 21, 2012 |

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| Kim Sutcliffe | FOR THE RESPONDENT |

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