Federal Court  Cour fédérale

Date: 20120907

Docket: IMM-7323-11

Citation: 2012 FC 1061

Ottawa, Ontario, September 7, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PEDRO ANTONIO CASTILLO REYES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a Cuban national, lost his refugee status in the United States by reason of convictions for serious drug crimes. He served a long sentence of incarceration. Upon his release in November 2009 he was ordered deported. He failed to attend a meeting with the Homeland Security Department and, in July 2010, crossed the Canadian border illegally to claim protection.

[2] The Refugee Protection Division of the Immigration and Refugee Board rejected the applicant's claim on the ground that section 98 of the *Immigration and Refugee Protection Act*

("IRPA") and Article 1F(b) of the *United Nations Convention on the Status of Refugees* ("Refugee Convention") operate to exclude him from refugee protection in Canada.

[3] In assessing the "seriousness" of the offences at issue, the Board Member considered the factors set out in *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, [2009] 4 FCR 164 (CA) [*Jayasekara*]. The Member observed that the United States is a democracy and that the applicant's prosecution was "fair and judicious." There was no evidence of a miscarriage of justice. Had he been convicted in Canada he would have been liable to a maximum term of life imprisonment. The applicant does not dispute these findings.

[4] In the result, the Member concluded that "there are serious reasons for considering that the claimant has committed a serious non-political crime outside of Canada prior to coming to Canada".

[5] She then went on to consider aggravating and mitigating circumstances related to the applicant and his offences. Citing *Jayasekara*, she considered that "the factors [to be] evaluated with regard to the seriousness of the crime are those 'underlying the conviction'". In other words, she found that evidence of subsequent rehabilitation is not relevant to an Article 1F(b) determination.

[6] The applicant was twenty-four years old at the time of his first conviction. Given the relative maturity to be expected of a person of that age, the Member rejected the applicant's assertion that he was badly influenced or manipulated into his involvement in the drug trade. The Member noted that the applicant had completed his jail sentence, but found, again citing *Jayasekara*, that this did not preclude exclusion.

[7] The applicant seeks judicial review of the decision on the ground that the Board erred in failing to take into account evidence that he improved his education while imprisoned in the United States; that he has not re-offended subsequent to his release; and that he is presently gainfully employed on a work permit in Canada.

[8] The applicant submits that the Board counted a 2010 failure to appear as an aggravating factor even though it occurred years after the applicant's criminal offences. Having done so, he argues, the Board had a duty to consider evidence of *positive* post-offence conduct as well.

[9] The sole issue before me on this application is whether the Member erred by concluding that the applicant's criminal conduct was "serious" within the meaning of Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* without considering evidence that he reformed during his term in prison and has been rehabilitated. This is a question of mixed fact and law reviewable on the standard of reasonableness (*Jayasekara*, at para 14).

[10] For the reasons I expressed in *Camacho v. Canada (Minister of Citizenship and Immigration)* 2011 FC 789 I am satisfied that the Board's conclusion falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para 59.

[11] As the Court of Appeal stated in *Jayasekara* at paragraph 44:

> …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… Emphasis added]).

[12] The failure to appear in response to the notice from the Department of Homeland Security was a factor extraneous to the facts and circumstances underlying the conviction. However, the Member mentioned this only briefly, and only in the context of her analysis as to whether the applicant's completion of his sentence should be taken into account as a *mitigating* factor. It did not open the door to a review of his post-conviction efforts to reform.

[13] The applicant proposes that I certify the question certified by the Court in *Hernandez Febles v Canada (Minister of Citizenship and Immigration* 2011 FC 1103:

> When applying article 1F(b) of the United Nations *Convention Relating to the Status of Refugees*, is it relevant for the Refugee Protection Division of the Immigration and Refugee Board to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue?

[14] The same or a similar question has been certified by the Court in *Feimi v Canada (Minister of Citizenship and Immigration)* 2011 FC 262 and *Cuero v Canada (Minister of Citizenship and Immigration)* 2012 FC 191.

[15] The respondent opposes certification on the ground that the question has already been determined by the Court of Appeal. I agree with the respondent but will follow my colleagues' lead in fairness to the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is dismissed; and

2. the following question is certified:

   When applying article 1F(b) of the United Nations *Convention Relating to the Status of Refugees*, is it relevant for the Refugee Protection Division of the Immigration and Refugee Board to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue?

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	PEDRO ANTONIO CASTILLO REYES and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

D. Clifford Luyt	FOR THE APPLICANT
Alison Engel-Yan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. CLIFFORD LUYT Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT