Federal Court Cour fédérale

Date: 20130416

Docket: IMM-6226-12

Citation: 2013 FC 381

Ottawa, Ontario, April 16, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MARTIN VUCAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a decision of the Refugee Protection Division [the RPD], dated May 28, 2012, wherein it determined that the Applicant is not a Convention refugee.

I. Facts

[2] The Applicant is a citizen of Albania. In 1988 he accompanied his family to the United States.

[3] In July 2004, the Applicant's best friend, Markjol, was attacked in Birmingham, Michigan by an individual with whom he had a fight. The Applicant and his friends went to help Markjol, and a fight started.

[4] Three days later, the Applicant and his friends were confronted by three individuals who were part of the group that had fought with them earlier. They had weapons, and the Applicant was shot in his right wrist. His friend Markjol was shot and killed. The Applicant made a police report against the individuals who shot his friend. The Applicant learned that those individuals were gang members from Albania. The families of the individuals declared a blood feud against the Applicant.

[5] As a result of the blood feud, the Applicant's sister left California, and his family sold their home. He later became addicted to marihuana.

[6] The Applicant was arrested in Michigan on July 13, 2006. He was charged with delivery of marihuana, conspiracy to deliver marihuana, and possession with intent to distribute marihuana. He pleaded guilty to the charges against him and received a two-year probationary sentence.

[7] The United States immigration authorities deported the Applicant to Albania, where he arrived on March 25, 2009. Upon his arrival, his father's friend informed him that his neighbours had seen armed people break into his family home in the city of Shkoder and that these individuals were waiting to kill him. He fled to Montenegro and arrived in Canada on April 1, 2009.

[8] He fears returning to Albania because the families of three Albanian individuals who were convicted largely due to the Applicant's efforts are in a "blood feud" with his family.

II. Decision under review

[9] The determinative issue for the RPD was the Applicant's exclusion pursuant to Article 1F(b) of the Convention. The RPD found that the Applicant is a "compulsive criminal." Documentary evidence from police in Michigan was consistent with the Applicant's testimony since it confirmed that he has a history of criminality in the United States. Moreover, the Applicant used his United States permanent residence card, which was not valid, to enter Canada.

[10] The RPD noted that the Applicant was convicted of an aggravated felony related to the illicit trafficking in a controlled substance, a conspiracy or attempt to violate law or regulation of a state in the United States, and maintaining a drug house. The Applicant was sentenced to two years' probation on January 17, 2008, discharged from probation under Youth Trainee Status, and as a result of the convictions, deported to Albania.

[11] The RPD noted that the Federal Court of Appeal has indicated that a serious non-political crime should be equated with one for which a maximum sentence of 10 years of imprisonment or

more could have been imposed. The RPD summarized the Applicant's testimony and the documentary evidence related to his criminal history in the United States. It determined that since he was an adult caught on four occasions in possession of marihuana for the purpose of trafficking, he would be "cumulatively liable for a jail term of over 10 years" had the crimes been committed in Canada. As a result, the RPD found that he had committed serious crimes in the United States prior to entering Canada.

[12] By looking at the factors set out by the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, 76 Imm LR (3d) 159 [*Jayasekara*], the RPD determined that the Applicant had not rebutted the presumption of the seriousness of the crime for a number of reasons.

[13] The Applicant was an adult when he committed the crimes. With respect to the elements of the crime, the RPD found that the documentary evidence demonstrated that the Applicant had committed serious non-political crimes in the United States and was convicted by a fair judiciary. The mode of prosecution in the United States was fair and judicious, given that the Applicant testified that he had the benefit of legal counsel before he was found guilty and that there was no persuasive documentary evidence to suggest either that he was innocent or that he was prosecuted or convicted in error. The Applicant had been tried for a felony rather than a misdemeanour. There was no evidence to suggest that he was forced to plead guilty. Regarding the penalty prescribed, the RPD determined that the Applicant's deportation and loss of permanent resident status in the United States indicated the gravity of the offences he committed. The RPD determined that there were no

mitigating and aggravating circumstances underlying his conviction because there was no persuasive evidence suggesting that the conviction was in any way unfair.

III. Relevant legislation

[14] Article 98 of the IRPA reads as follows:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
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.

[15] Article 1F(b) of the Convention states the following:

United Nations Convention Relating to the Status of Refugees	*Convention des Nations unies relative au statut des réfugiés*
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;

IV. Applicant's submissions

[16] First, the Applicant submits that the RPD erred by basing its conclusion that he had committed serious crimes in the United States prior to entering Canada on the finding that he would be "cumulatively liable for a jail term of over 10 years" had the crimes been committed in Canada. The Applicant points out that Article 1F(b) of the Convention targets persons with respect to whom there are serious reasons for considering that he or she has "committed a serious non-political crime" [emphasis added] before entering the country of refuge and that there are no provisions in the legislation for considering all of the crimes an individual committed over his or her lifetime, adding up the maximum sentences for each crime, and then determining that cumulatively the maximum term of imprisonment would exceed 10 years.

[17] Second, the Applicant submits that the RPD did not properly apply the factors set out in *Jayasekara*, above. He argues that the RPD failed to consider the mode of prosecution, namely that he was treated as a youth, and instead focused on whether he was convicted in error. Furthermore, the Applicant submits that the RPD ignored the penalty prescribed for his crimes, which was only two years' probation. Instead, the RPD focused on the irrelevant issue of his deportation and loss of permanent resident status in the United States.

[18] The Applicant claims that the RPD did not consider the mitigating circumstances, which would include his addiction to painkillers after he was injured in a fight with a criminal gang and his

alleged entrapment by an undercover police officer who asked to buy marihuana from him while the police were conducting a sting against his roommate. The Applicant maintains that he never initiated the sale of marihuana to anyone. Moreover, he submits that no force or weapons were involved in the crimes.

V. Respondent's submissions

[19] The Respondent submits that the Applicant fails to appreciate that the standard of proof for Article 1F(b) of the Convention is whether there are "serious reasons for considering" that the claimant committed a serious non-political crime and that convictions or formal charges are not prerequisites for an exclusion finding. The Respondent contends that the jurisprudence has established that it is not necessary for the RPD to attribute a specific crime to a claimant or to set out and determine all of the specifics or elements of the crime committed. Accordingly, the Respondent argues that the RPD reasonably relied on the marijuana trafficking and possession offences to assess the seriousness of the Applicant's non-political crimes.

[20] The Respondent submits that a number of relevant factors must be examined under Article 1F(b) of the Convention. First, it is reasonable for the RPD to use as a measurement of a "serious crime" the view that Canadian law takes of that offence and whether in most jurisdictions, the act would be considered a serious crime. In Canada, trafficking marihuana carries a maximum sentence of life imprisonment if the amount trafficked is greater than 3 kilograms. For trafficking less than 3 kilograms of marihuana and possession of more than 30 grams, the maximum penalty is a five-year term in prison (*Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]). The Federal Court of Appeal recognized in *Jayasekara*, above at para 48 that drug trafficking is "treated as a serious

crime across the international spectrum.” The police reports from Michigan confirm that the Applicant chose to sell, give, transfer, and transport marihuana in addition to selling marihuana to the undercover police officer. This activity amounts to trafficking under section 2 of the CDSA. Moreover, the evidence indicates that he was in possession of or sold large quantities of marihuana to others. The RPD’s reliance on the marihuana trafficking and possession offences to assess the seriousness of the Applicant’s non-political crimes is reasonable, and the evidence is sufficient to meet the requisite low evidentiary threshold that the Applicant committed a serious non-political crime.

[21] Moreover, the Respondent submits that the RPD reasonably considered the *Jayasekara* factors. The RPD considered his conviction, sentence and rehabilitation, none of which diminish the seriousness of the crime. It also considered the fact that he was represented by counsel during the criminal proceeding, that he voluntarily pleaded guilty to the charges, and that he was an adult when he committed the offences. Regarding the mitigating circumstances, the Respondent contends that contrary to the Applicant’s assertion that the undercover police officer convinced him to sell marihuana, the police reports confirm that on multiple occasions the Applicant chose to contact the police officer to sell marihuana. The Respondent submits that it was also open to the RPD to find that the Applicant is a compulsive criminal and that he was deported back to Albania by the United States authorities as a result of his convictions. The Respondent claims that these are aggravating circumstances. The Respondent also notes that the Applicant entered Canada illegally.

[22] Finally, the Respondent submits that adequacy of reasons is not a stand-alone basis for quashing a decision.

VI. Issue

[23] Did the RPD err in its assessment of the seriousness of the Applicant's crimes?

VII. Standard of review

[24] The Applicant submits that the RPD's interpretation of the law was flawed, and that as the issue is strictly one of law, the applicable standard of review is correctness.

[25] The Respondent submits that the issue of whether the Applicant is a person described in article 1F(b) of the Convention involves questions of mixed fact and law, and as such can only be quashed if it is unreasonable (*Jayasekara*, above at para 10).

[26] Since this judicial review involves the RPD's interpretation of Article 1F(b) of the Convention, a standard of correctness is appropriate as there is a need to interpret international conventions uniformly (see *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 at paras 22-25, 223 ACWS (3d) 1012). As recently as March of this year, the Court of Appeal confirmed this position (See *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 at para 71, 2013 CarswellNat 650).

VIII. Analysis

[27] The RPD's decision cannot be maintained and must be quashed. The RPD's interpretation of the IRPA that led to its conclusion that the Applicant has committed a serious non-political crime is incorrect.

[28] As noted by the RPD, the Court of Appeal recognized that paragraph 101(2)(*b*) of the IRPA, which defines a serious non-political crime as a crime for which a maximum term of imprisonment of at least 10 years could have been imposed had the crime been committed in Canada, is a strong indicator that such crimes are considered serious (*Jayasekara*, above, at para 40):

> **40.** For the purpose of determining whether a person is ineligible to have his or her refugee claim referred to the Refugee Protection Division on the basis of "serious criminality", paragraph 101(2)(b) of the IRPA requires a conviction outside Canada for an offence which, if committed in Canada would be an offence in Canada punishable by a maximum term of at least 10 years. This is a strong indication from Parliament that Canada, as a receiving state, considers crimes for which this kind of penalty is prescribed as serious crimes. In the case of a crime committed outside Canada, paragraph 101(2)(b) makes the length of the sentence actually imposed irrelevant. [...] [emphasis added]

[29] With this in mind, the RPD assessed the facts surrounding the offences and determined that the Applicant was convicted of a crime for which a term of imprisonment of 10 years or more could have been imposed. It is apparent from the RPD's reasoning that it deemed necessary to establish that such maximum penalty could have been imposed had the crime been committed in Canada in order to characterize the offence as a "serious non-political crime." It is noteworthy that the Court of Appeal in *Jayasekara*, above referred to this term of imprisonment of at least 10 years as a strong indicator of what amounts to a "serious non-political crime" from Parliament's perspective. However, *Jayasekara* does not stand for the proposition that the RPD cannot find that a crime for

which a maximum term of imprisonment of less than 10 years could be imposed is a "serious non-political crime." The RPD must consider a number of additional factors to assess the seriousness of a crime.

[30] To reach its conclusion that the Applicant would be subject to a maximum term of at least 10 years of imprisonment, which it considered determinative of the application, the RPD first found that the four offences that the Applicant committed between April and July 2006 amount to drug possession and drug trafficking under Canadian law. It then considered that these offences each bear a maximum sentence of five years less a day of imprisonment since the Applicant trafficked less than 3 kilograms of marihuana and he possessed more than 30 grams of marihuana on each occasion (see CDSA, above, ss. 4(1), 4(4)(*a*), 5(1), (3)(*a.1*)). The RPD therefore determined that in Canada the Applicant would be cumulatively liable for a maximum term of imprisonment of at least 10 years.

[31] The RPD misapplied the comments made in relation to the maximum term of imprisonment in *Jayasekara*, above, to the facts. The RPD erred in basing its conclusion on the finding that the Applicant would be "cumulatively liable" for a term of imprisonment of at least 10 years had the crimes he committed in the United States been committed in Canada and by considering this element as determinative of the exclusion analysis. There is no provision in the legislation for determining whether an applicant is excluded from the Convention by adding up the maximum sentences in Canada for each of the crimes that he or she has committed over his or her lifetime and then determining that cumulatively the maximum term of imprisonment would be more than 10 years. Article 1F(b) of the Convention states that a refugee claimant shall be excluded from the

Convention if there are serious reasons for considering that he or she has committed "a" serious non-political crime outside the country of refuge prior to being admitted into the country of refuge. The sentence imposed for each offence therefore needs to be considered individually, and the RPD committed an error in adding up the maximum sentences for each one of the convictions.

[32] Having said that, the Applicant's apparent willingness to continue to traffic marihuana, raised by the RPD, is certainly an important factor to consider when assessing whether he committed a "serious non-political crime," which, as explained below, should have been examined by the RPD. As seen above, the maximum sentence of 10 years of imprisonment is a "strong indicator", but there may be other factors to consider in order to determine whether a claimant has committed a "serious non-political crime," such as his recurrent behaviour.

[33] Furthermore, in *Jayasekara*, above at para 3, the Court of Appeal set out four factors to consider in order to evaluate the seriousness of a crime for the purposes of Article 1F(b) of the Convention:

1. The elements of the crime.
2. The mode of persecution.
3. The penalty prescribed.
4. The facts and the mitigating and aggravating circumstances underlying the conviction.

[34] According to the evaluation process outlined by the Federal Court of Appeal, "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" (*Jayasekara*, above at para 44).

[35] These steps must be followed in order to correctly make the determination. In the present case, in addition to the erroneous finding relating to the cumulative liability of imprisonment described above, the RPD did not adequately deal with some of the above-mentioned factors.

[36] First, the RPD did not consider in any meaningful way the mode of prosecution. Instead, it merely referred to the mode of prosecution without giving more detail. The RPD should have considered, for example, whether the charges were indictable or summary. If they were summary, that would be a relevant factor in favour of the Applicant when considering the seriousness of his crimes.

[37] Second, it is important to highlight that the RPD did not consider the penalty imposed, as required by *Jayasekara*. The RPD merely noted that the Applicant had "received sentences in accordance with the USA Criminal Code." The penalty imposed for the four convictions was a two-year probationary sentence, but nowhere in the decision does the RPD discuss the impact of this penalty on its analysis. The penalty would also have been a relevant factor to consider when assessing whether or not the Applicant has rebutted the presumption of the seriousness of his crimes.

[38] Finally, concerning the RPD's examination of the mitigating or aggravating circumstances, it seems to have concluded that there were none. However, a basic reading of the facts of this case shows that the Applicant became addicted to painkillers as a result of an injury that occurred during a criminal gang fight. He cooperated with the authorities and was instrumental as a key witness for the Crown in the trial that led to the conviction of some of the criminal gang members who

participated in the fight. It is also noteworthy that the Applicant did not use weapons in committing the drug trafficking offence and that no serious injury resulted from the offence. The RPD's analysis would have been more complete had these factors been properly addressed.

[39] The analysis would also have been more complete if the RPD had canvassed the Applicant's pattern of criminal behaviour as part of its consideration of aggravating and mitigating factors.

[40] Had the RPD conducted a proper and complete analysis, it might have reached the same conclusion. However, the present decision is in error as it is manifest that the RPD concluded at the outset that the facts justified a "serious non-political crime" determination and then conducted an erroneous and incomplete analysis. In its reasoning, the RPD did not properly consider the language of Article 1F(b) of the Convention or the factors listed in *Jayasekara*, above to assess whether the Applicant committed a "serious non-political crime." These errors are of such importance that, in light of the standard of correctness applicable to the interpretation of Article 1F(b) of the Convention, the RPD's decision cannot stand. It shall therefore be quashed and the matter remitted to a different panel for a new hearing.

[41] The parties were invited to submit a question for certification but none were submitted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter will be referred to a new panel. No question will be certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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