Federal Court  Cour fédérale

Date: 20140228

Docket: IMM-3747-13

Citation: 2014 FC 199

Ottawa, Ontario, February 28, 2014

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

IKENNA UNACHUKWU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Are wife beaters welcome to apply for asylum in Canada? In a most thorough, well reasoned decision, Me Alain Bissonnette, of the Refugee Protection Division, of the Immigration and Refugee Board of Canada, held that Mr. Unachukwu was a person described in Article 1F(b) of *The United Nations Convention Relating to the Status of Refugees* and accordingly he is not an eligible Convention refugee or a person otherwise in need of Canada's protection, as set forth in

s. 98 of the *Immigration and Refugee Protection Act* [IRPA]. This is the judicial review of that decision.

[2] A preliminary point to be determined is whether the standard of review is reasonableness or correctness. Reasonableness is rebuttably presumed to be the standard in the review of a tribunal's home statute–*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, [2011] SCJ No 61(QL). However, one factor to take into account, as per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL) at para 62, is prior jurisprudence.

[3] In *Hernandez Febles v Canada (Citizenship and Immigration)* 2012 FCA 324, [2012] FCJ No 1609 (QL), Mr. Justice Evans, with whom Madam Justice Sharlow concurred, held that the standard of review in applying Article1F of the Refugee Convention was correctness. Mr. Justice Stratas, who concurred in the result, was of the view that it was not necessary on the facts of that case to determine which standard of review applied. An appeal to the Supreme Court is pending. In the case at bar, I am satisfied that the decision was both reasonable and correct.

I. The Law

[4] Section 98 of IRPA provides:

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.	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.

[5] Article 1F of the Refugee Convention provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: a. he has committed a crime against peace, a war crime, or	Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
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.

[6] Mr. Unachukwu, a Nigerian national, had been living for many years in the United States. He pled guilty to assaulting his common-law spouse, and another woman. This was not a political crime. There were clearly "serious reasons for considering" that he had committed a crime outside Canada prior to his arrival here.

[7] The Tribunal, basing itself on *Farkas v Canada (Citizenship and Immigration)*, 2007 FC 277, [2007] FCJ No 399 (QL) held that the standard of proof was more than a mere suspicion, but less than the civil standard of the balance of probabilities. This standard was recently

reiterated by the Supreme Court of Canada in *Ezokoval v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] SCJ No 40 (QL).

II. The Issues

[8] Mr. Unachukwu submits that there are two issues. The first is a breach of natural justice. He was self-represented, did not have a fair opportunity to make his case, and was subjected to unnecessarily vigorous cross-examination by the Minister's representative without the Tribunal coming to his aid. The second issue is that his crimes were not "serious" within the meaning of s. 98 of IRPA and Article 1F of the Refugee Convention. In point of fact, he says he did not even commit them.

III. Procedural Fairness

[9] There is no basis for the allegation that Mr. Unachukwu was not treated fairly. Given that he seemed to be unable to speak the truth, had been living under an alias, had failed to mention in his Personal Information Form that he had been living in the United States for many years and had been convicted of crimes there, it is hardly surprising that he was subjected to a vigorous examination. "[B]ut at the length truth will out." (Shakespeare, *The Merchant of Venice*) He chose to represent himself and has no cause for complaint (*Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206, [2004] FCJ No 1460 (QL).

IV. Is Wife Beating a Serious Crime?

[10] The gravity of Mr. Unachukwu's offences must be considered in the light of the record.

[11] The principal element of his criminal past in the United States is set out in a report by the Boston police in May 1999. According to their report:

> On arrival spoke to victim who stated her (…) boyfriend, & herself had an argument during which he became violent and began punching her in the face with a closed fist. He then threw her on to the ground, & began destroying the Department. Officers observed the victim's left eye to be swollen & bruised. There were broken blood vessels in the white of her left eye. Above her right eye officers observed her skin to be broken. She had scratches on both forearms. Victim refused medical attention. Victim further states the suspect tore the phone out of the wall & then threatened to kidnap their 3 year old son Ikenna Hunter (dob 3/1/96). The suspect then threw the victims 12 year old daughter, Shamae Bone, (dob 6/2/86) to the ground.
> Narrative for supplement number 1 written 05/28/1999 12:00 A.M.: On 5-28-99 at about 2:15 PM Detective Merengi received a phone call from A.D.A. Victor Tice stateing that a man wanted for beating his girlfriend and her daughter earlier in the day was at 85 Warren St. The Roxbury Court House. Detectives Marengi and Poggi obtained a copy of the original report and did respond to the Court House. Suspect was placed under arrest for A&B 209 A 2 counts, and destruction of Personal Property and was escorted to area B-2 for booking procedures.

[12] In what appears to be a plea bargain, a guilty plea was accepted with respect to the offence of assault and battery of his spouse under s. 13A of Chapter 265 of the *General Laws of Massachusetts* which provides:

> Section 13A. (a) Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not

> more than 21/2 years in a house of correction or by a fine of not more than $1,000.
>
> A summons may be issued of a warrant for the arrest of any person upon a complaint for a violation of any provision of this subsection if in the judgment of the court or justice receiving the complaint there is reason to believe that he will appear upon a summons.
>
> (b) Whoever commits an assault or an assault and battery:
>
> (i) upon another and by such assault and battery causes serious bodily injury;
>
> (ii) upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant; or
>
> (iii) upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault or assault and battery; shall be punished by imprisonment in the state prison for not more than 5 years or in the house of correction for not more than 21/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment.
>
> (c) For the purposes of this section, "serious bodily injury" shall mean bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

[13] Mr. Unachukwu was sentenced to 12 months probation.

[14] Quite apart from the guilty plea with respect to his common law spouse, he was also convicted in 2003 of assault and battery on another woman. He was sentenced to nine months in prison and six months probation, later extended by three months.

[15] He has also been charged but never convicted of, among other things, larceny, indecent exposure, violations of the *Abuse Prevention Act*, stalking in violation of an order and intimidation. Indeed, according to his rap sheet he was arraigned some 64 times.

V. The RPD's Decision

[16] The Tribunal correctly stated that the primary purpose of Article 1F(b) of the Refugee Convention is to ensure that perpetrators of serious non-political crimes cannot obtain international protection in the country in which they seek asylum. It correctly noted that the standard of proof is more than mere suspicion but less than the civil standard of the balance of probabilities, as mentioned above.

[17] In considering whether the crime was "serious", the Tribunal based itself on the decision of the Federal Court of Appeal in *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404, [2008] FCJ No 1740 (QL), which in turn took note of the UN Refugee Agency *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*.

[18] Paragraph 44 of *Jayasekara* reads:

> 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.

[19] *Jayasekara* was reaffirmed by the Federal Court of Appeal in *Hernandez Febles*, above.

[20] Points which do not directly pertain to this case, but bear mentioning, are that the facts that Mr. Unachukwu has served his sentence and is not a fugitive from justice is not relevant.

[21] For his part, Mr. Unachukwu denied everything. He simply pleaded guilty to get rid of matters. His spouse was an insane drunk, and the charge against him by the other woman is part of a deep conspiracy. It was reasonable for the Tribunal not to believe him. Another factor which is not relevant is whether the criminal has reformed, not that there is anything in this record to suggest Mr. Unachukwu has.

[22] It must be kept in mind that under Article 1F of the Refugee Convention, it is not necessary that a person be actually convicted. Nevertheless, if there were Court proceedings, they are a factor to be considered.

[23] The record does not indicate whether Mr. Unachukwu pleaded guilty under s. 13A(a) of the Massachusetts Law which provided for a maximum imprisonment of two and a half years; or

13A(b)(1) and (c). If the assault and battery causes serious bodily injury, meaning permanent disfigurement, loss or impairment of a bodily function, limb or organ or substantial risk of death, the maximum term of imprisonment is five years.

[24] The Minister proposed at the hearing before the Tribunal, and in this Court, that Mr. Unachukwu had only faced a maximum penalty of two and a half years. The Tribunal disagreed. It was of the view that Mr. Unachukwu had inflicted injuries upon his common law spouse that could seriously and permanently interfere with her health and comfort, and that these were aggravating circumstances. I am unable to say that the Tribunal's assessment in this regard was unreasonable.

[25] Had the offence against Mr. Unachukwu's common-law spouse occurred in Canada, s. 266 of the *Criminal Code* provides that anyone who commits an assault is guilty of an indictable offence liable to imprisonment for a term not exceeding five years, or is guilty of an offence punishable on summary conviction. On the other hand, if the assault caused bodily harm, s. 267 calls for an indictable offence subject to imprisonment not exceeding 10 years, or an offence punishable on summary conviction and liable to an imprisonment not exceeding 18 months.

[26] One of the principles in imposing a sentence, is that the offence is aggravated, if the abused was the offender's spouse or common-law partner (*Criminal Code*, s. 718.2(a)(ii)).

[27] As the Tribunal noted, for any number of reasons, a sentence may be light, but that does not detract from the seriousness of the crime.

[28] This domestic violence was serious, and is so considered in both Canada and the United States. If there are countries in which such violence is not considered serious, then those countries are sadly lacking in what is right and what is wrong, and do not reflect international standards.

VI. Disposition

[29] Although this application for judicial review is being dismissed, in accordance with *Hernandez Febles*, above, Mr. Unachukwu is entitled to a pre-removal risk assessment based on the factors set out in s. 97 of IRPA, but not those in s. 96.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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