Federal Court  Cour fédérale

Date: 20160830

Docket: IMM-963-16

Citation: 2016 FC 981

Ottawa, Ontario, August 30, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SAJID, MAHMOOD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Court concurs with the Refugee Protection Division [RPD] that the Applicant had misrepresented or withheld material facts relevant to his refugee protection claim. Therefore, it is for that misrepresentation that the Applicant's refugee protection is vacated.

[2] The RPD held that the omissions, or withholdings, were directly related to alleged current criminal activities and investigation in the United States. The RPD held that if it was not for the omissions, the outcome of the refugee protection claim might have been different as they are directly related to an exclusion for refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and article 1F*b*) of the *United Nations Convention Relating to the Status of Refugees*, Can TS 1969 No 6 [Convention].

II. Introduction

[3] This is an application for judicial review by the Applicant pursuant to subsection 72(1) of the IRPA of a decision by the RPD of the Immigration and Refugee Board of Canada, dated February 16, 2016, wherein the RPD allowed an application by the Minister of Public Safety and Emergency Preparedness [Minister] to vacate the Applicant's refugee protection pursuant to section 109 of the IRPA.

III. Background

[4] The Applicant, Mahmood Sajid (age 34), is a citizen of Pakistan. The Applicant was granted refugee protection by the RPD in a decision dated September 12, 2014. In that decision, the Applicant testified that he left Pakistan for the United States in January 2000 due to persecution based on his sexual orientation. He remained in the United States without status until he crossed the Canadian border on May 15, 2014. On June 13, 2014, he claimed refugee protection which was granted in September 12, 2014.

[5] On April 20, 2015, the Minister filed an application to vacate the decision for the Applicant's refugee protection, in accordance with section 109 of the IRPA [Application]. A hearing was held on July 14, 2015. In a decision dated February 16, 2016, the RPD allowed the Application.

[6] In the Application, the Minister submitted serious reasons for considering that the Applicant had committed serious non-political crimes in the United States prior to his admission to Canada as a refugee; hence, the Applicant was to be considered for exclusion from refugee protection in accordance with article 1F*b*) of the Convention and section 98 of the IRPA.

[7] On December 16, 2014, the Applicant was indicted by a Grand Jury of the United States District Court for the District of Maryland for: i) Conspiracy to Defraud the United States under 18 USC 371 by conspiring to export firearms and related accessories to Pakistan; ii) Unlawful Export of Defense in the Category I of the United States Munitions List under 22 USC 2778 from the United States to Pakistan without first obtained the required licenses or authorizations; and, iii) Unlawful Export of Goods 50 USC 1705 [Indictment]. The Minister submitted to the RPD that if committed in Canada, these offences would constitute:

a. Conspiracy of Exporting knowing it is unauthorized of a firearm, as described in paragraphs 465, 103(1)*a*) of the Canadian Criminal Code, punishable by a maximum term of 10 years imprisonment;

b. Export or attempt to export, as described at paragraphs 13 and 19 of the Export and Import Permits Act, punishable by a maximum term of 10 years imprisonment;

c. False or misleading information, and misrepresentation, as described at paragraphs 17 and 19 of the Export and Import Permits Act, punishable by a maximum term of 10 years imprisonment.

(Certified Tribunal Record [CTR], Application to Vacate Refugee Protection at para 10, pages 28-29)

[8] Moreover, the Minister submitted to the RPD that the Applicant obtained refugee status by directly or indirectly misrepresenting or withholding material facts in relation to his refugee protection claim. As such, in support of his refugee protection application, the Applicant answered "No" to two questions in regard to possible prior criminal activities in two different forms, signed on June 23, 2014. First, in the Schedule A – Background/Declaration form, he answered "No" to the question "Have you ever been convicted of, or are you currently charged with, on trial for, or party to a crime or offence, or subject of any criminal proceedings in any other country?" (see CTR at page 35). Secondly, in Schedule 12 – Additional information – Refugee Claimants Inside Canada form, he answered "No" to the question "Have you ever committed or been charged with or convicted of any crime, in any country, including Canada?" (see CTR at page 244).

IV. Impugned Decision

[9] In a decision dated February 16, 2016, the RPD allowed the Minister's Application to vacate the Applicant's refugee protection status. The RPD held that the Applicant directly or indirectly misrepresented or withheld material facts relating to his refugee protection claim.

[10] First, the Applicant withheld that he used an alias while living in the United States: Shawn Chudhary. The Applicant is referred to in the Indictment as "SAJID MAHMOOD, a/k/a Shawn Chudhary".

[11] Secondly, the Applicant withheld that he had been asked to voluntarily leave the United States. The Applicant's answer in the refugee claim form to which he wrote "No" to the question "Have you [ever] been refused admission to, or ordered to leave, Canada or any other country?". The RPD relied on a Report from US Homeland Security, dated October 7, 2014, which states that "a Warrant of Removal/Deportation was issued for MAHMOOD" (CTR at page 50).

[12] Thirdly, there is an inconsistency as to when the Applicant stopped to work at the pizza restaurant where the two other alleged co-conspirators worked. In his refugee claim forms, the Applicant stated that he had worked at the restaurant until May 2014. Conversely, in the vacation hearing, the Applicant stated that he stopped working in mid-February 2014. According to the Report from US Homeland Security, the co-conspirators were arrested in March 2014 for their participation in the smuggling of weapons accusation; and the Applicant fled prior to his arrest for immigration violations.

[13] Fourthly, the RPD held that the Applicant had misrepresented when he stated that he had not been aware of the investigation in his regard when he left the United States; and, that he was not unaware of the co-conspirators' arrests in March 2014. According to the Report from US Homeland Security, the investigation started in the fall of 2012. the RPD concluded that the Applicant was aware of the investigation into the alleged criminal activities in which he and the co-conspirators were implicated:

> The panel finds it likely that the true reason why the respondent left the United States when he did was because he was aware of the investigation into the alleged criminal activities. As such, when he claimed refugee protection in Canada and when he signed his refugee claim forms, the panel concludes that the respondent knowingly withheld the fact that he was aware that the American

> authorities were conducting an investigation into the alleged criminal activities in which he was allegedly involved in the United States.
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> (CTR at page 13, RPD's decision at para 48)

[14] The RPD held that the aforementioned omissions, or withholdings, were directly related to alleged current criminal activities and investigation in the United States. The RPD held that if it was not for the omissions, the outcome of the refugee protection claim might have been different as they are directly related to an exclusion for refugee protection pursuant to section 98 of the IRPA and article 1F*b*) of the Convention.

[15] Turning to the determination as to whether the Applicant is excluded from refugee protection, in accordance with section 98 of the IRPA and article 1F*b*) of the Convention, the RPD held that there were serious reasons for considering that the Applicant had committed serious non-political crimes in the United States prior to his admission to Canada as a refugee. The RPD relied on the Indictment, as well as the inconsistencies and contradictions made by the Applicant during the vacation hearing, to support its conclusion that the Applicant committed non-political crimes in the United States. The RPD agreed with the equivalencies suggested by the Minister as the RPD was of the opinion that the wording of the American and Canadian articles of law are similar; the equivalencies are regarding the same type of offences; and, both include the requirement of knowledge and intent.

[16] Applying the factors stated by the Federal Court of Appeal in *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*], the RPD concluded that the offences under subsections 103(1) and 465(1) of the *Criminal Code*, RSC 1985, c C-46, are

serious offences. The RPD relied on the fact that a conviction under subsections 103(1) and 465(1) of the *Criminal Code* could result in a person being found guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. The RPD noted that subsection 103(1) of the *Criminal Code* is not a hybrid offence which may be prosecuted summarily. The RPD found that there were no sufficient mitigating circumstances underlying the convictions to rebut the presumption that the alleged crimes are serious. Therefore, the RPD held that had the initial panel had been aware of the investigation, it would have found in favour of an exclusion pursuant to section 98 of the IRPA and article 1F*b*) of the Convention. Given its conclusions regarding the possible exclusion of the Applicant, the RPD held that it was not necessary to proceed with the analysis provided at subsection 109(2) of the IRPA.

[17] Consequently, the RPD allowed the Minister's application to vacate the Applicant's refugee protection.

V. Positions of the Parties

[18] The Applicant submits that the RDP's decision to vacate the Applicant's refugee protection is unreasonable as the RPD erred in finding that the initial panel would have found in favor of the exclusion, pursuant to section 98 of the IRPA and article 1F*b*) of the Convention, had it had been made aware of the investigation in the United States. As such, the Applicant submits that the RPD erred in its negative credibility findings, in accepting the equivalency of the infraction and in finding that there are serious reasons for considering that the Applicant has committed serious non-political crimes. Furthermore, the Applicant submits that the RDP erred

by failing to proceed with the second component of an application to vacate refugee protection as provided at subsection 109(2) of the IRPA.

[19] Conversely, the Respondent submits that the RPD's decision is reasonable as the RPD reasonably found that the Applicant had misrepresented or withheld material facts which were relevant to the refugee protection claim. The RPD reasonably held, based on the evidence, that there are serious reasons for considering that the Applicant has committed serious non-political crimes in the United States prior to his arrival to Canada as a refugee. The Respondent also submits that a vacation hearing is not a criminal hearing, hence, the fact that the evidence may fall short of the standard of the proof in criminal proceedings is irrelevant. Finally, the Respondent submits that it was reasonable for the RPD not to proceed to the second stage of the analysis under subsection 109(2) of the IRPA as the misrepresentation or withholding of material facts pertain to a possible exclusion under section 98 of the IRPA and article 1F*b*) of the Convention (*Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554; *Parvanta v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1146).

VI. Issues

[20] The Applicant submits that the following issues should be considered by this Court:

1) Did the RPD err in finding that the Applicant obtained refugee protection by misrepresenting or withholding material facts?
2) Did the RPD err in finding that there are serious reasons for considering that the Applicant committed the offence stated in the Indictment?

3) Did the RPD err by failing to conduct an analysis under subsection 109(2) of the IRPA?

[21] The Court is satisfied that the only issue that needs to be addressed is whether the RPD's determination that the non-political crimes for which the Applicant is indicted are serious.

VII. Standard of Review

[22] The parties disagree on the applicable standard of review. The Applicant submits that the interpretation and the application of section 98 and article 1F*b*) of the Convention are to be reviewed under the correctness standard of review (*Feimi v Canada (Citizenship and Immigration)*, 2012 FCA 325 at para 14 [*Feimi*]; *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at paras 24-25 [*Febles* (FCA)]). The Respondent does not dispute that the correctness standard applies to the interpretation by the RPD of article 1F*b*) of the Convention, however the Respondent submits that the standard of reasonableness applies to the RPD's findings of fact or a mix fact and law in a vacation proceeding (*Feimi*, above at para 16).

[23] Recently, in *B010 v Canada (Citizenship and Immigration)*, [2015] 3 SCR 704, 2015 SCC 58, the Supreme Court reiterated the principle that presumption exists that the standard of review of reasonableness applies to the interpretation by a tribunal and a Minister of a home statute (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 at para 34). The Supreme Court noted that the Federal Court of Appeal took different views regarding the standard of review applicable to statutory interpretation involving consideration of international instruments. In *Febles* (FCA), above, the

Federal Court of Appeal applied the correctness standard while in *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87, the Federal Court of Appeal applied the reasonableness standard. The Supreme Court held that as it was unnecessary to resolve this issue as such for the purpose of that decision. The same reasoning is applicable to the present case; regardless of the standard of review, the RPD's statutory interpretation of the relevant section is correct.

[24] Nonetheless, the RPD's determination that a non-political crime is serious attracts the standard of reasonableness (*Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 at para 28 [*Jung*]).

VIII. Analysis

[25] The RPD reasonably held that the Applicant misrepresented or withheld material facts relevant to his refugee protection claim as the RPD's findings are supported by the evidence. It has been stated on numerous occasions that the role of a review court is not to reweigh the evidence considered by the tribunal (*Canadian Artists' Representation v National Gallery of Canada*, [2014] 2 SCR 197, 2014 SCC 42 at para 30; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at para 64).

[26] Furthermore, on the basis of the evidence before the RPD, the RPD reasonably held that there are serious reasons for considering that the Applicant committed non-political crimes in the United States prior to his admission to Canada as a refugee. The RPD's equivalency findings are reasonable as the RPD did more than just identify the relevant provisions in the *Criminal Code* and the *Export and Import Permits Act*, RSC 1985, c E-19, and stated that they are sufficiently

similar (*Notario v Canada (Citizenship and Immigration)*, 2014 FC 1159). The RPD analyzed the provisions and explained how they share the same essential elements; consequently, the RPD's findings regarding equivalency are reasonable.

[27] In its analysis to determine whether the non-political crimes are serious, the RPD relied on the Federal Court of Appeal decision in *Jayasekara*, above. As explained by Justice Mary J.L. Gleason, then at the Federal Court, in *Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709 [*Tabagua*], the Supreme Court in *Febles v Canada (Citizenship and Immigration)*, [2014] 3 SCR 431, 2014 SCC 68, nuanced the presumption that a crime is serious if the offence is punishable by a maximum term of at least ten years of imprisonment:

> [14] Prior to *Febles*, as my colleague Justice de Montigny recently noted at para 32 of *Jung v Canada (Minister of Citizenship and Immigration)*, 2015 FC 464 [*Jung*], "… the presumption that a crime is 'serious' under Article 1F(b) if, were it committed in Canada, it would be punishable by a maximum of at least 10 years' imprisonment, was consistently applied by the Courts …". The Supreme Court, however, significantly nuanced this proposition in *Febles*. There, the majority stated as follows regarding how the seriousness of a crime is to be ascertained:
>
> > [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the *Canadian Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F (b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a

> presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (G. S. Goodwin-Gill, The Refugee in International Law (3rd ed. 2007), at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner. [Emphasis in original.]

(*Tabagua*, above at para 14)

[28] In its decision, the RPD did in fact rely heavily on the presumption that the crimes are serious as the *Criminal Code* provides that the maximum term of imprisonment for offences under subsections 103(1) and 465(1) of the *Criminal Code* are for a term not exceeding ten years. Nonetheless, the RPD did not stop its analysis there. The RPD considered the factors outlined in *Jayasekara*, above, as well as the surrounding documentary background of the alleged crimes; namely, that the Applicant had illegally shipped to Pakistan, without a permit, large quantities of “high caliber” firearms, firearm parts and accessories.

[29] The present case is distinguishable from both *Tabagua*, above, and *Jung*, above, wherein the Federal Court held that the RPD’s decisions were unreasonable as the RPD did not take into consideration the large sentencing range. In the present case, the RPD did not apply the ten-year rule in a mechanistic or unjust manner. Rather, the RDP took into consideration the context and

the circumstances surrounding the crimes for which the Applicant was indicted in the United States.

[30] Given the findings that there are serious reasons for considering that the Applicant committed serious non-political crimes in the United States prior to his admission to Canada as a refugee, the RPD did not have to proceed to an analysis under subsection 109(2) of the IRPA (*Omar v Canada (Citizenship and Immigration)*, 2016 FC 602 at para 49).

IX. Conclusion

[31] Consequently, the application for judicial review is dismissed.

JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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