Federal Court  Cour fédérale

Date: 20150826

Docket: IMM-863-15

Citation: 2015 FC 1015

[REVISED ENGLISH TRANSLATION]

Montréal, Quebec, August 26, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

LUIS TRINIDAD ESPINOSA REYES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated January 16, 2015, in which the RPD held that the applicant was neither a "Convention refugee" nor a "person in need of protection" within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27

(IRPA), on the ground that the applicant was subject to Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees*, signed in Geneva on July 28, 1951 (the Convention), by virtue of section 98 of the IRPA.

[2] For the reasons that follow, I am of the view that the RPD's decision must be upheld.

II. Background

[3] Section 98 of IRPA provides:

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.

[4] Article 1F(*b*) of the Convention states:

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 réfugiées ;

(Emphasis added.)

[5] The applicant arrived in Canada from Mexico on August 14, 2012. He made a claim for refugee status the following day.

[6] Before arriving in Canada, the applicant lived in the United States for several years and had a number of encounters with the California justice system. Despite his extensive legal troubles, only one incident is relevant to this decision. On April 29, 1996, the applicant and his spouse (Guadalupe Garcia) got into an argument. The argument degenerated to the point where the applicant punched his spouse several times in the presence of their minor children.

[7] The police report describes Ms. Garcia's injuries as follows:

> Garcia's upper lip was swollen and discolored. She had a large bump on the right rear side of her head . . . She had a scratch on her left cheek. She had scrapes and bruises on her lower back.

[8] While the applicant was beating his spouse, a neighbour heard Ms. Garcia screaming and asking that someone call the police, which the neighbour did. When the police arrived, the applicant escaped through his bedroom window.

[9] The applicant was arrested on May 7, 1996, and charged with "inflicting corporal injury on spouse" (section 273.5(a) of the *Penal Code of California*) and "endangering health of a child" (section 273a(b)). After plea bargaining, the applicant pleaded *nolo contendere* to the first charge (meaning that the charge was not contested), and the second charge was withdrawn. The applicant was then convicted and given a suspended sentence of eight months' imprisonment, as well as 36 months' probation, 104 hours of therapy to control his violent outbursts and various

fines. The applicant ended up spending 97 days in prison because he was unable to pay the $7,500 bond for his release before trial.

[10] Section 273.5(a) of the *Penal Code of California* reads as follows:

> Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment.

[11] The RPD held that the equivalent to this offence in Canadian law was paragraph 267(*b*) of the *Criminal Code*, RSC 1985, c C-46, which is uncontested. Paragraph 267(*b*) reads as follows:

Assault with a weapon or causing bodily harm	*Agression armée ou infliction de lésions corporelles*
267. Every one who, in committing an assault,	267. Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois quiconque, en se livrant à des voies de fait, selon le cas :
. . .	[…]
(*b*) causes bodily harm to the complainant,	*b*) inflige des lésions corporelles au plaignant.
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an	

> offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

[12] In its decision, the RPD concluded that there was a presumption that the crime committed by the applicant was serious since the offence, if committed in Canada, would have been punishable by imprisonment for a maximum term of at least ten years: *Canada (Citizenship and Immigration) v Nwobi*, 2014 FC 520 at para 6. The RPD noted that this presumption could be rebutted upon consideration of the following factors set out in *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404 (*Jayasekara*) at para 38:

- the nature of the act;
- the actual harm inflicted;
- the form of procedure used to prosecute the crime;
- the nature of the penalty for such a crime; and
- whether most jurisdictions would consider the act in question as a serious crime.

[13] Based on its analysis, the RPD concluded that it was a serious non-political crime and that the applicant was therefore excluded under section 98 of the IRPA and Article 1F(*b*) of the Convention.

III. Analysis

[14] It is common ground between the parties, and I agree, that the standard of review applicable to the analysis of the seriousness of a crime for the purpose of this judicial review is reasonableness: *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FC 238 at para 10.

[15] The parties also agree that the Federal Court of Appeal's decision in *Jayasekara* is a good authority for the presumption of the seriousness of a crime and the factors to be considered in rebutting the presumption. However, the applicant submits that the RPD did not take all of these factors into account. The applicant focuses on three errors.

[16] First, the applicant submits that the RPD did not recognize that the crime of which he was convicted had two levels of seriousness (both in Canada and California) and that his conviction fell under the less serious of the two. In California, there is the possibility of imprisonment "in the state prison for two, three, or four years" or "in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment." Similarly, prosecution in Canada under paragraph 267(*b*) of the *Criminal Code* may result in up to 10 years in prison or up to 18 months depending on the proceedings leading up to the conviction.

[17] The RPD failed to note that the applicant's file before the court in California was transferred from the Superior Court to the Municipal Court and that his prison sentence was served in the county jail. It also failed to note that the sentence of a maximum term of imprisonment of at least 10 years (which gave rise to the presumption of seriousness) applies

only to the most serious levels of offence defined in section 267 of the *Criminal Code*. The applicant submits that the presumption of seriousness should therefore never have been applied.

[18] The second error alleged by the applicant is that the RPD indicated several times in its decision (at paras 4, 23, 31, 32) that the applicant was convicted of both of the offences with which he was initially charged, when he was in fact convicted of just one, the second charge having been withdrawn. The applicant asserts that the RPD misapprehended the facts.

[19] The third error alleged by the applicant is that the RPD failed to acknowledge that the sentence of eight months' imprisonment imposed by the court in California was suspended. The applicant submits that this is another example of the RPD's misapprehension of the facts.

[20] As for the two levels of the crime of which the applicant was convicted, I see no error on the part of the RPD. Although one of the factors relevant to the rebuttal of the presumption of seriousness of a crime is "the form of procedure used to prosecute the crime", I am satisfied that the RPD was aware of these two levels (given that it reproduced section 273.5(*a*) of the *Penal Code of California* at para 31of its decision).

[21] The decision in *Canada (Citizenship and Immigration) v Lopez Velasco*, 2011 FC 627, cited by the applicant, is of no assistance to him. The Court indicated at para 46 of that decision that the "RPD was entitled to consider the hybrid nature" of the section relevant to the case. However, allowing the RPD to consider the fact that his mode of prosecution was the less serious is not the same as obliging it to make explicit reference to this in its decision.

[22] The respondent has drawn my attention to subsection 36(3) of the IRPA, which states that, for the purpose of determining whether a crime is sufficiently serious to justify denying access to Canada for serious criminality, the mode of prosecution is irrelevant. The respondent submits that the same principle should apply here.

[23] In my view, it was reasonable for the RPD to conclude that the crime committed by the applicant was serious even though the charge was prosecuted in the Municipal Court. The RPD was not obliged to make explicit reference to the mode of prosecution in California.

[24] As for the RPD's statements that the applicant was convicted of both of the offences with which he had initially been charged (instead of only one), I am of the view that the RPD did understand the facts and that this was simply a minor inaccuracy. The RPD clearly indicated at para 24 of its decision that one of the two charges had been withdrawn, and I am satisfied that this fact was kept in mind throughout the decision.

[25] As for the fact that the sentence of eight months' imprisonment imposed on the applicant was suspended, I am again of the view that the RPD properly understood the evidence. Despite the fact that the RPD did not mention this explicitly, I have no reason to believe that it was unaware that the sentence was suspended. I am satisfied that the RPD concentrated on the facts that were more central to its decision, such as the injuries sustained by Ms. Garcia.

IV. Conclusion

[26] I therefore conclude that the RPD did not make a sufficiently significant error to render its decision unreasonable. This conclusion is sufficient to dismiss the present application for judicial review.

[27] Before I conclude, I would like to address the applicant's argument that his crime was not serious. In particular, the applicant submits that this type of domestic dispute occurs in 40% of families, that Ms. Garcia was the one who had started it, that she was not the one who had called the police and that she had refused medical care (implying that her injuries were not serious).

[28] I do not know where to begin with this series of submissions. As a general comment, I agree with the respondent that these arguments demonstrate that the applicant has learned very little about conjugal violence since the 1996 incident.

[29] No domestic dispute, regardless of who started it, justifies beating one's spouse. The police report of the incident describes injuries indicative of serious violence, despite Ms. Garcia's refusal of medical care.

[30] The fact that a neighbour called the police after hearing Ms. Garcia's screams suggests that the reason she did not call the police herself was not that the [TRANSLATION] "argument" was not serious, but rather that she was in the process of being beaten, and therefore incapable of calling the police herself.

[31] The fact that the victim was the applicant's spouse is an aggravating circumstance: subparagraph 718.2(*a*)(ii) of the *Criminal Code*; *Unachukwu v Canada (Citizenship and Immigration)*, 2014 FC 199 at para 26. The fact that the applicant's minor children were present during the incident is another aggravating circumstance.

[32] The parties have not suggested any serious question of general importance warranting certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed.

2. No serious question of general importance is certified.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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