Federal Court  Cour fédérale

Date: 20180306

Docket: IMM-3482-17

Citation: 2018 FC 252

Ottawa, Ontario, March 6, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

LIKE MA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Like Ma, seeks judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c. 27 [*IRPA*], of a decision of the Refugee Appeal Division [RAD] on July 12, 2017. The RAD overturned the decision of the Refugee Protection Division [RPD] on January 17, 2017. The RPD found that the Applicant was not excluded under Article 1F(b) of the United Nations Convention Relating to the Status of

Refugees, *1951*, CTS 1969/6; 189 UNTS 150 [*Convention*]. The Applicant is asking the Court to grant the judicial review and remit the matter to a differently constituted panel.

II. The Facts

A. *Background*

[2] The Applicant is a citizen of China and is 37 years old. He has a high school diploma. The Applicant has a son (five years old) born in Vancouver.

[3] On the day of his testimony before the RPD, the Applicant described his involvement with the village council. The Applicant claimed that he found a job with the village council at a village fair and in 2004 started working as a security guard with the council. At the time he was 24 years old. Within a year, he was promoted by his boss to the position of sales manager. The Applicant's salary was then substantially increased, from $2,000.00/month to $4,000.00/month. The Applicant claimed that he asked private individuals in 2006-2007 to invest in a business conducted by his village council members. The Applicant was to have other individuals invest in an agricultural products wholesale company, with a promise of return on their investment. He did so, bringing in a total investment of around $500,000.00 (2.8 million RMB) from over 40 investors. However, apparently unbeknownst to him, the village council was just collecting the money and never intended on providing a return to the investors on their investment. When he realized that no returns were being issued, he refused to sell any further investments into the company and was threatened by his village council but escaped in 2007 to Wenzhou, China. While he was in hiding, the village council sent individuals to raid the Applicant's home.

[4] The Applicant testified that in 2010 the Chinese police came looking for the Applicant at his parents' home as they had a warrant for his arrest for the offense of embezzlement. The Applicant remained in hiding. In December 2011, the Chinese police arrested the Applicant's girlfriend. At that time the Applicant was living with his girlfriend in Dongguan, China. Upon learning of his girlfriend's arrest, the Applicant turned himself into police in 2012 and was detained. The Applicant submitted that his mother was able to obtain a deal with the village council to release him from detention if he was to falsely admit guilt and he would thereby receive a suspended sentence. The Applicant stated that the trial lasted only minutes, that there were no witnesses, that he did not ask for a lawyer and that the whole process consisted of the reading of the allegations and a sentence.

[5] On June 7, 2012, the Applicant was charged for misappropriation. On June 14, 2012, the Applicant was convicted of misappropriation or embezzlement in China as per sections 272(1) and 67(1) of the *Criminal Law of China*. The Applicant was sentenced to one and a half years imprisonment with a two year reprieve in exchange for pleading guilty to the crime. He completed his imprisonment sentence in June 2014 and his probation term ended in June 2016. Thus, he is no longer wanted by China.

[6] Upon having completed his sentence in 2014, he claimed the village council was pressuring him to start doing illegal activities again, and as a result went to the United States in April 2015. He returned to China shortly thereafter, in May 2015.

[7] The Applicant claimed he made an application for a Canadian visitor visa in December 2014 and August 2015, but was refused both visas for unknown reasons. The issue of participating in illegal activity resurfaced, and on December 19, 2015, the Applicant left China for the United States, entered Canada illegally, and made a claim for refugee protection.

[8] Upon arrival to Canada, the Applicant claimed refugee protection under sections 96 and 97(1) of the *IRPA*. On October 3, 2016, the Minister of Public Safety and Emergency Preparedness filed a notice of intention to intervene in the matter, stating that it believed that matters involving Article 1F(b) of the *Convention* were raised by the Applicant. The notice indicated that the Minister had serious reasons to consider the claimant had committed a serious, non-political crime of embezzlement in China in 2011 which, if committed in Canada, would constitute an offence under section 380 of the *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*]. The Minister indicated that, furthermore, this was an indictable offence as the amount of money involved exceeded $5,000.00 and the Applicant was, thus, liable for a term of imprisonment not exceeding 14 years.

[9] In its decision of January 17, 2017, the RPD found that: (1) the Applicant was not excluded under Article 1F(b) and that (2) the Applicant was a Convention refugee. More precisely, the RPD found that:

(1) The Applicant was not excluded under Article 1F(b) because the Minister had not met its burden of establishing that there was a serious reason to believe that the Applicant had committed a serious non-political crime before entering Canada,

namely fraud as per section 380 of the *Criminal Code.* The RPD determined that the offence did not meet the test for seriousness because:

(a) There was a lack of *mens rea*; and

(b) The judicial system in China was corrupt.

(2) The Applicant was a Convention refugee because:

(a) The Applicant was a credible witness, testifying in a straightforward manner and without omissions or contradictions;

(b) The Applicant had a well-founded fear of persecution by reason of political opinion; and

(c) State protection was not an option for the Applicant, nor was an Internal Flight Alternative, given that the persecution emanated from the state.

B. *Decision Under Review*

[10] On July 12, 2017, the RAD reversed the RPD's decision. Before the RAD, the Minister argued that the RPD had erred in mixed fact and law by determining that the Applicant was not excluded from Article 1F(b).

[11] The RAD overturned the RPD's decision for the following reasons:

(1) It was not in dispute that the offence for which the Applicant was charged in China contained elements which were equivalent to theft or fraud in Canada, both of which carried maximum sentences of 10 years or more and, thus, a presumption existed that the offence was to be presumed a serious crime;

(2) The evidence was sufficient to establish that the Applicant had committed a crime in China, and the RPD's only requirement was to determine the seriousness of the crime;

(3) The RPD's action in conducting a reassessment of the evidence was contrary to the IRPA and the guidance of the Federal Courts;

(4) The evidence supported the finding that the Applicant had participated in a complex fraud;

(5) There was no persuasive evidence that a corrupt judicial system had played a role in the Applicant's prosecution in China; and

(6) The Applicant was not a credible witness, given the Applicant's contradictions in his testimony, the embellishment of his statements and his inability to provide reasonable explanations.

III. Issues

[12] Having reviewed the parties' submissions, the Court finds that the issues and sub-issues can be organized as follows:

(1) Did the RAD reasonably undertake the analysis required to determine whether the presumption of seriousness applied?

(a) Was the RAD reasonable in deciding that an equivalency analysis was not required as part of the exclusion test under Article 1F(b)?

(b) Was the RAD reasonable in deciding that there existed a presumption that the offence committed in China was a serious crime under Canadian law?

(2) Did the RAD reasonably undertake the analysis required to determine whether the presumption of seriousness of the offence might be rebutted?

(a) Did the RAD reasonably assess the four factors established in *Jayasekara v Canada (Minister of Citizenship & Immigration)*, 2008 FCA 404, [2008] FCJ No 1740 [*Jayasekara*]?

(b) Was the RAD reasonable in determining that the RPD could not go behind the conviction in China, that is, reassess the conviction?

(c) Were the RAD's conclusions on corruption in the criminal judicial system in China reasonable?

(d) Was the RAD reasonable in deciding not to show deference to the RPD's credibility assessment?

IV. Standard of Review

[13] The Applicant submits that the standards of review are as follows:

(1) The interpretation of the test of Article 1F(b) is a question of law and, thus, is reviewable on a standard of correctness; and

(2) The application of the test of Article 1F(b) is reviewed on a standard of reasonableness.

[14] The Respondent submits that the standard of review is reasonableness.

[15] The appropriate standards of review are described in *Jung v Canada (Minister of Citizenship and Immigration)*, 2015 FC 464, 479 FTR 1 at paras 27-28:

> [27] There is no dispute between the parties as to the applicable standard of review. First of all, the question as to whether the Board erred in law by interpreting Article 1F(b) as precluding consideration of the Applicant's post-conviction rehabilitation and/or his present dangerousness is correctness. While there is a presumption that reasonableness is the applicable standard of review when a tribunal interprets its enabling statute, the presumption does not come into play in the case at bar because provisions of an international convention must be interpreted as uniformly as possible: *Febles FCA*, at para 24.
>
> [28] The determination of whether a non-political crime is serious, on the other hand, attracts a standard of reasonableness. The Federal Court of Appeal recently held in *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325 (FCA) (at para 16), a companion case to *Febles FCA*, that "[r]easonableness is the standard applicable when, as here, questions of law and fact are 'intertwined...and cannot be readily separated'".

[16] The RAD's interpretation of the seriousness test in Article 1F(b) was correct. The case law explains that the first step of the exclusion test is to determine whether the offence, had it been committed in Canada, would have been punishable by a maximum of at least 10 years' imprisonment. If yes, then the presumption that the offence is serious exists: *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 390 (CA), and *Jayasekara*.

[17] However, in *Hernandez Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, the SCC explained that the presumption should not be understood as a rigid presumption that is impossible to rebut.

[18] In *Jayasekara*, the Court explained that the second step is to determine whether this presumption is rebutted based on four factors: elements of the crime, mode of prosecution, penalty prescribed, and mitigating and aggravating circumstances.

[19] The RAD enunciated the two-step test in a similar fashion as follows:

> [10] The first step is to determine what possible sentence could have been imposed had the crime been committed in Canada.
>
> […]
>
> [11] The second step includes consideration of the following additional factors:
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> (i) The elements of the crime;
>
> (ii) The mode of prosecution;
>
> (iii) The penalty imposed;
>
> (iv) Any mitigating or aggravating circumstances underlying the conviction.
>
> [12] Under points (iii) and (iv) one would examine the penalty imposed in China in terms of the plea deal.

[20] Therefore, the issue before us is rather the application of the test to the facts. A reasonableness standard is applicable.

[21] As concerns the standard of review applicable to questions of credibility, the case law is clear that reasonableness is the appropriate standard (*Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 at para 24).

[22] Before assessing the reasonableness of the RAD's decision, it is important to recall what constitutes reasonableness as established by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 47:

> [47] [..] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] In *Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the SCC further described judicial revision on the standard of reasonableness:

> [14] It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in Dunsmuir when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

V. Statutory Provisions

[24] Article 1F(b) of the *Convention* provides for the definition of refugee as follows:

Article 1 Definition of the term "refugee"	**Article premier Définition du terme "réfugié"**
1F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	1F Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as	a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre

defined in the international instruments drawn up to make provision in respect of such crimes;	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.

[25] Section 2(1) of the *IRPA* provides that:

2 (1) The definitions in this subsection apply in this Act.	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
Refugee Convention means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule. (Convention sur les réfugiés)	Convention sur les réfugiés La Convention des Nations Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951, dont les sections E et F de l'article premier sont reproduites en annexe et le protocole afférent signé à New York le 31 janvier 1967. (Refugee Convention)

[26] Section 98 of the *IRPA* implements Article 1F into Canadian legislation:

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.

[27] Section 380(1) of the *Criminal Code* provides that:

Fraud	**Fraude**
380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,	380 (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or	a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;
(b) is guilty	b) est coupable :
(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or	(i) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans,
(ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars.	(ii) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, si la valeur de l'objet de l'infraction ne dépasse pas cinq mille dollars.

VI. Arguments

[28] The Applicant claims that the RAD erred in five ways in coming to its decision.

[29] First, the Applicant submits that the RAD erred in its equivalency analysis. The Respondent claims that no such equivalency analysis was required as part of the exclusion test under Article 1F(b) and bases its position on *Notario v Canada (Minister of Citizenship and Immigration,* 2014 FC 1159, [2014] FCJ No 1211.

[30] Second, the Applicant states that the RAD erred in its finding that the RPD could not go behind the conviction. The Respondent argues that the RAD was not required to conduct a reassessment of the offence.

[31] Third, the Applicant claims that the RAD erred by not showing deference to the RPD's assessment of credibility, since the RPD was in an advantageous position as opposed to the RAD. The Respondent submits that there are instances where the RPD is not in an advantageous position, and that the case before us constitutes one of those instances.

[32] Fourth, the Applicant submits that the RAD made an unreasonable finding about corruption in China. The Respondent argued that the RAD's finding that there was no evidence of corruption in this case was reasonable.

[33] Finally, the Applicant argues that the RAD erred by failing to conduct a proper analysis of whether the presumption of seriousness of the crime had been rebutted. In particular, the Applicant finds that the RAD did not consider the appropriate mitigating and aggravating factors, as set out in *Jayasekara*. The Respondent claims that the RAD's finding that the presumption had been rebutted was reasonable.

VII. Analysis

A. *Did the RAD reasonably undertake the analysis required to determine whether the presumption of seriousness applied?*

[34] The RAD properly enunciated the two-part test as established in *Jayasekara*. The issue before us is the application of the test by the RAD. The reasonableness standard is applicable.

(1) Was the RAD reasonable in deciding that an equivalency analysis was not required as part of the exclusion test under Article 1F(b)?

[35] The RAD was reasonable in deciding not to conduct an equivalency analysis. The jurisprudence suggests that the equivalency analysis is geared to inadmissibility for criminality (*Victor v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 979, 439 FTR 263 (Eng.) at paras 59-62). It is advisable to not mix the tests for issues of criminal inadmissibility with issues of exclusion under Article 1F(b).

(2) Was the RAD reasonable in deciding that there existed a presumption that the offence committed in China was a serious crime under Canadian law?

[36] The RAD was reasonable in concluding that the presumption of seriousness applied to the Applicant's offence in China. The RAD explained that the offence of misappropriation or embezzlement for which the Applicant was convicted in China was found under paragraphs 272(1) and 67(1) of the *Criminal Law of China*. It further found that under the *Criminal Code* the offence would be found in paragraph 380(1)(a), the offence in question involved over $5,000.00 and it would be an indictable offence. The RAD's analysis was intelligible as well as transparent and justifiable.

B. *Did the RAD reasonably undertake the analysis required to determine whether the presumption of seriousness might be rebutted?*

(1) Jayasekara Factors

[37] The RAD's conclusions, based on its assessment of the four *Jayasekara* factors and the Applicant's credibility, was reasonable. The burden of rebutting the presumption fell to the Applicant to establish, based on compelling and credible evidence, that there were no serious reasons for considering that the Applicant had committed a serious non-political crime before entering Canada (*Mugeresa v. Canada (Minister of Employment and Immigration)*, 2005 SCC 40 at para 114).

[38] Regarding the elements of the crime the RAD noted the following:

(1) The Applicant had participated in a complex fraud involving:

(a) Soliciting investors;

(b) Gaining their trust;

(c) Getting them to commit to investing;

(d) Having investors sign contracts; and

(e) Accepting investor complains and directing them to company principals for remediation.

(2) The Applicant's ongoing participation in the fraud;

(3) The number of investors directly attributed to the Applicant (approximately 40) as well as the financial implications of the fraud (approximately $500,000.00);

(4) The fact that the Applicant was convicted of the crime;

(5) The Applicant's willingness to continue his association with those involved in the embezzlement through his further business ventures after finishing his prescribed criminal sentence, despite his testimony that he feared these individuals would harm him; and

(6) Fraud under s 380 of the *Criminal Code* carries a maximum sentence of 14 years when the offence involves over $5,000.00 (s 380(1)(a)) and constitutes an indictable offence.

[39] Regarding the mode of prosecution, the RAD noted that the Applicant plead guilty in order to obtain a lighter sentence and, therefore, an extensive hearing with legal counsel was no longer required. The RAD found that, according to the Applicant's record and audio recording of the RPD hearing, the Applicant was not credible.

[40] Regarding the penalty, the Applicant was sentenced to one and a half years imprisonment with a two year reprieve in exchange for pleading guilty to the crime. The RAD properly viewed the sentence as lenient since the evidence showed that the Applicant's mother had persuaded the village council's lawyer to intervene and seek a lesser sentence, as well as to ensure his silence regarding the involvement of the principals of the company.

[41] The RAD found the Applicant's assistance to the authorities was limited and self-serving. The RAD also noted that fraud involving over $5,000.00 was an indictable offence under the *Criminal Code*.

[42] One must not consider the length or completion of a sentence in isolation. A lenient sentence does not diminish the seriousness of the crime (*Cabreja Sanchez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1130, [2012] FCJ No 1215).

[43] Regarding the mitigating and aggravating circumstances, the RAD properly considered the circumstances of the plea deal and arrangement with the village council. Past offence factors should not be taken into account in determining the seriousness of the offence (*Valdespino Partida v Canada (Minister of Citizenship and Immigration)*, 2013 FC 359, 430 FTR 197 (Eng.)

at para 11). I do not see the fact that the Applicant continued working with the village council after completing his sentence as extraneous to the offence (*Jayasekara*). The Applicant's continued involvement with the village council is also relevant in assessing the Applicant's fear of the village council.

(2) Was the RAD reasonable in determining that a reassessment of the evidence of the crime in China was inappropriate in the circumstances?

[44] The RAD's duty was to reasonably assess the *Jayasekara* factors along with the credibility of the Applicant. The RAD reasonably conducted an assessment of the credibility of the Applicant along with the four factors set out in *Jayasekara.* The RAD also gave the reasons for which it found the Applicant to be guilty of the offence. This is in conformity with *Valdes v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 1175, 2011 FC 959 at para 49.

[45] The RAD was transparent and intelligible in its justification and its conclusion falls within a range of possible, acceptable outcomes which are defensible on the facts and law.

(3) Where the RAD's conclusions on corruption in the criminal justice system in China reasonable?

[46] The RAD's determination that corruption in the judicial system was not an issue in this particular case is reasonable. The RAD considered Professor Yang's report and other evidence of the Applicant. The RAD noted that the evidence suggested the authorities in China were

investigating small scale corruption at local levels but the evidence failed to show any corruption in this particular case.

(4) Was the RAD reasonable in deciding not to show deference to the RPD's credibility assessment?

[47] The role of the RAD is to intervene when the RPD is wrong in law, in fact or in factual law (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 93, [2016] FCJ No 313 [*Huruglica*] at para 28). *Huruglica* explains at para 72 that:

> [72] […]If the RAD can identify an error in situations where, for example, a claimant was not found credible because his story was not plausible based on common sense, the RPD may have no real advantage over the RAD.

[48] At para 74 the Court goes further:

> [74] […]The RAD should be given the opportunity to develop its own jurisprudence in that respect; there is thus no need for me to pigeon-hole the RAD to the level of deference owed in each case [to the RPD].

[49] The threshold for the RAD to overturn the RPD's decision is low. The RAD only needs to find that the RPD's assessment was incorrect. Therefore, I am unable to find that the RAD's decision to substitute its own credibility assessment was unreasonable.

VIII. Conclusion

[50] For the above reasons, I would dismiss the application for judicial review. No question of general importance is certified.

JUDGMENT

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

No question of general importance is certified.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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