Federal Court Cour fédérale

Date: 20180828

Docket: IMM-548-18

Citation: 2018 FC 864

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 28, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

CARLOS SANTIAGO RODRIGUEZ CANDELARIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA] of a decision [Decision] rendered by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] on January 15, 2018,

according to which the applicant is not a refugee or a person in need of protection under section 98 of the IRPA because he is a person referred to in paragraph 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [Convention].

[2] For the reasons that follow, the application is dismissed.

II. Facts

[3] The applicant is a citizen of the Dominican Republic who arrived in the United States on April 24, 2007.

[4] On September 3, 2008, the applicant was arrested in Lawrence, Massachusetts, and charged with trafficking cocaine. He was detained until December 23, 2008, and released on condition that he appear in court on January 16, 2009. Due to his failure to appear and the fact that the indictment could not be served, an arrest warrant was issued against him by the Superior Court of Essex County, Massachusetts. The arrest warrant is still outstanding.

[5] On December 31, 2010, the applicant left the United States and reported to the Lacolle port of entry.

[6] On January 31, 2011, the applicant filed his claim for refugee protection. He claimed, without (providing details), that he feared an employer named Raymond Ayala believed he was arrested because of the applicant and that Mr. Ayala had uttered death threats against him.

[7] On March 7, 2011, in response to question 31 of his Personal Information Form (PIF), the applicant provided an account of his employment as a deliveryman for Raymond Ayala. His job was to deliver meals with the help of a taxi driver who was also working for Mr. Ayala. Mr. Ayala had asked him to pick up a package containing meals in a plastic bag at his home. The applicant was arrested by police when they discovered that the package contained 230 grams of cocaine. Subsequently, the police entered his apartment to search the premises and found equipment for processing/converting cocaine. The applicant did not know what to do. He tried to explain to the police that he did not know anything and was only an employee, but the police did not listen to him and he was arrested.

[8] The applicant claims that, after he was released from prison, he learned that Mr. Ayala was also being detained. Mr. Ayala was angry and believed that the applicant had reported him. He was allegedly assaulted and threatened by individuals who told him the beating was for Mr. Ayala. His family in the Dominican Republic was allegedly also threatened and went into hiding.

[9] On March 27, 2012, a representative of the Minister of Public Safety and Emergency Preparedness [MPSEP] intervened before the RPD and raised the exclusion under paragraph 1F(b) of the Convention on the grounds that the applicant was arrested in the United States for trafficking cocaine and that, had he committed the offence in Canada, he would be liable to imprisonment for life under paragraph 5(3)(a) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19.

[10] In February 2014, the MPSEP referred the applicant's case to the Immigration Division [ID] for investigation. On September 4, 2014, the ID ruled that there was insufficient evidence to establish that the applicant had committed an offence abroad, that it had not been proved that the applicant intended to traffic or knew about the trafficking, and that there was no evidence that the applicant was aware of the contents of the bag. Considering the event that occurred on September 3, 2008, the applicant was found to be admissible to Canada under subsection 36(1) of the IRPA. The Minister's representative did not appeal this decision.

[11] On January 23, 2015, the applicant's application for pardon, filed in February 2014, was granted by an immigration officer who found that the applicant was not inadmissible, based on the ID's decision. The officer also reminded the applicant that his admissibility to Canada would continue to be assessed while the application for permanent residence was being processed.

[12] On December 11, 2017, the RPD heard the applicant's claim for refugee protection. On January 15, 2018, the RPD found that the applicant was a person referred to in paragraph 1F(b) of the Convention.

III. Impugned decision

[13] Based on the evidence before it, the RPD concluded that there were serious reasons for considering that the applicant had committed a serious non-political crime outside Canada before filing his claim for refugee protection in Canada.

[14] The RPD declared that the applicant was a person referred to in paragraph 1F(b) of the *Refugee Convention*. Also, the applicant is not a Convention refugee or a “person in need of protection” under section 96 or subsection 97(1) of the IRPA, and is therefore excluded.

[15] The RPD dismissed the applicant’s allegations, which it did not find credible, considering that the applicant did not credibly demonstrate that he was a victim in this story. Also, the RPD relied on evidence that it characterized as reliable and trustworthy, such as the criminal docket of the Superior Court of Essex County in the United States indicating that the applicant was charged with trafficking cocaine. The RPD also relied on the fact that the applicant admitted at the hearing that he had drugs in his possession and worked for Mr. Ayala under the name of Yandiel Martinez.

IV. ISSUES

[16] The issues proposed by the applicant are as follows:

(1) Did the Commissioner properly evaluate the applicant’s testimony and credibility?

(2) Did the Commissioner properly assess the applicable burdens of proof?

(3) Did the Commissioner err in his analysis of the application of paragraph 1F(b) of the Convention?

(4) Did the Commissioner err in refusing to consider previous decisions rendered in the applicant’s immigration cases in Canada?

V. APPLICABLE STANDARDS OF REVIEW

[17] The parties agree that the applicable standard of review is reasonableness [*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraphs 54, 57, 62], except for the contention that the requirement for legal proof was misapplied, which the applicant first argued at the hearing, claiming that he should be evaluated on a standard of correctness.

VI. Analysis

[18] With respect to the second issue regarding the applicable burdens of proof, although the Court recognizes that the Commissioner seems to have incorrectly defined the burdens of proof in two proceedings, given the evidence and the decision as a whole, there was no error of assessment with respect to the appropriate legal tests. Furthermore, it is not clear whether the Commissioner was referring to the burden of proof imposed on the applicant to explain why he was in possession of cocaine, or the legal burden applicable to the final decision.

[19] With respect to the third issue, the applicant argues that the Commissioner erred in finding that the exclusion under paragraph 1F(b) of the Convention was applicable based on his judgment [TRANSLATION] "that the Minister's representative has discharged his burden and that there are serious reasons for considering that the applicant committed a serious non-political crime outside Canada, specifically cocaine trafficking, and that, had he committed the crime in Canada, he would be liable to imprisonment for life." [Emphasis added]

[20] The applicant contends that although committing a crime such as drug trafficking is presumed to be serious, the offence must be proved. In the applicant's case, no proof of the constituent elements of the offence (possession of the illicit substance and the intention to traffic the substance) has been demonstrated, citing *Jayasekara v. Canada (Citizenship and Immigration)*, 2008 FCA 404.

[21] The Court considers that it has never been argued that the constituent elements of the offence (possession of the illicit substance and the intention to traffic the substance) should be at issue because the applicant has claimed that he never committed the crime. According to his testimony, it was not his apartment, and he was delivering a package of take-out meals that, unbeknownst to him, contained cocaine. Due to his lack of credibility, the applicant failed to convince the Commissioner on these points. It therefore followed that he intended to traffic the drugs, and his guilt based on the other evidence indicated that he was involved in drug trafficking (his apartment contained drug production equipment and almost $2,000 in cash, etc.).

[22] With respect to the fourth issue, the Court agrees that it may seem unreasonable for two immigration courts, the ID and the RPD, to render two completely different decisions generally based on the same questions of fact. There is no question of the applicability of the principle of res judicata as argued before the Commissioner. The respondent abandoned this contention in its factum, arguing instead that the RPD had to consider the ID's previous decision rendered on September 4, 2014, declaring the applicant admissible to Canada following a review of the evidence and his credible testimony.

[23] The Court would agree with this submission if it thought that certain elements of the ID's decision were valid and not considered by the RPD. However, the reality is that the Minister conducted a more thorough cross-examination of the applicant and exposed numerous inconsistencies that were not mentioned or developed during the ID hearing. Ultimately, the question is whether the RPD's finding that the applicant was not credible and that his account was meaningless satisfied the test of reasonableness. Based on the Court's careful reading of the transcript of the RPD hearing, there is more than enough evidence to support its adverse credibility findings against the applicant, which provided the basis for its exclusion order.

[24] The foregoing findings also respond to the applicant's first argument that the RPD's assessment of the evidence was unreasonable, and in particular its adverse credibility findings against him. Among the many inconsistencies in the applicant's testimony, the Court intends to address the claim that counsel for the applicant misinterpreted the question as to whether the applicant was the occupant of the premises where highly probative evidence was found that the occupant was trafficking cocaine.

[25] Here the Court is addressing the respondent's reference to the applicant's testimony indicating that the expert in forensic linguistics he retained in the United States acknowledged that Mr. Rodriguez was abducted from his own apartment and taken to the police station. At the end of the hearing, counsel for the applicant argued that the Court had not been made aware of all the circumstances and that the expert's statements were based on the affidavit of the American police officers, which the applicant contradicted.

[26] However, after having read the affidavit more carefully, it is clear to the Court that the police affidavit was only cited for three very brief questions. After that, the expert indicated that [TRANSLATION] "Mr. Rodriguez's version of the events is not the same as the version in the police report," adding finally "about 20 minutes after he was first approached, Mr. Rodriguez stated that he was removed from his apartment and taken to a police station." [Emphasis added] There was also a range of other evidence showing that he was the occupant of the apartment.

[27] The expert's opinion could possibly support the argument that the police did not inform the defendant of his rights following his arrest in order to render inadmissible his statement that he was the occupant of the apartment, where the most compelling evidence of cocaine trafficking was located. Under the circumstances in which the applicant escaped to Canada to avoid his trial in the United States, where this evidence could have been properly considered, this issue is certainly not relevant before the RPD.

VII. Conclusion

[28] The application for judicial review is dismissed. No question is certified for appeal.

<u>JUDGMENT in IMM-548-18</u>

THE COURT'S JUDGMENT is that the application is dismissed, and no question is certified.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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