Federal Court  Cour fédérale

Date: 20191029

Docket: IMM-5279-18

Citation: 2019 FC 1353

Ottawa, Ontario, October 29, 2019

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ISAACK SHIEK MAGOYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Isaack Shiek Magoya (the "Applicant") seeks judicial review of a decision of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD"), confirming the decision of the Refugee Protection Division (the "RPD") that he is excluded from refugee protection by operation of Article 1 F (b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS no 6 (the "Convention").

[2] Article 1 F (b) is a schedule to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and is incorporated by reference. That Article provides as follows:

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 réfugiés;

[3] The Applicant is a citizen of Somalia. He entered Canada from the United States of America in July 2017 and sought refugee protection, pursuant to the provisions of the Act.

[4] The Applicant, while residing in the United States, was the subject of several criminal charges, including charges of battery and domestic assault. The RPD considered the Applicant to be excluded from refugee protection in Canada on the basis of Article 1 F (b) of the Convention.

[5] Upon appeal to the RAD, the Applicant requested an oral hearing. He did not seek to admit new evidence and his request for an oral hearing was denied.

[6] In its decision, the RAD said that the Applicant had failed to submit "full and detailed" submissions about alleged errors by the RPD. At paragraph 8 of its decision, the RAD said the following:

> The appellant has failed to do so. The appellant has instead provided some very general and seemingly 'cut and paste'

> submissions without applying them to specific analysis or findings of the RPD. It is not the role of the RAD to speculate as to the RPD's errors and/or to undertake a microscopic search for errors. Further, the role of the RAD is not to provide the appellant a "second chance" to present a claim. [Emphasis in original.]

[7] The RAD otherwise confirmed the decision of the RPD, after describing elements of the Applicant's criminal history.

[8] The Applicant now argues that the RAD erred in its decision by failing to conduct its own assessment of the seriousness of his offences, as discussed in *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, [2009] 4 F.C.R. 164. He also submits that the RAD erred by shifting the burden from the Minister of Citizenship and Immigration (the "Respondent"), to show why the exclusion should apply, to him, to show why it should not apply.

[9] The Respondent argues that the arguments raised by the Applicant in this application were not presented to the RAD and cannot now be raised before the Court upon the application for judicial review.

[10] Further, the Respondent argues that the RAD did conduct its own analysis and reasonably found that the exclusion finding was reasonable.

[11] The first matter to be considered is the standard of review.

[12] For any issue of procedural fairness, the standard of correctness will apply; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[13] The substantive decision of the RAD is reviewable on the standard of reasonableness; see the decision in *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325 at paragraph 16.

[14] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[15] The RAD criticized the Applicant for not having set out specific details as to how the RPD had erred. In my opinion, the sufficiency of the Applicant's Notice of Appeal is not the dispositive issue in this application for judicial review.

[16] The copy of the Notice of Appeal contained in the Certified Tribunal Record (the "CTR") does not refer to specific grounds of appeal. However, the Memorandum filed on his behalf before the RAD set out the Applicant's argument that the RPD had failed to consider the Article 1 F (b) exclusion "in the proper manner that jurisprudence has laid out."

[17] This is a clear and unambiguous allegation of error by the RPD.

[18] The RAD's reference to the decisions in *Febles v. Canada (Citizenship and Immigration)*, [2014] 3 S.C.R. 431 and *Jayaserkara, supra* imply that the RAD understood the

basis of the Applicant's appeal, that is error by the RPD in the manner it reached its decision on the basis of Article 1 F (b) of the Convention.

[19] The decisions in *Febles, supra* and *Jayaserkara, supra* teach that before reaching a conclusion on the basis of Article 1 F (b), the decision maker is to assess the seriousness of a crime. I refer to paragraph 44 of the decision in *Jayaserkara, supra*, where the Court said the following:

> **44** 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; S. & Ors v. Secretary of State for the Home Department,* [2006] EWCA Civ 1157*; Miguel-Miguel v. Gonzales,* 500 F.3d 941 (9th Cir. 2007), August 29, 2007, at pages 945 and 946-947. 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 (Minister of Citizenship and Immigration),* [2005] 1 F.C.R. 304 (F.C.A.), at paragraph 38; *Immigration and Naturalization Service v. Aguirre-Aguirre*, at page 427; *T. v. Secretary of State for the Home Department*, [1995] 1 W.L.R. 545 (C.A.), at pages 554-555; *Dhayakpa v. Minister of Immigration and Ethnic Affairs*, at paragraph 24.

[20] The RAD did not deal with the tests set out in *Jayaserkara, supra*. In my opinion, this failure makes its decision unreasonable, within the meaning of the test in *Dunsmuir, supra*.

[21] In the result, the application for judicial review is allowed, the decision of the RAD is set aside and the matter is remitted to a differently constituted panel of the RAD for re-determination.

[22] It is not necessary to address the other argument raised by the Applicant.

[23] There is no question for certification arising.

JUDGMENT in IMM-5279-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of Refugee Appeal Division is set aside and the matter is remitted to a differently constituted panel of the Refugee Appeal Division for redetermination.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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