Federal Court  Cour fédérale

Date: 20220201

Docket: IMM-3326-20

Citation: 2022 FC 113

Ottawa, Ontario, February 1, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

OLUWAFEMI SAMUEL AYORINDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a Nigerian citizen. The Refugee Protection Division [RPD] excluded him from refugee protection on the ground that he had committed a serious non-political crime outside of Canada.

[2] The Applicant applies under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the RPD's July 8, 2020 decision. He argues the RPD decision is unreasonable for two reasons. First, he submits the RPD erred in its evaluation of the seriousness of the crimes. Second, he submits the RPD erroneously relied on his post-crime conduct in considering the seriousness of the offences (namely, that the Applicant returned to Nigeria from the United States to avoid prosecution). The Respondent argues the RPD reasonably concluded the Applicant was excluded from refugee protection.

[3] I am of the view that the RPD erred in assessing the seriousness of the crimes and that this is determinative of the Application. As explained below, I am of the opinion that the RPD was required to consider where on the sentencing spectrum the Applicant's sentence may have fallen had he been convicted. The RPD's failure to do so renders the decision unreasonable.

II. Relevant Law and Jurisprudence

[4] Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* and section 98 of the IRPA exclude an individual from refugee protection where that individual has committed a serious non-political crime outside of Canada:

United Nations Convention Relating to the Status of Refugees	***La Convention de 1951 relative au statut des réfugiés***
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 :
[…]	[…]

(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 […]
***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des refugies*, LC 2001, c 27**
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.

[5] Paragraph 36(1)(c) of the IRPA recognizes a crime committed outside of Canada as involving "serious criminality" where, if the crime were committed within Canada, it would be punishable by a maximum prison sentence of 10 years or more:

Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for […]	**36. (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants : […]
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

> by a maximum term of imprisonment of at least 10 years.

[6] In considering the issue of exclusion, the jurisprudence requires that a decision maker engage in a two-step process. First, the decision maker must determine whether the offence, had it been committed in Canada, would have been punishable by a maximum of at least 10 years' imprisonment. Where this is established, a rebuttable presumption arises that the offence is serious. However, that presumption may be rebutted upon consideration of the factors identified in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*]. These factors are: (1) the elements of the crime; (2) the mode of prosecution; (3) the penalty prescribed; and (4) any mitigating or aggravating circumstances (also see *Ma v Canada (Citizenship and Immigration)* 2018 FC 252 at paras 16-18, where Justice Paul Favel helpfully summarizes the jurisprudence).

III. Background

[7] In 1994, the Applicant used a visitor visa to enter the United States with a genuinely issued Nigerian passport but under an assumed name. In January 1997, he was arrested on three felony charges relating to counterfeit and fraud. The Applicant failed to appear for his pre-arraignment in the United States, having returned to Nigeria in March 1997. A warrant for his arrest (under his alias) remains outstanding in the United States.

[8] The Applicant re-entered the United States in 2002 as a permanent resident. He again used a genuinely issued Nigerian passport with a second alias. The Applicant then returned to

Nigeria in 2012, his application for naturalization in the United States having been denied on the basis of fraud and misrepresentation.

[9] The Applicant then departed Nigeria for Canada, reporting that he feared persecution in Nigeria on the basis of sexual orientation. He entered Canada on May 22, 2012, using a Nigerian passport with a third alias. He filed a claim for refugee protection on July 18, 2012.

IV. Decision under Review

[10] The Applicant testified during the RPD hearing that he committed the crimes for which he had been charged in the United States in 1997. The RPD found the crimes charged also constitute offences in Canada, each punishable by maximum prison sentences of 10 years or more (sections 380(1), 366(1) and 367, and 403(1) of the *Criminal Code of Canada* [Criminal Code]: Fraud (over $5,000), Forgery and Identity Fraud respectively). This established the presumption of serious criminality.

[11] The RPD then undertook a consideration of the factors identified by the Federal Court of Appeal in *Jayasekara*.

[12] In addressing the elements of the crimes and the mode of prosecution, the RPD noted the Applicant had not been prosecuted in the United States, having returned to Nigeria, but that he had been charged with three felony counts rather than misdemeanours. The RPD found it could not assess the penalty prescribed because the Applicant had not been convicted.

[13] The RPD considered the surrounding facts and found the Applicant had committed the crimes of his own free will at the age of 30 and the crimes had been committed for economic reasons. Participation in an organized criminal group and having profited from the crimes were identified as aggravating factors. The RPD declined to account for the Applicant's lack of criminal history since 1997 as a mitigating factor but acknowledged the non-violent nature of the crimes as a mitigating factor.

[14] The RPD concluded the circumstances did not rebut the presumption of serious criminality and decided there were serious reasons to consider that the Applicant had committed a serious non-political crime outside of Canada.

[15] The RPD addressed the Applicant's numerous aliases and found they prevented the RPD from establishing his real name on a balance of probabilities. However, the RPD was satisfied the Applicant was the same individual who engaged in the criminal activity in the United States.

V. Standard of Review

[16] The parties agree that the issues raised in the Application are reviewable on a reasonableness standard (*Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 at para 28 [*Jung*]). A reasonable decision is based on "an internally coherent and rational chain of analysis" and must be justified in relation to the facts and law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]). In conducting a reasonableness review, a reviewing court is expected to consider both the outcome and the reasoning process leading to that outcome (*Vavilov* at para 87).

VI. Analysis

A. *The RPD erred in failing to consider where in the sentencing range the Applicant's criminal conduct would fall when assessing if the presumption of serious criminality had been rebutted*

[17] The Applicant submits the crimes in issue engage a large potential sentencing range. The crimes of Forgery and Identity Fraud prescribe maximum sentences of 10 years' imprisonment each and Fraud over $5,000 carries a maximum sentence of 14 years. All encompass a broad range of potentially culpable conduct. Fraud over $5,000, in particular, encompasses conduct involving amounts of $5,000 to $1,000,000 before the minimum punishment provision of a two-year term of imprisonment is triggered (*Criminal Code*, subsection 380(1.1)).

[18] In this case, the Applicant was charged with offences involving amounts in the range of $8,000 USD. The Applicant submits that in assessing whether he had engaged in serious criminality, and in the absence of a conviction and sentence, the RPD was required to consider if the Applicant would have received a sentence at the low, medium or high end of the spectrum if convicted of the offences.

[19] The Respondent submits the RPD did not err. The RPD canvassed the factors prescribed by *Jayasekara* and, while not explicitly addressing the sentencing ranges for the crimes in issue, there is no indication that the RPD was unaware of the wide sentencing spectrums. The Respondent further argues there is nothing to guarantee that the Applicant would have received a sentence at the lower end of the spectrum because the monetary value involved is only one factor to be considered in sentencing. Finally, the Respondent argues the jurisprudence the Applicant

relies on is distinguishable. All relevant elements of the Applicant's criminal conduct were considered and assessed and the RPD reached a reasonable finding on serious criminality.

[20] The Supreme Court of Canada has stated that when a claimant's crime fell or would fall at the low end of a wide Canadian sentencing range, that claimant should not be presumptively excluded by Article 1F(b) (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 62 [*Febles*]).

[21] *Jayasekara* recognizes that sentencing and the circumstances surrounding the commission of an offence are relevant factors when assessing whether the presumption of serious criminality is rebutted. In the absence of a sentence, the *Jayasekara* factors do not, exclude consideration of where within a sentencing range the conduct may fall. As noted above, the Supreme Court has held that conduct that would result in a sentence at the low end of the spectrum is relevant in assessing the seriousness of a crime (*Febles* at para 62).

[22] This Court has recognized that the crime of Fraud over $5,000 has a large sentencing range of 0-14 years and that claimants whose crimes would fall at the low end of that spectrum are entitled to have this fact considered by the RPD (*Jung* at paras 48-49). This Court has also found, citing *Febles*, that a decision maker errs in its seriousness evaluation when it looks "only to the maximum potential sentences" and fails to "meaningfully grapple" with whether a claimant's sentence would fall at the lower end of a large sentencing range (*Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709 at paras 15-16; *Lin v Canada (Citizenship and Immigration)*, 2021 FC 1329 at paras 32-33).

[23] The Respondent argues the jurisprudence is distinguishable on the basis that none of the *Jayasekara* factors were overlooked by the RPD in this instance. I disagree. Those factors must be considered in light of the jurisprudence that has followed. Where no sentence has been imposed and there is a wide sentencing range available, *Febles* requires a consideration of where in the sentencing range a claimant's impugned conduct might fall. While I agree with the Respondent's submission that many factors will influence a sentence, this does not alleviate the RPD of its obligation to grapple with whether a claimant's conduct would result in a sentence at the low end of a wide sentencing range.

[24] The Respondent argues that the decision does not demonstrate the RPD was unaware of the wide sentencing range. This does not excuse a potentially deficient decision on the reasonableness standard. Reasonableness review is focused on the reasoning process as well as the outcome. The failure to expressly address an issue central to the matter before the decision maker will undermine the reasonableness of the decision. This has occurred here.

[25] The above-cited jurisprudence required the RPD to consider and address whether the Applicant's sentence would fall at the lower end of a large sentencing range. The failure to do so renders the decision unreasonable.

B. *The RPD did not rely on post-offence conduct in considering the seriousness of the offences*

[26] The Applicant submits the RPD considered his post-offence conduct (his flight from the United States) in assessing the seriousness of the crimes. I disagree.

[27] The RPD expressly recognized that the assessment of the seriousness of the crimes was not to include anything subsequent to the commission of the offences or factors extraneous to the commission of the offences. In detailing the facts surrounding the crimes, the RPD noted the Applicant returned to Nigeria to avoid prosecution in the United States. The return to Nigeria is not identified in the section of the decision that addresses the mitigating and aggravating circumstances underlying the offences.

[28] Reading the RPD's decision as a whole and in context, as I must, I am satisfied that the reference to the return to Nigeria was included for reasons of context but was not relied upon to assess the seriousness of the crimes.

VII. Conclusion

[29] The Application is granted. The parties have not identified a question for certification and none arises.

JUDGMENT IN IMM-3326-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision maker.

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3326-20
STYLE OF CAUSE:	OLUWAFEMI SAMUEL AYORINDE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 13, 2022
JUDGMENT AND REASONS:	GLEESON J.
DATED:	FEBRUARY 1, 2022

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