Federal Court  Cour fédérale

Date: 20221123

Docket: IMM-13-20

Citation: 2022 FC 1612

Toronto, Ontario, November 23, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

ZBIGNIEW SIWAK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant filed an application for judicial review, asking the Court to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the "RPD") that vacated his status as a Convention refugee in Canada.

[2] The applicant submitted that the RPD's decision dated December 9, 2019, was unreasonable under the principles described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the following reasons, the application is dismissed.

I. Background

[4] The applicant is a citizen of Poland and is of Roma ethnicity. He was granted refugee status in Canada in January 2001.

[5] By application filed on July 24, 2012, the Minister of Public Safety and Emergency Preparedness applied to the RPD to vacate the applicant's refugee status under section 109 of the *Immigration and Refugee Protection Act* (*"IRPA"*).

[6] The Minister's application alleged that the applicant misrepresented material facts concerning a matter relevant to his application for refugee status. The Minister alleged that the applicant denied having been arrested, charged or convicted of a criminal offence in any place, or detained or jailed at any time. The applicant did not disclose that he had been convicted of one or more serious non-political crimes he committed in Poland and that he had been incarcerated for those crimes.

[7] Eventually, after various delays, adjournments, procedural issues and a consent Judgment setting aside an earlier decision on the Minister's application, the RPD allowed the Minister's application by decision dated December 9, 2019 (the "Decision").

[8] The RPD found that the applicant's Convention refugee status was obtained as a result of misrepresentations and the withholding of material facts relating to exclusion under section 98 of

the *IRPA* and Article 1F(*b*) of the Convention. The RPD determined that the applicant had committed serious non-political crimes outside Canada.

[9] The RPD referred to a European Arrest Warrant issued by Poland for the applicant dated December 8, 2006, in respect of two final and binding court judgments. The judgments imposed a custodial sentence of 4 years. The applicant had not yet served 2 years and 7 months of that incarceration.

[10] The RPD described the applicant's "criminal history" as follows:

> 1. On September 21, 1991, the [applicant], while under sentence for an earlier judgment of two years for break and enter, was found guilty of assault and theft.
>
> 2. On October 22, 1991, the [applicant], having previously been sentenced to three months imprisonment for insulting a public functionary in connection with the performance of his duties, committed an assault on two police officers using incapacitating gas.
>
> 3. On January 26, 1993, the [applicant] was sentenced to a period of four years imprisonment. During his sentence, he obtained leave from the penitentiary and did not return, remaining at large.
>
> 4. The Warrant includes a sentence order from the Court of Appeal in Paznan wherein the sentence was upheld and the [applicant] was ordered to pay legal costs.

[11] The RPD found that the applicant admitted that he intentionally failed to provide his history of criminal activities and convictions to Citizenship and Immigration Canada and the RPD panel that granted his application for refugee status.

[12] The RPD referred to the parties' positions, the robbery provision in section 344 of the *Criminal Code*, and to passages from *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 and *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164, which set out the analytical process for determining whether the applicant had committed a "serious" non-political crime. The RPD advised that it had "considered the elements of the robbery offence, the mode of prosecution and the penalty prescribed in combination with mitigating and aggravating factors".

[13] The RPD found that the facts did not support the applicant's submission that the justice system in Poland was discriminatory towards people of Roma ethnicity and that he was wrongfully convicted of robbery. There was no persuasive evidence suggesting that the conviction was wrongful, or that the term of imprisonment was longer than expected had the applicant not been Roma.

[14] The RPD did not consider the applicant's evidence that he was mistreated or abused in prison and his subsequent health issues in Canada, as that evidence did not "speak to the commission of the criminal offences, as required by *Febles* in the determination of a vacation application."

[15] The RPD was satisfied that the Minister met the standard of proof for establishing that there were serious reasons for considering that the applicant has committed a serious non-political crime prior to coming to Canada and that he knowingly concealed this evidence when claiming refugee protection. Had the applicant not withheld material facts related to his history

of criminality and the conviction, the panel at the initial refugee hearing would have found that he had committed serious non-political crimes in Poland and that he was excluded from obtaining refugee protection under *IRPA* section 98 and Article 1F(*b*) of the Convention.

[16] The applicant now seeks judicial review of the RPD's Decision.

II. Standard of Review

[17] The parties both correctly made submissions on the basis that the applicable standard of review is reasonableness. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28- 33. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

III. Analysis

[18] The applicant raised several challenges to the reasonableness of the Decision, which I will address in turn.

A. Alleged Failure to Follow *Febles* and *Jayasekara*

[19] The applicant submitted that the RPD failed to follow the requirements set out in *Febles* and *Jayasekara*. Specifically, the applicant contended that the RPD failed to carry out a "contextualized" assessment of the circumstances of his convictions in Poland. According to the applicant, such an assessment would show that his offence was not "serious" for the purposes of Article 1F(b).

[20] The applicant relied on the following passage from the Supreme Court's decision in *Febles*, at paragraph 62:

> [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(*b*) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill and McAdams, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.
>
> [Emphasis added.]

[21] The applicant's position was that the circumstances surrounding the commission of the crime should be taken into account when assessing whether it was "serious". The applicant maintained that, in this case, the RPD had to conduct a full analysis of the applicant's testimony at the RPD (which included his position that the police fabricated his involvement in the robbery), the country condition evidence about systemic discrimination against Roma people by Polish police, and medical and health evidence consistent with his allegations of ill treatment by authorities while incarcerated.

[22] The applicant also argued that, contrary to *Febles*, the RPD Decision took a mechanistic approach in relation to sentencing factors, particularly the presumption of seriousness arising from an offence which, if committed in Canada, would attract a maximum punishment of 10 years imprisonment or more.

[23] The respondent's position was that the RPD properly applied the requirements in *Febles* and *Jayasekara* and that the applicant was seeking to re-litigate his convictions in Poland. The respondent maintained that the RPD considered and rejected the applicant's arguments about discrimination against Roma people, and that the RPD followed *Febles* in declining to consider certain evidence after or unrelated to the commission of the offence. The respondent noted that *Febles* expressly listed wounding and armed robbery as examples of "serious" crimes for the purposes of Article 1F(*b*).

[24] For the following reasons, I am not persuaded that the Decision contained a reviewable error.

[25] With respect to the applicant's submission about the RPD's alleged "mechanistic" approach, the RPD's Decision expressly recognized that the "Supreme Court of Canada has warned against a mechanistic application of the [10-year] presumption". The Decision expressed the view that a:

> … contextualized approach, as set out in *Febles* should be considered by the Panel, as follows:
>
> > the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, **decontextualized**, or unjust manner.
>
> In consideration of the factors set out in *Jayasekara/Febles*, the Panel has considered the elements of the robbery offence, the mode of prosecution and the penalty prescribed in combination with mitigating and aggravating factors.
>
> [Emphases added by the RPD. Footnote omitted.]

[26] The applicant did not identify a legal error in the passage quoted above. The RPD's reasoning here suggests that it was sensitive to avoiding a mechanistic approach and sought to conduct a contextualized assessment of the seriousness of the crimes.

[27] The Decision then addressed the applicant's submissions that he was wrongfully convicted of robbery and suffered from discrimination in the justice system in Poland. The RPD disagreed with both submissions on the evidence, noting that the applicant was represented by legal counsel and unsuccessfully appealed his conviction in Poland. It also noted that there was no evidence to suggest that the sentencing was different for the applicant than for a non-Roma individual.

[28] The RPD disagreed with the applicant's position on the evidence – which was the same position he took on this application to the Court. However, the applicant's submissions do not demonstrate that the RPD failed to appreciate his key arguments or the evidence in a manner that would permit this Court to intervene. This Court is not permitted to re-weigh the evidence; nor is it allowed to assess the matter *de novo* or come to its own conclusions: *Vavilov*, at paras 75, 83, 116 and 125-128.

[29] The applicant submitted that the RPD erred in law when it declined to consider the applicant's evidence of mistreatment while in prison in Poland and his later health issues while in Canada. The applicant argued on this application that this evidence supported (or was consistent with) his evidence about the circumstances that led to his convictions.

[30] In *Febles*, the Supreme Court did not accept that the individual's "current situation, including rehabilitation, expiation and current dangerousness" could be considered. Speaking for a majority of the Supreme Court, McLachlin CJ concluded that "only factors related to the commission of the criminal offences can be considered, and whether those offences were serious within the meaning of Article 1F(*b*)": *Febles*, at para 6. At paragraph 60 of *Febles*, Chief Justice McLachlin concluded:

> Article 1F(*b*) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.
>
> [Emphasis added.]

[31] After quoting that passage in *Febles*, this Court in *Jung* found that events post-dating the crime and arguments unrelated to the crime and conviction were not relevant in the Article 1F(*b*) analysis: *Jung v Canada (Citizenship and Immigration),* 2015 FC 464, at paras 41-42. Justice de Montigny concluded that to the extent the RPD did not consider that the applicant had served his sentence, had been rehabilitated and posed no danger to the public, the RPD made no error.

[32] Applying the reasoning in *Febles* and *Jung*, the RPD made no reviewable error in this case. The evidence of the applicant's mistreatment in prison in Poland did not concern the commission of the crime itself – that is, the events or circumstances of the robbery that led to his conviction. The evidence of his health issues after arriving in Canada long post-dated the crimes and convictions.

[33] At the hearing in this Court, the applicant submitted that there is a wide range of possible sentences for robbery under the *Criminal Code* and the RPD failed to consider the appropriate sentence (citing *Jung,* at paragraphs 38 and 48, and *Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709, at paragraphs 15-16). The respondent argued that the RPD set out the applicant's "criminal history" in its reasons and stated in its analysis that it had considered the "sentencing equivalency in Canada" for robbery.

[34] As the Decision recognized, the analysis in *Febles* and *Jayasekara* contemplates a rebuttable presumption. A non-political crime is presumptively "serious" under Article 1F(*b*) of the Convention if a maximum sentence of ten years or more could have been imposed if the acts had been committed in Canada. However, this presumption may be rebutted by an evaluation of

the elements of the offence, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: *Febles*, at para 62; *Jayasekara*, at para 44. See also *Ayorinde v Canada (Citizenship and Immigration)*, 2022 FC 113, at para 6; *Gardijan v Canada (Citizenship and Immigration)*, 2022 FC 421, at para 39.

[35] In my view, the RPD did not make a reviewable error by concluding that the presumption of seriousness had not been rebutted in the present case, based on the reasons the RPD provided in the context of the underlying record, and the submissions made to it by the applicant.

[36] The RPD described the *Febles/Jayasekara* analysis without legal error and noted that section 344 of the *Criminal Code* carried a maximum sentence of life imprisonment. Based on the European Arrest Warrant, the RPD also set out many details of the applicant's "criminal history" in its reasons. The RPD expressly referred to the actual 4-year sentence of imprisonment that had been imposed on the applicant for assault and theft of jewellery and other possessions from a woman, and for assaulting two police officers using incapacitating gas: see *Ahmad v Canada (Citizenship and Immigration)*, 2022 FC 455, at paras 32 and 34 (distinguishing *Ayorinde*, at paras 21 and 23 and *Jung*, at para 48). The RPD also stated that the applicant had not completed his sentence, and that during his sentence, he obtained leave from the prison but did not return and remained at large.

[37] The RPD's reasons were sufficiently responsive to the principal issues the applicant raised in his submissions, which were based on his testimony and the country condition evidence related to the treatment of Roma people in Poland. As occurred in *Ahmad*, the applicant's

submissions did not refer the RPD to Canadian case law showing a low range of sentence that would be imposed for the robbery if it had occurred in Canada, to argue that his offence was not "serious" for the purposes of Article 1F(*b*): *Ahmad*, at para 31. This is not a case in which the RPD failed to recognize factual circumstances that pointed to a short sentence for the offence in Canada, or did not grapple meaningfully with a key submission that his conduct would have been on the low end of the sentencing range that would be imposed by a Canadian court for an equivalent offence: see *Tabagua*, at para 20; *Lin v Canada (Citizenship and Immigration)*, 2021 FC 1329, at paras 31-35; *Ayorinde*, at para 23-24; *Vavilov*, at paras 100 and 128; *Canada Post*, at paras 33 and 60.

[38] In this light, the RPD's conclusion on the rebuttable presumption in particular, and on the seriousness of the applicant's offence(s) overall, was reasonable as described in *Vavilov* and *Canada Post*. The applicant has not demonstrated that the RPD's Decision made a reviewable error by failing to apply the requirements in *Febles* and *Jayasekara*.

B. Alleged Failure to Assess the Transcript for One Day of the Hearing

[39] The applicant's written submissions argued that that the RPD's Decision was not transparent or justified because it did not give any indication that it considered the applicant's testimony at the hearing on March 21, 2019. The applicant submitted that he testified that day that authorities in Poland "hated gypsies" (i.e., Roma people) and police fabricated incidents about them. The applicant's written submissions asserted that the failure to mention this evidence was a fundamental misapprehension of or failure to account for the evidence (citing *Vavilov*, at para 126) and a "glaring error". However, the applicant did not pursue it in detail at the hearing in this Court.

[40] The respondent submitted that the RPD is presumed in law to have considered all evidence, even if it was not expressly mentioned. In addition, the respondent noted that the applicant's own written submissions to the RPD dated April 18, 2019, did not mention the testimony on March 21, 2019. The respondent argued that the testimony was substantively the same as on other days of hearing and that the RPD considered the substance of the applicant's testimony and rejected his position.

[41] The respondent must prevail on this issue. The applicant has not demonstrated a reviewable error, including that the RPD fundamentally misapprehended or misunderstood, or failed to account for, any evidence in the record: *Vavilov*, at para 126.

C. Alleged Error: *IRPA* subsection 109(2)

[42] The applicant's written submissions contended that the RPD erred in law by failing to proceed to an analysis under *IRPA* subsection 109(2). However, the applicant advised during reply submissions that he was not arguing that the RPD ought to have conducted an inclusion analysis, and that he was focused on the submission that the RPD did not follow the requirements in *Febles*. If necessary to decide, I agree with the respondent that there was no requirement to proceed to subsection 109(2) after the RPD's conclusion on exclusion under section 98 and Article 1F(*b*): *Omar v Canada (Citizenship and Immigration),* 2016 FC 602, at para 49; *Sajid v Canada (Citizenship and Immigration),* 2016 FC 981, at para 30; *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554, at para 29(d).

IV. Conclusion

[43] The application is dismissed.

[44] Neither party proposed a specific question to certify for appeal prior to, or at, the hearing of this application. The applicant advised at the hearing that no such question would arise if the Court's Reasons concerned an application of *Febles*, but requested an opportunity to review the Reasons in draft if they assessed whether the RPD had the ability to engage with the applicant's testimony that the police fabricated his involvement in the offence to put him in jail. The respondent referred to the Court's Practice Direction concerning the timing of proposed questions for certification (five days before the hearing) and submitted that no question arose for certification – the case would turn on its specific facts.

[45] In light of the Court's published guidance, the parties' positions and the contents of these Reasons, I find it unnecessary to ask for further submissions. In my view, this application turned on its own facts and an application of the law in *Febles* and *Jayasekara* to the RPD's reasons. No question arises in the present case that passes the relevant legal test for certification. See the Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022), at para 36; *Canada (Public Safety and Emergency Preparedness) v XY*, 2022 FCA 113, at para 7; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 FCR 674, at para 46; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229, at para 36.

JUDGMENT IN IMM-13-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-13-20
STYLE OF CAUSE:	ZBIGNIEW SIWAK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 8, 2022
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	NOVEMBER 23, 2022

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wennie Lee Lee & Company Toronto, Ontario	FOR THE APPLICANT
Christopher Ezrin Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT