Federal Court Cour fédérale

Date: 20240815

Docket: IMM-3100-23

Citation: 2024 FC 1268

Ottawa, Ontario, August 15, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

HUMBERTO RAFAEL VELASQUEZ MAYORGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, a citizen of Nicaragua, entered Canada in 2015. He initiated a claim for refugee protection in 2020, reporting a risk of persecution in Nicaragua due to his sexual orientation.

[2] The Refugee Protection Division [RPD] held the Applicant to be excluded from refugee protection, finding serious reasons to consider the Applicant had committed the crime of theft over $5000, a serious non-political crime outside of Canada.

[3] In a decision dated February 17, 2023, the Refugee Appeal Division [RAD] dismissed the Applicant's appeal.

[4] The Applicant applies under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of that decision. The Applicant submits the RAD breached the duty of procedural fairness by making a new credibility finding, and that the decision is unreasonable for two reasons: first, the RAD failed to demonstrate it independently assessed the evidence of intent; and second, the RAD failed to address the Applicant's submissions on mitigating factors.

[5] The Respondent argues that since credibility was in issue before the RPD, it was therefore open to the RAD to make independent credibility findings, and that the decision is reasonable.

[6] For the reasons that follow, the Application is dismissed.

II. Background

[7] The Applicant reports that he entered the United States [US] in 1999 after having experienced harassment, abuse, and assault in Nicaragua due to his sexual orientation. In 2010, he began working as a gardener and cleaner, and, in 2013, he obtained a US green card.

[8] In 2014, a co-worker approached the Applicant for help selling antique garment buttons. The Applicant created an e-Bay account where he advertised the buttons for auction. In December of that year, after informing the Applicant that the police were searching for him, the co-worker informed the Applicant that the buttons had been stolen from the Applicant's employer. The Applicant alleges the co-worker threatened he would harm the Applicant and his mother if the Applicant informed the police that the buttons were from his co-worker. Fearing the police and the co-worker, the Applicant fled to Nicaragua.

[9] In 2015, the Applicant travelled to Canada and worked in construction. The Applicant's US green card expired in July 2015, precluding him from returning to the US.

[10] On September 22, 2022, the RPD found there to be serious reasons to consider the Applicant had committed theft in the US, which, if committed in Canada, could have been prosecuted as theft over $5,000, an offence punishable by a sentence of up ten years imprisonment (*Criminal Code*, RSC, 1985, c C-46 sections 322 and 334). On this basis, the RPD held that the Applicant was excluded from refugee protection pursuant to section 98 of the IRPA

and Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [Refugee Convention].

[11] In dismissing the Applicant's appeal, the RAD noted the issue before it was not the Applicant's guilt or innocence under the criminal law. Instead, after examining its constituent elements in light of the facts and evidence, the RAD needed to decide whether there were serious reasons for considering that the Applicant had committed the offence of theft over $5000.

[12] The RAD determined that the 10-year maximum sentence attracted the presumption that the offence was serious, and that the Applicant failed to rebut the presumption. The RAD further determined that there was serious reason to consider that the evidence established the elements of the offence, including the requisite intent; agreeing with the RPD's conclusion that the Applicant's wilful blindness in receiving and selling the antique buttons was sufficient to establish intent.

[13] The RAD excluded the Applicant from refugee protection under section 98 of the IRPA and Article 1F(b) of the Refugee Convention. In reaching this conclusion, the RAD relied on *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] and *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*].

III. Analysis

A. *No breach of procedural fairness*

[14] At paragraphs 27 and 28 of its decision, the RAD addresses evidence suggesting the Applicant sought to cover-up his actions once he became aware of police involvement. The RAD states:

> [27] The Minister submitted to the RPD that Mr. V attempted to cover up his activity when he became aware police were involved. The police evidence raises some questions regarding covering up the crime or a guilty mind such as why would [the Applicant] need to use an alias if he was innocently selling items on eBay for a co-worker? After finding out the buttons were stolen, why try to immediately hide all the evidence of the sales, change Facebook settings, cancel a cell number, quit work and run away to Nicaragua, instead of co-operating with police to apprehend the real culprit [the co-worker]?
>
> [28] Neither [Party] address these questions beyond the submissions that the RPD failed to consider [the Applicant's] explanations of threats to [his] and his mother's life by [his co-worker]. I have conducted an independent assessment of all the evidence, including reading the transcript and listening to large portions of the audio recordings of the RPD hearing. I have considered [the Applicant's] explanations and surmise that they might provide some basis for a defence were Mr. V to stand trial where the standard of proof is beyond a reasonable doubt. That is not the standard here and I determine that Mr. V's testimony and explanations are simply not enough to discount the voluminous police evidence that provide serious reasons for considering that he did commit the crime.

[15] The Applicant submits that the RAD raised, for the first time in the proceedings, the question of the Applicant's usage of an alias on e-Bay as evidence of a cover-up or a guilty mind. In so doing, the RAD failed to give the Applicant the opportunity to address and explain

the use of the alias, and to demonstrate that the alias was not an attempt to cover-up or hide his identity. This, the Applicant contends, was a breach of procedural fairness.

[16] In considering issues of fairness a reviewing court should ask whether the process was fair, taking into account the particular context and circumstances. The reviewing court must question whether the applicant was given a full, fair opportunity to know and respond to the case before the decision-maker. No deference is owed by a reviewing court where questions of procedural fairness arise, in those cases, the court applies a standard of review akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54 and 56).

[17] Despite the Applicant's claims to the contrary, the Applicant was questioned on the use of the alias before the RPD, and was, at that time, given the opportunity to address the source and meaning of the alias. In addition, the Applicant's use of an alias on e-Bay was but one of many factors the RAD considered in its determination that the Applicant had a guilty mind and had sought to cover-up his involvement in the offence. The RAD expressly acknowledged the Applicant's explanations to the RPD in respect of each of these factors but did not find them convincing.

[18] The Applicant essentially argues that fairness required the RAD to extend a second opportunity to explain the use of the alias. At least in the context of the circumstances disclosed in this matter, no such obligation arose.

[19] There was no breach of procedural fairness.

B. *The RAD's decision was reasonable*

[20] Section 98 of the IRPA states: :

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.

[21] Subsection 1(F)(b) of the Refugee Convention states:

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 réfugiées.

[22] As the RAD noted, an exclusion finding does not require a determination of guilt, but rather a finding that there are "serious reasons for considering" that the claimant has committed a serious non-political crime. The "serious reasons for considering" standard is lower than both the

criminal and civil standards of proof (“beyond a reasonable doubt” and “on a balance of probabilities” respectively), but higher than mere suspicion (*Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 101, *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 [*Sing*] at para 25). Both credible evidence and an objective basis underpinning the facts asserted are required to meet this standard. Whether a claimant is a fugitive or has been charged or convicted of the crime is not relevant to an exclusion finding (*Febles* at paras 35 and 60, *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 at para 82).

[23] The seriousness of the crime in the context of Article 1F(b) requires courts to consider international standards and requires the 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 (*Jayasekara* at paras 37 and 44). The Canadian sentencing range available upon conviction is an additional consideration (*Febles* at para 62). The jurisprudence recognizes that a prescribed maximum punishment of ten years imprisonment is the benchmark by which a crime is presumptively considered serious. The presumption is rebuttable, and the benchmark is not to be applied in a mechanistic or unjust manner (*Jayasekara* at para 55; and *Febles* at para 62).

[24] The Applicant argues that, in considering the intent element of the offence, the RAD agrees with the RPD but fails to undertake an independent assessment of the evidence. The Applicant, relying on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 98, *Ali v Canada (Citizenship and Immigration)*, 2016 FC 396 [*Ali*] at para 4 and *Pintyi v*

Canada (Citizenship and Immigration), 2021 FC 117 [*Pintyi*] at para 11, argues this renders the decision unreasonable. The argument is not persuasive.

[25] In its decision, the RAD addressed the Applicant's written submissions, and agreed that the RPD was obligated to consider each of the elements of the offence. The RAD then proceeded to identify and consider the evidence and facts relevant to the element of intent. The RAD engaged with both the submissions made, and the evidence on the record.

[26] The Applicant relies on *Ali* and *Pintyi* to argue that the RAD was required to do more than simply state that it undertook an independent analysis in order to agree with the RPD. I take no issue with the Applicant's interpretation of either *Ali* or *Pintyi*, but the RAD's engagement with both the Applicant's submissions and the evidence distinguish both cases from the facts in this instance.

[27] Having engaged with the issue raised and the relevant evidence, it was not an error for the RAD to conclude, based on its own independent assessment of the evidence and the submissions made, that it agreed with the RPD.

[28] In finding serious reasons to consider the Applicant had the requisite intent to commit the offence, the RAD was also entitled to examine the evidence disclosed in the police investigation together with the Applicant's explanations. In doing so, the RAD engaged with the Applicant's explanations for the actions disclosed by the evidence. The RAD did not ignore this evidence but reasonably concluded that the explanations provided might provide some basis for a defence in a

criminal proceeding. However, the issue before the RAD was not the Applicant's guilt or innocence, instead, the question was whether the evidence satisfied the serious reasons for considering standard.

[29] Nor did RAD err in considering mitigating and aggravating circumstances. The RAD addressed the primary arguments advanced on this issue and was under no obligation to make express findings on each constituent element of those arguments. In holding that the absence of prosecution in the US was not a factor favouring the rebuttal of the presumption of seriousness, and finding that the RPD did not err in concluding that the Applicant was in a position of trust, it was reasonable for the RAD to note and rely on the insufficiency of the evidence of mitigating factors.

IV. Conclusion

[30] The Application for Judicial Review is dismissed. The Parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-3100-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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