Date: 20080826

Docket: IMM-930-08

Citation: 2008 FC 966

Ottawa, Ontario, August 26, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LEOPOLDO QUINTANA MURILLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] There is no obligation or requirement on the Refugee Protection Division (RPD) of the Immigration and Refugee Board to conduct a "balancing" exercise to determine whether a claimant is excluded under Article 1F(*b*) of the United Nations Convention Relating to the Status of Refugees (Refugee Convention). It is reasonable for the RPD to use as a measurement of a "serious" crime the view which Canadian law takes of that offence (*Controlled Drugs and Substances Act*, 1996, c.19 (CDSA), Section 5). Any offence for which a maximum sentence of ten years could be imposed under Canadian law is a "serious" crime. The focus must be on whether the acts of the claimant could be considered crimes under Canadian law. Canadian Courts have

consistently held that drug trafficking is a serious non-political crime. Involvement in such activities make of a party, "a party to the offence", pursuant to subsection 2(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. (*Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, 165 A.C.W.S. (3d) 140 at para. 11; *Farkas v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 277, 155 A.C.W.S. (3d) 914 at para. 22; *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390, 190 D.L.R. (4th) 128 (F.C.A.) at para. 9; *Vlad v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 172, 155 A.C.W.S. (3d) 387 at para. 22; *Medina v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 62, 285 F.T.R. 306 at paras. 22-24.)

[2] There is no requirement that the RPD consider a claimant's "good character" under Article 1F(*b*) of the Refugee Convention. The only consideration that may be salient to the RPD's determination is whether the claimant already served a sentence outside of Canada for the crime in question. Justice Judith Snider dealt squarely with this argument in *Vlad*, above:

> [19] Unfortunately for the Applicant, the jurisprudence does not support the notion that the past record of the Applicant or other mitigating factors should be considered in excluding the Applicant under s. 98 of the *IRPA*. On the contrary, as in *Xie, supra* at paras. 33-35, the Federal Court of Appeal held that other mitigating factors, such as risk of torture, are not salient in the Board's decision to exclude an Applicant under Article 1F of the *Convention*. The only consideration the Federal Court of Appeal finds salient is if the Applicant had served his sentence already, which is not applicable in this case…

II. Introduction

[3] The Applicant, Mr. Leopoldo Quintana Murillo voluntarily participated in the import, sale and purchase of 15 to 20 boxes of approximately 50 kg of cocaine and 500 kg of marihuana while living illegally in the United States.

[4] After living illegally in the United States for 13 years, Mr. Murillo entered Canada and made a claim for refugee protection. He claimed that organized criminals will harm him if he returns to Mexico.

[5] The RPD found Mr. Murillo excluded from refugee protection in Canada based on Article 1F(*b*) of the Refugee Convention. Mr. Murillo argues that the RPD erred by not considering mitigating factors in considering exclusion under Article 1F(*b*) of the Refugee Convention.

[6] The Minister of Citizenship and Immigration submits that the RPD properly found that Mr. Murillo, having committed a serious, non-political crime, was excluded from refugee protection in Canada under Article 1F(*b*) of the Refugee Convention. There is no requirement on the RPD to conduct a balancing exercise when considering exclusion under Article 1F(*b*). Furthermore, the RPD may not – and, in fact, should not consider the "good character" of an offender when determining whether an offender is excluded from refugee protection under Article 1F(*b*). Finally, the Minister submits that the RPD considered all of the evidence and circumstances with respect to the commission of a crime, as it stated in clear and articulate language in its reasons for decision.

III. Facts

Mr. Murillo's crime in the United States

[7] Mr. Murillo is a citizen of Mexico who was living and working illegally in the United States since November 1995. (Personal Information Form (PIF), Certified Tribunal Record (CTR) at pp. 259, 265; PIF, Applicant's Record (AR) at p. 33.)

[8] In April 2003, Mr. Murillo voluntarily agreed to assist two drug traffickers, Pepe and Chuy, with the importing of approximately 50 kg of cocaine and 500 kg of marihuana into the United States in order to sell these drugs in Memphis, Tennessee. In particular, Mr. Murillo agreed to assist the drug traffickers in securing a truck to transport the drugs and "be a lookout" for the police during the time of the sale of the drugs. In exchange, Mr. Murillo was to be paid $50,000. (Reasons for Decision, AR at p. 6; PIF, CTR at pp. 265-266; PIF, AR at pp. 33-34.)

[9] Mr. Murillo and Chuy were in daily contact and met several times up to the date of the sale of the drugs. (PIF, CTR at pp. 266-267; PIF, AR at pp. 34-35.)

[10] On the day of the transaction, Mr. Murillo drove to the location where the drug traffickers were to meet. On his way, Mr. Murillo spotted an unmarked police car and immediately telephoned Chuy to inform him to stop the transaction. Mr. Murillo then decided to abandon his own vehicle and follow Chuy in his friend's vehicle. (PIF, CTR at p. 267; PIF, AR at p. 35.)

[11] According to Mr. Murillo, the planned sale of drugs did not take place as scheduled, as some "dirty United States cops stole the drugs" from the truck drivers. Mr. Murillo subsequently picked up Chuy in his friend's vehicle. He later purchased a bus ticket in his own name for Chuy to flee to Texas. (PIF, CTR at p. 28; PIF, AR at p. 36.)

[12] Following the foiled transaction, Mr. Murillo alleges that he received a threatening phone call from Pepe and a Javier Corona. This telephone call prompted him to "investigate" the

whereabouts of this Javier Corona and seek police protection. (PIF, CTR at pp. 268-269; PIF, AR at pp. 36-37.)

[13] In 2004, Mr. Murillo moved to Nashville, Tennessee. His nephew, incarcerated in a federal penitentiary, informed him that he was offered $50,000 to murder Mr. Murillo. Mr. Murillo also claims that he knew that he was being sought by the police in Memphis, but he did not return to Memphis. (PIF, CTR at p. 270; PIF, AR at p. 38.)

[14] In November 2004, Mr. Murillo and his family moved to Albuquerque, New Mexico. Mr. Murillo assumed a false identity and he and his family resided in New Mexico close to their relatives, some of whom were also living illegally in the United States. Mr. Murillo then returned to Memphis. At no time after the commission of the offence did Mr. Murillo experience any incident or any threats of harm. (PIF, CTR at p. 272; PIF, AR at p. 40; Declaration of M. Savard, March 7, 2007, AR at p. 47.)

Refugee Claim in Canada

[15] On February 16, 2007, Mr. Murillo arrived in Canada at the border crossing at Surrey, B.C. (PIF, CTR at p. 259; PIF, AR at p. 30.)

[16] On February 29, 2007, Mr. Murillo made a claim for refugee protection in Canada based on his alleged risk from the drug traffickers who he had previously assisted. (PIF, CTR at p. 259; PIF, AR at p. 30.)

[17] On March 7, 2007, Mr. Murillo was interviewed by immigration officer, M. Savard. At the interview, Mr. Murillo stated:

a. He used a fake identity to obtain immigration papers in the United States;
b. The drug traffickers have issued a "contract" of one million dollars to kill him;
c. The drug traffickers were charged, sentenced and arrested by the authorities in the United States and were released from custody in February 2007;
d. He is at risk from the Mexican mafia; and,
e. He waited three years before coming to Canada because he was determined to get help in the United States.

(Declaration of Mr. Savard, above, AR at pp. 44-53.)

[18] On January 7, 2008, Canada Border Services Agency (CBSA) Officer Ward Hindson telephoned the Memphis Police Department, Internal Affairs Section, with respect to Mr. Murillo's allegations of abuse of power against the police officers in Memphis. Lieutenant Whitney of the Memphis Police Department confirmed that he conducted a search of the police systems and indicated that there had been no such charges against the police officers named by Mr. Murillo. (Statutory Declaration of Ward Hindson, January 7, 2008, AR at p. 113.)

[19] On January 24, 2008, Mr. Murillo and his counsel were heard by the RPD. At the RPD hearing, Mr, Murillo testified:

a. The drug dealers needed a person who they could trust to assist with the importation of the drugs and he volunteered to assist (p. 40);

b. He was to be paid $50,000 for finding a U-Haul truck and serving as a lookout for the police prior to and at the time of the planned sale of the drugs (pp. 45, 49-51);
c. He assumed that the 15-20 boxes of drugs were from the Mexican Mafia (pp. 51, 53);
d. He observed the drug dealers load the drugs from the truck to the U-Haul and he cashed a cheque for the driver of the truck (p. 54);
e. While en route to the planned sale of the drugs, he saw a state police vehicle, so he telephoned the drug trafficker to inform him to "get rid of the drugs" (pp. 60-62); and,
f. He did not wish to use his personal vehicle to keep a lookout for the police, as the police could identify his vehicle (p. 67).

(Transcript of proceedings, January 24, 2008, CTR at pp. 1-124.)

[20] The RPD rendered its decision orally on that same day and issued its written reasons on February 5, 2008. (Reasons and Decision, CTR at pp. 240-248; AR at pp. 4-12.)

IV. Issue

[21] Did the RPD err in finding Mr. Murillo excluded under Article 1F(*b*) of the Refugee Convention. (*Bains v. Canada (Minister of Employment and Immigration)* (1990), 109 N.R. 239, 21 A.C.W.S. (3d) 405 (F.C.A.); *Adjei v. Canada (Minister of Employment and Immigration)*, [1994] 74 F.T.R. 57, 46 A.C.W.S. (3d) 484 (T.D.) at para. 3.)

V. Analysis

Standard of Review

[22] This Court has held that the issue of the application of Article 1F(*b*) of the Refugee Convention is a question of mixed fact and law and, as such, the appropriate standard of review is reasonableness. In the case at bar, Mr. Murillo argues that the RPD failed to take into account his mitigating factors in determining that he was excluded from refugee protection. As such, this is a finding of fact that should also be reviewed on standard of reasonableness. (*Jayasekara*, above; *Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paras. 68 and 77; *Ivanov v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1210 at para. 6; *Farkas*, above at para. 19; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.)

Article 1F(*b*) of the Refugee Convention – General Principles

[23] The primary purpose of Article 1F(*b*) of the Refugee Convention is to ensure that perpetrators of serious, non-political crimes are not entitled to international protection in the country in which they are seeking asylum. The effect of a finding under Article 1F(*b*) of the Refugee Convention is that the claimant is excluded from accessing the refugee determination process in Canada and cannot, therefore, be found to be a Convention refugee. (*Lai*, above at paras. 22, 23, 70.)

[24] It is trite law that the Minister bears the onus of proving that a claimant is excluded from refugee protection under Article 1F(*b*) of the Refugee Convention. An exclusion hearing under Article 1F of the Refugee Convention is not in the nature of a criminal trial where guilt or innocence

must be proven beyond a reasonable doubt. The Minister need only show that "there are serious reasons for considering" that a claimant committed a serious non-political crime outside of Canada, prior to his arrival in Canada. It is not the role of the RPD to establish the guilt or innocence of the claimant. (*Vlad*, above at paras. 17, 20; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298, 107 D.L.R. (4th) 424 (C.A.) at para. 21.)

[25] Mr. Murillo argues that the RPD erred by not balancing aggravating and mitigating factors before determining the seriousness of the crime committed by him. In particular, Mr. Murillo suggests that the RPD failed to consider the he was forthcoming about his participation in the commission of the offence, that he was only an accomplice to the drug trafficking, and that he never received the $50,000 payment for participating in the crime. The Minister submits that there is no merit to Mr. Murillo's argument. (Applicant's Memorandum of Argument at paras. 6-10, AR at pp. 372-373.)

[26] There is no obligation or requirement on the RPD to conduct a "balancing" exercise to determine whether a claimant is excluded under Article 1F(*b*) of the Refugee Convention. It is reasonable for the RPD to use as a measurement of a "serious" crime, the view which Canadian law takes of that offence. Any offence for which a maximum sentence of ten years could be imposed under Canadian law is a "serious" crime. The focus must be on whether the acts of the claimant could be considered crimes under Canadian law. Canadian Courts have consistently held that drug trafficking is a serious non-political crime. (*Jayasekara*, above; *Farkas*, above; *Chan*, above; *Vlad*, above; *Medina*, above.)

[27] There is no requirement that the RPD consider a claimant's "good character" under Article 1F(*b*) of the Refugee Convention. The only consideration that may be salient to the RPD's determination is whether the claimant already served a sentence outside of Canada for the crime in question. Justice Judith Snider dealt squarely with this argument in *Vlad*, above:

> [19] Unfortunately for the Applicant, the jurisprudence does not support the notion that the past record of the Applicant or other mitigating factors should be considered in excluding the Applicant under s. 98 of the *IRPA*. On the contrary, as in *Xie, supra* at paras. 33-35, the Federal Court of Appeal held that other mitigating factors, such as risk of torture, are not salient in the Board's decision to exclude an Applicant under Article 1F of the *Convention*. The only consideration the Federal Court of Appeal finds salient is if the Applicant had served his sentence already, which is not applicable in this case…

[28] The RPD may consider all evidence that it deems credible in considering whether a claimant is excluded under Article 1F(*b*) of the Refugee Convention. The RPD did, in fact, consider the circumstances of the seriousness of Mr. Murillo's crime, as based on the evidence before it. Further, Mr. Murillo does not dispute or challenge the RPD's factual findings regarding the illegal drug deal or his participation in the crime. As the RPD stated in its Reasons for Decision:

a. Mr. Murillo admitted to assisting "in the huge illegal drug deal, assisting in the sale and purchase of 15 to 20 boxes of marihuana and/or cocaine";
b. Mr. Murillo admitted that he "helped find the U-Haul, that he scoped out Memphis to assist in the sale and further that he was the lookout for the sale of the controlled substance, that is to make sure that the police do not intercept the drug sale…[he] was in contact with the other traffickers the very day of the sale in an effort to keep the police away from the other drug traffickers. He was going to receive $50,000 for his part in this drug trafficking scheme…";

c. The sale did not take place because some “dirty US cops” stole the drugs from the truck drivers and Mr. Murillo later exposed those dirty cops to many US and Mexican officials; and,

d. Mr. Murillo has not served a sentence for this crime outside of Canada.

(*Lai*, above at paras. 24-25, 37; Reasons and Decision, CTR at pp. 240-242; Reasons and Decision, AR at pp. 6-8.)

[29] Mr. Murillo relies on the decision of *Pushpanathan v. Canada (Minister of Employment and and Immigration)*, [1998] 1 S.C.R. 982, for the principle that the purpose of Article 1F(*b*) of the Refugee Convention is to prevent fugitives from justice from benefiting from refugee protection and that since he is not a fugitive from justice, he should not be excluded under Article 1F(*b*); however, that case is different from the case at bar. (Applicant’s Memorandum of Argument at paras. 15-16, 21, AR at p. 373.)

[30] The Court in *Pushpanathan* dealt with the issue of the interpretation of Article 1F(*c*) of the Refugee Convention, and, in particular, whether an individual who had pleaded guilty to the crime of drug trafficking in Canada could be excluded from the definition of a refugee because of the application of Article 1F(*c*), not Article 1F(*b*). Article 1F(*c*) of the Refugee Convention does not require “serious criminality” and the Court only referred to Article 1F(*b*) to discuss “the possible overlap of Article 1F(*c*) and F(*b*) with regard to drug trafficking.” The Court concluded that “the presence of Article 1F(*b*) suggests that even a serious non-political crime such as drug trafficking

should not be included in Article 1F(*c*)." Thus, *Pushpanathan* cannot be of any assistance to Mr. Murillo. (Applicant's Memorandum of Argument at para. 21, AR at p. 374; *Farkas*, above.)

[31] Furthermore, in the case of *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 174, the Federal Court of Appeal explicitly rejected Mr. Murillo's argument and confirmed that it is not necessary for a specific crime to be attributed to a claimant or for a claimant to be accused of that crime in order for him to be excluded under Article 1F(*b*). The only question that must be answered is whether there are serious reasons for considering that a claimant committed a serious non-political crime. In *Zrig*, the Court dealt with comments of Justice Michel Bastarache in *Pushpanathan*:

> [67] With all due respect for the contrary view, I cannot find any intention in the remarks of Bastarache J. to limit the non-political crimes covered by Article 1F(*b*) to those which are extraditable under a treaty. Such a limitation would be surprising to say the least, since first it is in no way contained in the wording of Article 1F(*b*), and second, the limitation would lead to an absurd situation in which extraditable criminals would be excluded from refugee protection whereas offenders whose crimes were not extraditable crimes would not be excluded because Canada had not concluded an extradition treaty with the country in which the serious non-political crimes were committed.
>
> [68] Rather, I feel that the comments by Bastarache J. are simply an indication of the nature and seriousness of crimes which may fall under the Article 1F(*b*) exclusion, that is, serious crimes to which the extradition treaties might be fully applicable.

RPD did not err in finding Mr. Murillo excluded under Article 1F(*b*) of the Refugee Convention

[32] In this case, the RPD properly found that Mr. Murillo was excluded from refugee protection in Canada based on his voluntary participation in the trafficking of 15 to 20 boxes of cocaine and marijuana into the United States. His activity constituted a serious, non-political crime in Canada, in

violation of subsection 5(1) of the CDSA. The maximum punishment for trafficking controlled substances is life imprisonment, pursuant to subsection 5(3) of the CDSA. (Reasons and Decision, CTR at pp. 242-243, Reasons and Decision, AR at pp. 7-8.)

[33] Mr. Murillo does not challenge the fact that he voluntarily transported drugs by helping to find a U-Haul truck, giving advice of the drug traffickers about Memphis and "scoping out" the area, keeping daily contact with the drug traffickers, and keeping "on the lookout" for the police during the time of the planned purchase and sale. His involvement in these activities made him a "party to the offence", pursuant to subsection 21(1) of the Criminal Code. (Reasons and Decision, CTR at p. 243, Reasons and Decision, AR at p. 8.)

[34] Once the RPD determines that a claimant is excluded under Article 1F(*b*) of the Refugee Convention, the RPD cannot then determine that the claimant is nevertheless eligible for refugee protection. In *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304, the Court held:

> [38] …Once the Board found that the exclusion applied, it had done everything that it was required to do, and there was nothing more it could do, for the appellant. The appellant was now excluded from refugee protection, a matter within the Board's competence, and was limited to applying for protection, a matter within the Minister's jurisdiction…

(Reference is also made to *Ivanov v. v. Canada (Minister of Citizenship and Immigration), v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1210, 261 F.T.R. 211 at para. 14; *Atef v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 86, 32 Imm. L.R. (2d) 106 at para. 16.)

VI. Conclusion

[35] As Mr. Murillo has failed to raise an arguable case that the RPD erred in finding him excluded under Article 1F(*b*) of the Refugee Convention, the Application for Judicial Review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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