Federal Court  Cour fédérale

Date: 20120914

Docket: IMM-9420-11

Citation: 2012 FC 1081

Ottawa, Ontario, September 14, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

FAIDIVER DURANGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision rendered by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated November 7, 2011, which refused the applicant's claim to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

Factual Background

[2] Mr. Faidiver Durango (the applicant) is a citizen of Colombia who seeks protection in Canada. The applicant alleges that he fears the former Colombian Department of Adm Security (the DAS), the paramilitaries and the Colombian government as he criticized them in his work as a journalist.

[3] The applicant moved to the United States (the U.S.) illegally in 1996. In 1997, the applicant brought his wife and his son to live with him in the U.S. During his time in the U.S., the applicant became involved with the Colombian expatriate community and he co-founded certain non-profit organizations.

[4] After September 11, 2001, the applicant alleges that he was unable to renew his driver's license that was set to expire in 2005. Consequently, in 2003, he purchased a false birth certificate, social security card and American passport under the name "Nelson Huertas Diaz". Using his false passport, the applicant returned to Colombia several times between 2003 and 2007 in connection with his work for his foundations.

[5] In December of 2005, the applicant returned to Colombia with his family in the hopes of re-establishing themselves. However, the family returned to the U.S. in 2007.

[6] The applicant did not make an asylum claim in the U.S. allegedly due to his use of false documents.

[7] In 2008, the applicant travelled to Canada using his false passport and filed a claim for refugee protection on August 28, 2008. His wife and his two children entered Canada on September 17, 2008 and subsequently filed for refugee protection based on the applicant's story.

[8] The applicant's refugee claim was heard by the Board on October 18, 2010, February 21, 2011 and May 30, 2011.

Decision under Review

[9] The Board concluded that the applicant was ineligible for refugee protection in Canada because he was excluded on the basis of article 1F(*b*) of the *United Nations Convention relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137, Can TS 1969 no 6 (the Convention) for having committed serious non-political crimes in the United States. However, though the Board rejected the applicant's claim, it found that his wife and one of his son – born in Colombia – to be Convention refugees. The Board affirmed that it would have accepted the applicant's claim for refugee status had it not been for his exclusion under article 1F(*b*) of the Convention. The Board also determined that the applicant's other son, who was born in the U.S., could not be given refugee status as it concluded that there was adequate state protection in the U.S.

[10] With respect to the applicant's exclusion under article 1F(*b*) of the Convention, the Board noted that the applicant had not obtained the false passport for the purpose of making a claim for asylum in the U.S., but rather, in order to remain in the U.S. The Board held that if the applicant's offences had been committed in Canada, they would have been equivalent to "use, trafficking or possession of a forged document", which is contrary to section 368, as well as forgery of or uttering

a forged passport contrary to section 57 of the *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*]. The Board then applied the presumption of seriousness related to offences carrying a sentence in Canada of ten (10) years in prison or more, pursuant to the case of *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1180, [2000] 4 FC 390, [*Chan*]. The Board also analyzed the factors outlined by the Federal Court of Appeal in the case of *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 [*Jayasekara*], regarding the interpretation of the exclusion clause: specifically, the elements of the crime, the mode of prosecution, the penalty prescribed, the facts underlying the crime, the mitigating circumstances, and the aggravating circumstances. The Board ultimately concluded that the applicant had committed serious non-political crimes in the U.S. and consequently excluded him from refugee protection.

Issue

[11] The case raises the following issue:

Did the Board err in fact and law in concluding that the applicant should be excluded under article 1F(b) of the Convention?

Statutory Provisions

[12] The following provisions of the *Immigration and Refugee Protection Act* are applicable in these proceedings:

PART 2	PARTIE 2
REFUGEE PROTECTION	PROTECTION DES RÉFUGIÉS
REFUGEE PROTECTION, CONVENTION REFUGEES AND	NOTIONS D'ASILE, DE REFUGIE ET DE PERSONNE A PROTEGER

PERSONS IN NEED OF PROTECTION

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention – le réfugié – la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
b) soit à une menace à sa vie

risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

PART 3

ENFORCEMENT

Prosecution of Offences

Deferral

PARTIE 3

EXÉCUTION

Règles visant les poursuites

Immunité

133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(*a*) or section 127 of this Act or under section 57, paragraph 340(*c*) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.	**133.** L'auteur d'une demande d'asile ne peut, tant qu'il n'est statué sur sa demande, ni une fois que l'asile lui est conféré, être accusé d'une infraction visée à l'article 122, à l'alinéa 124(1)*a*) ou à l'article 127 de la présente loi et à l'article 57, à l'alinéa 340*c*) ou aux articles 354, 366, 368, 374 ou 403 du Code criminel, dès lors qu'il est arrivé directement ou indirectement au Canada du pays duquel il cherche à être protégé et à la condition que l'infraction ait été commise à l'égard de son arrivée au Canada.

[13] The following provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] is also pertinent:

PART 3	PARTIE 3
INADMISSIBILITY	INTERDICTIONS DE TERRITOIRE
Misrepresentation	Fausses déclarations
22. Persons who have claimed refugee protection, if disposition of the claim is pending, and protected persons within the meaning of subsection 95(2) of the Act are exempted from the application of paragraph 40(1)(*a*) of the Act.	**22.** Les demandeurs d'asile, tant qu'il n'est pas statué sur leur demande, et les personnes protégées au sens du paragraphe 95(2) de la Loi sont soustraits à l'application de l'alinéa 40(1)*a*) de la Loi.

[14] The following provision of the Convention is also applicable in these proceedings:

United Nations Convention Relating to the Status of Refugees	*Nations Unies Convention relative au statut des réfugiés*
Chapter 1	**Chapitre 1**
GENERAL PROVISIONS	**DISPOSITIONS GÉNÉRALES**
Article 1 – Definition of the term "refugee"	**Article premier – Définition du terme « réfugié »**
…	[…]
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes; (*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser: *a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes; *b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés; *c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

Standard of Review

[15] The established case law has determined that a Board's decision to exclude a refugee claimant on the basis of article 1F(*b*) of the Convention is a mixed question of fact and law which is

to be reviewed according to the standard of reasonableness (*Radi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 16 at para 11, [2012] FCJ No 9 (QL); *Shire v Canada (Minister of Citizenship and Immigration)*, 2012 FC 97 at para 47, [2012] FCJ No 111 (QL); *Jawad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 232 at para 21, [2012] FCJ No 232 (QL) [*Jawad*]). As such, the Court will concern itself with the "existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

Arguments

The Applicant's Position

[16] The applicant submits that he was never charged with any offences in the U.S. and that he had been forthcoming in disclosing in his refugee claim the fact that he had obtained and used false documentation in the U.S. in order to travel to Colombia. The applicant also submits that he fears returning to Colombia and underlines the fact that the Board noted that he would have been granted refugee protection but for the exclusion under article 1F(*b*) of the Convention.

[17] The applicant points to the following errors in the Board's decision. Firstly, the applicant alleges that the Board erred in law in failing to address the issue of whether his offences were political in nature. The applicant maintains that the Board merely assumed that his offences were non-political in nature without giving reasons. The applicant also submits that the "incidence test" developed in the case of *Gil v Canada (Minister of Employment and Immigration)* (FCA), [1995]

1 FC 508, 119 DLR (4th) 497 [*Gil*], which is used to determine whether crimes are political or non-political in nature, is only suitable to crimes of violence and should not be applied in cases where the offence in question is not violent (*Gil*, above, para 17). Moreover, the applicant explains that he obtained the false documentation in order to remain in the U.S. and therefore in order to save himself from having to return to Colombia under his own identity where he would face persecution. Also, the applicant states that the false documentation permitted him to travel to Colombia to further the work of his charitable foundation. As such, the applicant asserts that the Board should have considered these motives in determining whether the offences were political or non-political in nature.

[18] The applicant also submits that the Board erred in its analysis of whether the offence was "serious" in accordance with the elements of the *Jayasekara*, above, case. The applicant argues the fact that the offences identified by the Board were covered by sections 133 of the Act and section 22 of the Regulations. The applicant contends that these sections exempt refugee claimants from misrepresentation. The applicant affirms that though he might not have been able to rely on section 133 of the Act in a criminal prosecution (as he used the false documentation to enter Colombia rather than Canada), the general principle that these sections protect should have been considered and included as a mitigating factor in the Board's analysis. Specifically, the applicant asserts that these sections of the Act and the Regulations have established the principle that "persons fleeing from persecution should not be held criminally liable for obtaining and using false documents to assist them in doing so" (Applicant's Memorandum of Argument, para 16).

[19] Moreover, the applicant states that the Board's analysis of the "mitigating circumstances" pursuant to *Jayasekara*, above, was irrational. Essentially, the applicant explains that the Board stated that it might have found mitigating circumstances if the applicant had used the passport to travel to Colombia for a "family emergency" but found that his use of the passport to travel to Colombia for "socially or politically involved reasons" to be an aggravating circumstance, though it noted that his work had "social value". The applicant contends that his travels to Colombia were humanitarian in nature and thus should have been considered as a mitigating factor (*Guerrero v Canada (Minister of Citizenship and Immigration*), 2011 FC 1210, 208 ACWS (3d) 815).

The Respondent's Position

[20] Contrary to the applicant's allegations, the respondent is of the view that the Board considered the applicant's motives for purchasing and using the false documentation; however, it ultimately determined that his arguments had no factual basis. With respect to the applicant's argument that he used his passport for his humanitarian work in Colombia, the respondent affirms that there was never a political reason behind the use of the false passport and the applicant adduced no evidence to "bridge the gap between the political and humanitarian" (Respondent's Memorandum of Argument, para 9). The applicant's use of his false birth certificate, social security card and passport in order to remain in the U.S. cannot be equated with a "political crime" as defined in the case of *Gil*, above.

[21] Additionally, the respondent asserts that the issue of the political or non-political nature of the applicant's offences was not put to the Board at the hearing stage, and therefore, this issue is not admissible in judicial review. With respect to the issue of whether the offences were political in

nature, the respondent submits that this issue was not ignored but merely considered to be insignificant.

[22] In response to the applicant's allegation regarding sections 133 of the Act and 22 of the Regulations, the respondent underlines the fact that the applicant used the false documentation for reasons other than fleeing persecution and that the argument is therefore unfounded. On the issue of the aggravating factor of using the forged passport to return to work in Colombia, the respondent alleges that even if the applicant's work had social value, there is no evidence that this would constitute grounds for waiving the serious offences outlined in sections 57, 368 or 403 of *Criminal Code* (Respondent's Memorandum of Argument, para 27).

Analysis

[23] The Court recalls that three (3) conditions must be present in order to trigger the exclusion under article 1F(*b*) of the Convention (see *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 at para 134, [2003] 3 FC 761): 1) there must be a crime; 2) the crime must be a non-political one; and 3) the crime must be serious.

[24] Although the applicant argued that his work and activities in Colombia amounted to political motives, the Court remains unconvinced with respect to the link between the applicant's humanitarian/charitable activities and its political aspects. The applicant failed to convince this Court that there was any political underpinning justifying the use of a forged American passport in order to return to Colombia on multiple occasions from the U.S.

[25] For instance, the applicant submits that he feared the Department of Administrative Security (DAS) or its agents in Colombia. Despite his alleged fear, when the applicant returned to Colombia, although he used his false identity in order to cross the border from the U.S. to Colombia, once in Colombia, he would use his real name in order to carry his work (Board's decision, para 18(f)).

[26] Further, the applicant used his forged passport in 2005 in order to return to Colombia with his family for personal reasons. No evidence was adduced that this return to Colombia was for political reasons. The applicant and his family eventually travelled back to the U.S. in 2007.

[27] There is also an important distinction to be drawn in this case. The applicant did not break the laws of Colombia in order to leave Colombia and claim refugee status in another country e.g. the U.S. The Court recalls that the applicant broke the laws of the U.S. for a period of nine (9) years and during that time, he returned on several occasions to Colombia. It is therefore difficult for the Court to find a political goal behind the use of the applicant's forged American passport in order to return to Colombia. *In obiter*, it is also clear from the evidence on record that the crimes committed by the applicant in the U.S. were not of a political nature.

[28] In support of its argument that a political offence is broader than what takes place in an uprising, the applicant referred to the case *Regina v Governor of Brixton Prison Ex parte Kolczynski* [1955] 1 QB 540 [*Kolczynski*] in *Gil*, above, para 17. However, the parallels drawn by the applicant between *Kolczynski* and the present case cannot be sustained. In *Kolczynski*, a crew of Polish fishing trawler had overpowered the master and the political officer and had brought the ship to Britain where they sought asylum. At that time, the Polish crew had committed an "offence of a political

character" and if surrendered by way of extradition they could be tried for piracy and could be punish "for a political crime" (*Gill*, above, para 17). However, it would indeed be farfetched to suggest – and there is no evidence to that effect on record – that the U.S. would punish the applicant for a political crime for the use of a forged passport.

[29] It is also noteworthy that the applicant not only forged an American passport but also forged an American birth certificate and a social security card. In doing so, the evidence demonstrates that the applicant was motivated by personal reasons rather than by a clearly identifiable political goal - i.e. he wished to remain in the U.S., live and work there (Applicant's Record, p 38; Tribunal's Record, pp 513 and 537). Hence, although the applicant argues that the Board assigned little significance to the question of whether the applicant's crime were political or non-political, the evidence is clear and, further, the Court is of the view that the Board sufficiently addressed the matter in its decision by making reference to the applicant's purpose of living and working in the U.S. (Board's decision, paras 18(d) and (f)).

[30] The applicant also argues the fact that the offences identified by the Board were "both anticipated and exculpated" by sections 133 of the Act and section 22 of the Regulations and misapplied *Jayasekara*, above, regarding serious crimes. However, and as mentioned above, the use of forged documents by the applicant in the case at bar was not used to get out of Colombia in order to claim asylum in another country. It was thus reasonable for the Board to state that "[t]his is not a situation where the claimant obtained a false passport for the purpose of making a claim for asylum in the United States" (Board's decision, para 14(3)-(5), 18(f)). Also, the applicant cannot repeatedly use forged documents in the U.S. and argue – on the basis of the facts of this case - that his actions

amount to a "mitigating" factor (Board's decision, para 18 *in fine*). In these circumstances, it was reasonable for the Board to acknowledge and characterize the work performed by the applicant in building houses for displaced individuals in Colombia as having social value on the one hand and, to extrapolate, on the other hand, that "using a false passport to return on several occasions for socially or politically involved reasons is an additional aggravating circumstances" (Board's decision, para 18 *in fine*).

[31] The Supreme Court of Canada recently made the following observations in *Newfoundland and Labrador Nurses' Union v. Newfoundland and* Labrador *(Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[32] For all of these reasons, the Court is of the opinion that, based on the facts of this case, the Board's decision that the applicant should be excluded under article 1F(*b*) of the Convention was reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Court's intervention is thus not warranted.

[33] At hearing, the respondent informed the Court that it would provide a certified question of general importance. However, by way of a letter dated July 31, 2012, the respondent informed the Court that its intention was not to propose any certified question of general importance on the basis of the facts of this case. The applicant responded by way of a letter on August 1, 2012 and agreed with the respondent that no question of general importance should be certified.

[34] Given the above, no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9420-11
STYLE OF CAUSE:	Faidiver Durango v MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 26, 2012
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	September 14, 2012

APPEARANCES:

D. Clifford Luyt	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Law firm of Mr. Luyt Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT