Federal Court  Cour fédérale

Date: 20130416

Docket: IMM-9996-12

Citation: 2013 FC 382

Ottawa, Ontario, April 16, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ANDREY GUDIMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant, a person who claims to be stateless, was excluded from refugee status because he had committed a serious non-political crime. He was excluded by virtue of s 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and Article 1F of the *Convention Relating to the Status of Refugees, 1951*, Can TS 1969 No 6.

II. BACKGROUND

[2] The Applicant considered himself stateless because he did not have U.S. citizenship (where he lived prior to coming to Canada) and had lost his Russian citizenship when his parents moved to the United States [U.S.].

[3] In 2003 he was charged with assault in the second degree by assaulting another person with a car. He entered into a plea bargain under which he was sentenced to 14 months imprisonment and 18 months supervised custodian probation. He had completed his U.S. sentence when he walked into Canada.

[4] The Applicant has a considerable criminal record, both pre and post conviction, generally related to alcohol-driving offences.

[5] The Refugee Protection Division Member [Member] found that the U.S. crime of second degree assault, a B class felony, was a serious crime similar to "assault with a weapon" (*Criminal Code*, RSC 1985, c C-46, s 267(a)) which can be an indictable offence subject to a maximum sentence of 10 years or summary conviction for a term not exceeding eighteen months. The Applicant admitted it was a "serious crime".

[6] The Member then considered the elements of the crime, the mode of prosecution, the penalty, the facts of the crime and the mitigating and aggravating circumstances as required by *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164.

[7] The Member found that the aggravating factors such as driving under the influence without a licence, previous DUI convictions and leaving the scene of the assault having injured a person outweighed the mitigating factors of admitted guilt, favourable plea bargain and a troubled childhood.

[8] The Member also rejected the submissions of the Applicant that his circumstances should be examined under a rehabilitation analysis. It was noted that the issue was pending before the Court of Appeal at the time of the judicial review.

[9] The critical issues in this judicial review are:

(a) Did the Member consider the relevant factors in assessing the seriousness of the crime?

(b) Was that consideration reasonable?

III. ANALYSIS

[10] I adopt Justice Manson's analysis of the applicable standard of review set forth in *Diaz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 88, 2013 CarswellNat 114, where Justice Manson considered the ratios in *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325, 353 DLR (4th) 536, and *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, 223 ACWS (3d) 1012 . The conclusion is that in respect of the interpretation of *IRPA*, s 98 and Article 1F(b), that standard of review is correctness. The standard of review in respect of the application of the law to the facts is reasonableness.

[11] The Applicant contends that the Member erred by including in the analysis of the "seriousness of the crime" and the "aggravating factors", the Applicant's other convictions and behaviours.

[12] In *Jayasekara*, above, the Federal Court of Appeal held that factors extraneous to the seriousness of the offence should not be considered, such as the potential for persecution in the claimant's country.

[13] However, in the present circumstance, the circumstance of the previous conviction, the repeated nature of drinking and driving – matter directly related to the type of crime committed – are relevant considerations. Repeat offences and repeat conduct impact the seriousness of the crime as held in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 937, 223 ACWS (3d) 181.

[14] Therefore, the Member committed no error in taking these factors into consideration as aggravating factors.

[15] On the issue of the Member's application of the facts to the legal test and relevant factors to consider, the Applicant's contention that the Member did not identify and assess the facts underlying the conviction is unsustainable.

[16] A fair reading of the Member's reasons establishes that the Member considered documentary evidence (including police and witness statements) preferring it over the Applicant's

version of events. The Member considered the nature of the offence both in Canada and the U.S.; the fairness of the process; the fact that the Applicant pled guilty; and the mitigating and aggravating factors.

[17] The Member considered the facts surrounding the offence in a manner consistent with *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, 253 DLR (4th) 606, in particular paragraph 50:

> The Applications Judge determined that the essential requirement for the Minister's notice was the identification of the Article 1F sub-clause that forms the basis of the intervention. He also found that the adult appellants were advised that they were considered excluded in relation to their commission of the serious non-political crimes of smuggling, fraud, tax evasion and bribery and that their exclusion was based on the information disclosed in their Personal Information Forms. Finally, he noted that the requirements in an exclusionary intervention are not the equivalent of the disclosure requirements in a criminal prosecution, because the purposes of the two processes and legislation are very different. In this case, he found that the Minister's notice of intent to participate met the requirements under the Act.

IV. CONCLUSION

[18] Therefore, this judicial review is dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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