Federal Court  Cour fédérale

Date: 20130507

Docket: IMM-7783-12

Citation: 2013 FC 476

Ottawa, Ontario, May 7, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

HZZM ABRAHAM USCKARYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a July 11, 2012 decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] wherein the Board allowed the Minister's application under section 109 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act] to vacate the applicant's refugee protection.

FACTS

[2] The applicant is a citizen of Iraq. He was granted refugee protection in Canada on October 24, 2008.

[3] On May 18, 2011, the Minister of Public Safety and Emergency Preparedness [the Minister] applied to vacate the applicant's refugee status on the basis that the applicant misrepresented his criminal history in the United States.

[4] The Board found that the applicant committed the offences for which he was convicted in the United States and that he entered into a plea bargain. It also found that the applicant withheld information about the offences when filing his refugee claim and then misled immigration officials in an attempt to obtain refugee protection. Had the applicant not withheld this information from the original panel of the Board, the original panel would have had serious reasons for considering that the respondent has committed a serious non-political crime outside of Canada and would have found that he was excluded from refugee protection.

ISSUES

1. Did the Board err in interpreting section 271 of the *Criminal Code*, RSC 1985, c C-46 [the Criminal Code]?
2. Did the Board err in considering whether the applicant had rebutted the presumption of the seriousness of his crime?

STANDARD OF REVIEW

[5] The first issue, being purely a question of law, is reviewed on the correctness standard (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339).

[6] The second issue deals with the application of law related to the Board's finding that the applicant had committed a serious non-political crime outside of Canada. Accordingly, the applicable standard of review is reasonableness (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238 at para 10; *Jawad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 232 at para 21).

ARGUMENTS AND ANALYSIS

1. Did the Board err in interpreting section 271 of the *Criminal Code*?

[7] The applicant submits the Board was mistaken as to the content of section 271 of the *Criminal Code*. The complete text of this provision was before the Board and reads as follows:

> 271. (1) Every one who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
>
> (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

[8] However, the Board omitted paragraph 271(1)(b) when it reproduced section 271 in the decision. The Board stated the provision in the following manner:

> 271. (1) Every one who commits a sexual assault is guilty of (an) indictable offence and is liable to imprisonment for a term not exceeding ten years.

[9] The applicant submits that the Board's error is significant because the fact that charges under section 271 can proceed summarily under paragraph 271(1)(b) is relevant to assessing whether the presumption of the seriousness of the applicant's crime is rebutted.

[10] The respondent submits that the Board merely transposed the same error into its decision that was in the Minister's evidence before the Board and that this error is not an error of law (*Lu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 159 at para 29). Moreover, if the applicant was concerned about the Board being misled by the error that was in the Minister's submissions, he should have raised it at the hearing (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta*]). In any case, the respondent contends that the Board did not misunderstand section 271 of the Criminal Code, as the Board acknowledged that the applicant argued that because he was convicted of a misdemeanour in the U.S., he would have been sentenced on summary conviction by the Canadian courts and liable to a term of imprisonment not exceeding eighteen months.

[11] I agree with the respondent. The Board's flawed reproduction of section 271 was immediately followed with the following acknowledgement:

> [28] Counsel for the [Mr. Usckarya] submits that because the [Mr. Usckarya] was convicted of a misdemeanour in the U.S., the Canadian courts would have sentenced the respondent on summary conviction where he would be liable to a term of imprisonment for a term not exceeding 18 months.

[12] The Board also acknowledged the applicant's argument related to paragraph 271(1)(b) in its summary of the applicant's argument relating to mitigating and aggravating circumstances:

> [39]…Counsel for [Mr. Usckarya] further submitted that because of these mitigating circumstances, the original panel would have looked favourably on the possibility of an 18-month sentence versus a ten-year sentence.

[13] Given that the Board acknowledged this argument and in no way indicated that a summary conviction under section 271 was impossible, I am persuaded that the Board correctly understood section 271 of the Criminal Code.

[14] Furthermore, as noted by the respondent, the applicant should have raised his concern about the omission in the respondent's evidence at the hearing if he was concerned that the omission might mislead the Board (see *Alberta*, above).

2. Did the Board err in considering whether the applicant had rebutted the presumption of the seriousness of his crime?

Applicant's argument

[15] The applicant submits that the following statement by the Board, made in the context of evaluating the elements of the crime in order to determine whether the presumption of the seriousness of the crime could be rebutted, was not based upon the factual record:

> [34] This was a violent and horrifying act, one that must have been terrible for the victim at the time but that also could have had long-enduring effects on her. The elements of this crime do not rebut the presumption of seriousness; they reinforce it.

[16] The applicant testified before the Board that he did not know that the complainant had not consented to the sexual relations until the police arrested him. On the advice of his lawyer, he pled guilty to reduced charges.

[17] The applicant submits that the Board suggests the incident was much more serious than the way he described it in his testimony, yet at the hearing the Board did not allege that the applicant's recitation of events was incomplete or untruthful and it is improper for the Board to do so in its reasons.

[18] The applicant further maintains the Board erred by discounting the fact that the applicant was prosecuted with a misdemeanour rather than a felony and did not provide an explanation for doing so. The foreign jurisdiction's choice in pursuing a less serious charge was important to a proper determination of whether the presumption of the seriousness of the applicant's crime had been rebutted (*Canada (Minister of Citizenship and Immigration) v Velasco*, 2011 FC 627 at paras 45-48).

[19] Finally, the applicant maintains that the Board erred in its analysis of mitigating circumstances by disregarding the fact that he had no history of assault or sexual assault prior to the offences. Moreover, the Board erred by finding that the applicant did not disclose materials from the U.S. proceeding, as the evidence before the Board demonstrated that applicant's counsel made extensive, yet unsuccessful, efforts to obtain evidence to corroborate his allegations.

Respondent's argument

[20] The respondent submits the Board reasonably considered the factors outlined in *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*], that may rebut the presumption that the offence committed was a serious non-political crime.

[21] Regardless of the applicant's perspective regarding the consent of the victim, he pleaded guilty to serious crimes. The respondent submits it was reasonable for the Board to acknowledge that victims of aggravated sexual assault are victims of horrific acts and that these crimes would have an impact on the victim's life.

[22] The respondent contends that it is not the role of the Court to reweigh the evidence that was before the Board regarding the mode of prosecution. In the circumstances, it was reasonable for the Board not to speculate as to the circumstances relating to the plea bargain and the prosecutorial actions in the U.S.

[23] Finally, the respondent submits that it is improper for the applicant to fault the Board for its finding that insufficient evidence was submitted regarding the reasons for the mode of prosecution when the evidence itself supported the finding. Regardless of the efforts made by the applicant's counsel to contact the Michigan court, the fact remained that the evidence was not available from this source. The Board reasonably considered the allegations made by the applicant regarding his lack of a previous criminal record, but he was not persuaded that the allegation was a mitigating factor.

Analysis

[24] An applicant may seek to rebut the presumption of the seriousness of his crime or crimes by addressing the factors set out by the Federal Court of Appeal in *Jayasekara*, above, at paras 44 and 45: the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction.

The elements of the crime

[25] I agree with the respondent that regardless of the applicant's testimony that he did not know the victim did not give her consent until the police arrested him, given that the applicant was convicted of aggravated assault and 4th degree criminal sexual assault, it was reasonable for the Board to acknowledge that it was a violent and horrifying act that must have been terrible for the victim and could have long-enduring effects on her.

The mode of prosecution and penalty prescribed

[26] Contrary to the applicant's submissions, the Board did not discount the fact that the applicant was sentenced with a misdemeanour rather than a felony. The decision demonstrates that the Board considered this issue and adequately examined it:

> [35] [Mr. Usckarya] made a plea bargain and was to be sentenced on a lesser charge of misdemeanour rather than a felony.
>
> [36] The panel does not accept that the willingness of the authorities to enter into a plea bargain proves that they viewed the offence as less than serious. However, even a probationary sentence should not be considered as light, as it carries restrictions which curtail one's liberty, and violation of which could leave to imprisonment.
>
> [37] The view that the American authorities took of [Mr. Usckarya's] offences is not in itself determinative of whether those offences constitute serious crimes for the purpose of an exclusion analysis.

(Footnotes omitted)

[27] I am not persuaded by the applicant's argument that the Board applied the improper test by commenting that "even a probationary sentence should not be considered light". The Board clearly understood throughout its decision that the issue was whether the applicant committed a serious non-political crime. The context of the comment that "even a probationary sentence should not be considered light", which is reproduced in the excerpt above, demonstrates that this observation was reasonable and related to the Board's explanation for why it did not accept that the U.S. authorities viewed the offence as less than serious.

The facts and the mitigating and aggravating circumstances underlying the conviction

[28] While the applicant's counsel had attempted unsuccessfully to obtain the Michigan court record, the Board cannot be faulted for noting that there was insufficient evidence submitted regarding the reasons for the mode of prosecution and the reasons for the sentence.

[29] Thus, in light of the evidence before it, it was reasonable for the Board to find that there were no mitigating circumstances that would be relevant to the *Jayasekara* analysis.

[30] The parties have not proposed any questions for certification.

[31] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No questions are certified.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7783-12
STYLE OF CAUSE:	*Hzzm Abraham Usckarya v The Minister of Citizenship and Immigration*
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