Federal Court  Cour fédérale

Date: 20130611

Docket: IMM-7487-12

Citation: 2013 FC 628

Ottawa, Ontario, June 11, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

RUSLAN TINCUL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Tincul says he was framed for his mother's homicide by Moldovan authorities and then either received a pardon or was the beneficiary of an amnesty. The Refugee Protection Division of the Immigration and Refugee Board therefore erred, he says, when it found that he was excluded from protection by reason of Article 1(F)(*b*) of the *United Nations Convention Relating to the Status of Refugees*, being a Schedule to the *Immigration and Refugee Protection* Act**,** SC 2001, c 27 [IRPA]. For that reason, he contends, the Court should grant his application for judicial review under section 72(1) of IRPA and send the matter back to the Board for reconsideration.

[2] For the reasons that follow, the application is dismissed.

BACKGROUND:

[3] Mr. Tincul is a citizen of the Republic of Moldova. His father was killed in 1991. His mother was killed in 2001. The applicant alleges that both his parents were killed for exposing corruption in the Moldovan government. He acknowledges, however, that he was found guilty in October 2001 of intentional bodily harm causing the death of his mother and sentenced to five years in prison.

[4] According to a document from a Court in the town of Cimislia, the conviction was based on an admission of guilt by the applicant and the evidence of several witnesses. It appears from the same handwritten document, translated and entered into evidence by the Minister, that the applicant had previously received a pardon for a theft conviction because of an amnesty stemming from the fifth anniversary of the Moldovan Constitution. In November 2004, a Court ordered his release on parole from the sentence imposed for the homicide.

[5] After his release, the applicant married and adopted his wife's surname to avoid the negative publicity surrounding his mother's death. He says that he attempted to clear his name by approaching the authorities and attempting to speak to a journalist who had met his mother. In 2009 the applicant says he was detained and tortured by the police. A request for a US visa that year was refused. In January 2010, he says that he was the victim of a kidnapping. He received a US visa on

March 31, 2010 and arrived in the United States on June 13, 2010. He claimed refugee protection at the Canadian border on October 29, 2010.

DECISION UNDER REVIEW:

[6] The Refugee Protection Division made its decision on June 28, 2012. The Panel Member accepted the Minister's allegation that the applicant had been found guilty of a Moldovan crime comparable to the offence of manslaughter under the *Criminal Code of Canada* with respect to his mother's death. The applicant did not dispute that finding but argued that he did not commit the crime and that the court proceeding was a sham contrived to make him a scapegoat for the actions of others.

[7] Notwithstanding the objective documentary evidence of corruption and politicization in the Moldovan justice system, the Member concluded that the applicant likely did commit the crime he was accused of and that his claim of innocence was not credible. She did not accept that the evidence supported a finding that all of the persons involved in the court proceedings, including the police, prosecutor, court officials and witnesses, would have engaged in massive collusion against the applicant.

[8] The Member did not find it credible that upon his release, the applicant would have attempted to obtain redress by complaining to the very police who had investigated the death of his mother, instead of pursuing an appeal or contacting oversight authorities. The Member also found a contradiction between the applicant having changed his name to avoid publicity and his assertion

that he had pursued publicity regarding his case. She gave little weight to the late disclosure of a letter from the applicant's sister as the applicant had no explanation for not producing it earlier in the proceedings and the sister's signature was questionable.

[9] The Member also found the applicant had misrepresented the nature of the beatings he suffered in 2009 and 2010. His Personal Information Form narrative gave the impression it was due to his quest to expose his wrongful conviction, but his oral testimony indicated that it was a result of broad political protests against the government.

[10] While the Member understood that convictions resulting from an unfair hearing should not be recognized in the context of an exclusion hearing, she found that the applicant had not demonstrated that he had been framed. As a result, there were serious reasons to believe he had committed the crime. The crime was not political as it was alleged to have occurred as the result of a longstanding dispute over the mother's drinking and misuse of the family's limited resources. It was presumptively serious enough to warrant exclusion due to being equivalent to Canadian crimes that would warrant more than a ten year sentence.

[11] The Member rejected the applicant's claim that he had been pardoned. Although a government document indicated he held no criminal record despite his conviction, the applicant did not give any oral evidence confirming a pardon. The Member considered the circumstances of the crime and concluded that the mitigating factors did not outweigh the factors indicating that it was a serious crime. She therefore concluded that the applicant was excluded. In the alternative, she found, the presumption of state protection was applicable.

ISSUES:

[12] The applicant made no submissions on the question of the standard of review. I accept the respondent's position that the standard has been satisfactorily established by the jurisprudence and is reasonableness for the Board's credibility findings and assessment of the evidence: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23; and *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38.

[13] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable, and intelligible and within the range of acceptable outcomes based on the evidence before it: *Khosa* above, at paragraph 59. It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence.

[14] While the applicant has raised a number of questions about the Board's findings, they can be summarized by asking whether the Board erred in rejecting the applicant's claim.

ANALYSIS:

[15] In my view, the applicant has identified no reviewable error in the Board's decision.

[16] The applicant's theory of a conspiracy was put to the Board, which reasonably rejected it due to its inherent implausibility and the applicant's lack of credibility. The applicant gave inconsistent testimony and could not explain the inconsistencies in his evidence. The Board accepted the country condition evidence showing that there was corruption in the Moldovan criminal justice system, but concluded that nothing in that evidence suggested such an elaborate and sophisticated level of collusion as alleged by the applicant.

[17] On the question of the alleged pardon or amnesty, the criminal history certificate issued by the Moldovan authorities is "muddled", as the Member described it. It both asserts that the applicant had been found to be criminally responsible and also that he has no criminal record. In any event, the statement was an insufficient basis upon which to find that the applicant had established that he had received a pardon. In his oral testimony, the applicant stated that he had been surprised to see the reference to no record as he had not applied for a pardon nor claimed to have received one. In the circumstances, it was not open to the Member to speculate as to the meaning of the statement. One alternative meaning, for example, is that no charges remained outstanding against the applicant.

[18] The Member considered the comments at page 157 of the *Handbook on Procedures and Criteria for Determining Refugee Status* of the United Nations High Commissioner for Refugees (the *UNHCR Handbook*) that there is a presumption that the exclusion clause is no longer applicable when an applicant has been granted a pardon or has benefitted from an amnesty. As the Federal Court of Appeal noted in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at paragraph 39, the UNHCR Handbook is not binding but may be relied upon by the courts for guidance. Given that the evidentiary burden was on the applicant, it was open to the

Board to conclude that he had not established that he was pardoned. The only reference in the evidence to an amnesty is found in reference to the applicant's earlier theft conviction which was not the basis for the exclusion determination. It was not necessary for the Member to address an issue not raised by the evidence.

[19] The Member carefully considered the *Jayasekara* factors in arriving at her conclusion that the applicant's crime was serious and I see no reason to interfere with her findings.

[20] No serious question of general importance was proposed for certification.

JUDGMENT

IT IS THIS COURT'S JUDGMENT that the application is dismissed. No question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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