Federal Court  Cour fédérale

Date: 20130613

Docket: IMM-9989-12

Citation: 2013 FC 649

Ottawa, Ontario, June 13, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ROMAN ALEXANDER CHERNIKOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns a decision [Decision] by a member of the Immigration and Refugee Board [Member] that the Applicant is not entitled to pursue his refugee protection claim because he committed a serious non-political crime outside Canada as outlined in Article 1F(b) of the *Convention Relating to the Status of Refugees, 1951*, CTS 1969/6, 189 UNTS 150.

> 1.F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> […]

> (b) he has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee.

II. BACKGROUND

[2] The Applicant was born in the Republic of Kyrgyzstan, when the USSR still existed. He claims that he is neither a citizen of Russia nor Kyrgyzstan. That issue is not relevant to this judicial review.

[3] The Applicant ultimately arrived in the United States in 2000 and lived there without status until 2006 when he came to Canada. He made his refugee claim in 2009.

[4] While in the United States, the Applicant was convicted of drunk driving causing the victim bodily harm in the nature of injuries to neck, back, wrist and a punctured lung. He was convicted on the charge of drunk driving causing bodily harm. He did not contest the charge and was sentenced to one year incarceration and 36 months probation.

[5] The Applicant's probation included an alcohol rehabilitation program at a residential facility. He left the facility without permission so as to avoid the program. A warrant for his arrest was issued; he was arrested, found in violation of his probation and sentenced to a further two years incarceration on August 30, 2005.

[6] The Applicant was then released in 2006 (a year earlier than his full sentence) on condition that he report regularly to his parole officer. He ultimately left for Canada in violation of his probation and another arrest warrant is believed to be outstanding.

[7] The Member outlined the facts of the drunk driving, the conviction, the sentences and the violations of probation/parole terms. The Member found that drinking and driving are serious and that in this case the drinking causing bodily harm increased the seriousness of the matter. The Member goes on to state that the level of seriousness is reflected in the sentence imposed for a first-time offence. The Member was also disturbed that the Applicant did not comply with conditions of rehabilitation and completion of parole.

The Applicant takes exception in this judicial review to the above comments by the Member.

[8] The Member found that the Canadian equivalent of the California offences is s 255(2.1) of the *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*], dealing with driving with blood alcohol over the legal limit causing bodily harm. The punishment for that indictable offence is imprisonment for not more than 10 years.

[9] The Applicant objected to the Member's reference to his failure to complete neither the rehabilitation program, nor parole, and to there being an outstanding warrant against him.

[10] Finally, in concluding that the Applicant was excluded from the *Immigration and Refugee Protection Act*, RSC 2001, c 27 [*IRPA*], s 96 and 97, the Member observed that parole is considered part of the sentence and that the Federal Court has found that sentences are not served in instances where an individual has fled prior to completion of their sentence.

III. ANALYSIS

A. *Serious Issue*

[11] The Applicant had defined the issues as erring in conclusion on Article 1F(b); failing to providing adequate reasons, and failure to follow *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 [*Jayasekara*]. The issue of an independent ground of inadequate reasons was not seriously advanced in view of the case law.

The real issue is whether the decision is reasonable as a proper application of *Jayasekara*.

[12] While the issue of whether *Jayasekara* was applied is a legal issue based on developed precedent and therefore subject to the correctness standard of review, the application of the legal test is a matter of mixed law and fact reviewable on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Pulido Diaz*, 2011 FC 738, 391 FTR 288).

B. Jayasekara *Test*

[13] The Applicant contends that the Member did not follow the *Jayasekara* test. This argument is grounded largely on the basis that *Jayasekara* is not referred to in the Decision despite being argued before the Member.

[14] The relevant factors are set forth in *Jayasekara* at paragraphs 55 and 56:.

> 55 In determining whether the appellant had been convicted of a serious crime, the Board looked at:
>
> > a) the gravity of the crimes (trafficking in opium and criminal possession of marijuana) under New York legislation which, even for a first offender, resulted in a jail term as well as a five year probation period;

> b) the sentence imposed by the New York court;
>
> c) the facts underlying the conviction, namely the nature of the substance trafficked and possessed, a traffic of opium in three parts, the quantity of drugs possessed and trafficked;
>
> d) the finding of this Court in *Chan* [*Chan v Canada (Minister of Citizenship and Immigration* (2000), 190 DLR (4th) 128, 10 Imm LR (3d) 167] that a crime is a serious non political crime if a maximum sentence of ten years or more could have been imposed if the crime had been committed in Canada;
>
> e) the objective gravity of a crime of trafficking in opium in Canada which carries a possible penalty of life imprisonment; and
>
> f) the fact that the appellant violated his probation order by failing to report three times to his probation officer and eventually absconded.
>
> 56 I believe that the judge committed no error when he concluded that it was reasonable for the Board to conclude on these facts that the appellant's conviction in the United States gave it a serious reason to believe that he had committed a serious non political crime outside the country.

[15] The Member, in the decision, considered the following factors:

- the gravity of the crime under California legislation, which, even for a first offender, resulted in a one year jail term as well as 36 months probation;
- the sentence imposed by the California court;
- the facts underlying the conviction, including the charge of driving under the influence causing bodily harm and the Applicant's "no contest" guilty plea;
- the finding that a crime is a serious non-political crime if a maximum sentence of 10 years or more could have been imposed were the crime committed in Canada;
- the objective gravity of a crime of blood alcohol over the legal limit causing bodily harm in Canada, which carries a possible penalty of imprisonment not exceeding ten years, putting it in the realm of "serious criminality" as defined by the *IRPA*;

- the Applicant violated his parole by not complying with the rehabilitation program provided, resulting in further jail time;
- the fact that upon release, the Applicant again violated parole by attempting to enter Russia and then entering Canada, resulting in an outstanding arrest warrant in the United States;
- the fact that parole is part of the sentence and a sentence is not served where an individual has fled prior to the completion of the parole period; and
- one of the purposes of Article 1F(b) is to protect the integrity of the refugee determination system by screening out serious ordinary criminals because of criminal activity in other countries.

[16] In my view, the Member touched on all the critical factors:

a) gravity of the crime;

b) sentence imposed;

c) facts underlying the conviction;

d) (the *Chan* matter is not relevant);

e) the objective gravity of the crime; and

f) the violation of probation.

[17] While it may be helpful and a "best practice" to refer to the leading authority followed by the Member, what is important and what the Applicant is entitled to is the analysis of those factors set forth in *Jayasekara*. In that regard the Member fulfilled that obligation even without reference to the leading authority.

C. *Facts Underlying*

[18] The Applicant contends that the Member misdescribed the facts underlying the offence by stating that the Applicant fell asleep while driving rather than being asleep due to excess alcohol, he

unconsciously drove the vehicle. If there is a material difference between falling asleep due to drunkenness and driving or falling asleep first and then driving while unconscious, I fail to see it. In any event, the finding, as quoted below, is sufficient to support the Member's conclusion.

> You testified today you were involved in an accident on February 17, 2004. You were driving after drinking and you fell asleep. In your words "you were unconscious at the wheel", and as a result collided with another vehicle in which two people were injured.

D. *Seriousness of the Offence*

[19] The Applicant says that the Member took into account irrelevant matters in considering the seriousness of the offence. The first of these is a purported personal view that drinking and driving are serious; the second is that the level of seriousness is reflected in the significant sentence imposed for a first-time offence. The precise words are at paragraph 24 of the Decision:

> I find, by nature, that drinking and driving are serious, but in this case, drinking, driving and causing bodily injury to others has increased the seriousness of the situation and this must be considered. This level of seriousness is reflected in the significant sentence imposed by the U.S. authorities for a first-time offence.

[20] In my view, the determinative statement is that related to drinking, driving and causing bodily injury to others increases the seriousness of the situation. That is an accurate statement of the relevant provision of the *Criminal Code*. The "personal comment" is almost a truism and the US sentence comment is an immaterial comment. One must read the Member's comment as a whole and against the background of the case.

E. *Post-Conviction Conduct*

[21] The Applicant takes exception to the Member considering the post-conviction conduct of probation and parole violations. The Applicant relies on the comments in *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, 223 ACWS (3d) 1012 [*Febles*], at paragraph 52, that seriousness is assessed at the time of commission of the offence:

> 52 In my view, the ordinary meaning of the text of Article 1F (b) is that whether a crime is serious for exclusion purposes is to be determined on the basis of the facts listed by this Court in *Jayasekara*. The seriousness of a crime is to be assessed as of the time of its commission; its seriousness does not change over time, depending on whether the claimant is subsequently rehabilitated and ceases to pose a danger to the public.

[22] The Applicant's argument cannot succeed. The Member's comments about post-conviction conduct follow her paragraph 28 wherein she concludes on the issue of seriousness of the California crime by reference to the equivalent offence in the Canadian *Criminal Code*. The Applicant has taken the comments out of context.

[23] The post-conviction comments are made in the context of the overall purpose of Article 1F(b).

> 32. One of the purposes of Article 1F(b) is to protect the integrity of the refugee determination system by screening out serious, ordinary criminals because of their criminal activity in other countries (Decision at para 32).

[24] This conclusion is consistent with the multi-purposes of Article 1F referred to at paragraph 28 of *Jayasekara* and cited with approval in *Zrig v Canada (Minister of Citizenship and Immigration)* 2003 FCA 178, [2003] 3 FC 761, and more recently, in *Febles*.

[25] In *Jayasekara*, one of the relevant factors considered was that appellant's violation of his probation order. *Jayasekara* confirms that post-conviction conduct may be relevant to whether a person has been convicted of a serious crime in the context of the purpose of Article 1F.

[26] I can find no support for the Applicant's argument that *Febles* and *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325, 353 DLR (4th) 536 [*Feimi*], were designed to limit or alter *Jayasekara*. In fact, *Febles* specifically adopts *Jayasekara* and *Feimi* relies on *Febles*. Had the Federal Court of Appeal wished to distance itself from *Jayasekara*, the Court would have done so in clear language.

IV. CONCLUSION

[27] In determining the reasonableness of the Member's decision, it must be looked at as a whole. For those who find one sentence or comment less appealing, it is still necessary to look at the whole of the decision. Having done so, I see no reason or basis for this Court's intervention.

[28] The parties will be allowed some time to consider whether a question should be certified. Each shall have seven (7) days – the Applicant from the date of the Reasons; the Respondent from receipt of the Applicant's submissions.

[29] Therefore, this judicial review will be dismissed.

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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