Federal Court  Cour fédérale

**Date: 20140728**

**Docket: IMM-7186-13**

**Citation: 2014 FC 753**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Montréal, Quebec, July 28, 2014**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**GLADYS MEJIA FRIAS**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The applicant is challenging the lawfulness of a decision by the Refugee Protection Division of the Immigration and Refugee Board (panel) allowing the application of the Minister of Public Safety and Emergency Preparedness (Minister) to vacate her refugee protection status under section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act).

[2] The applicant is a citizen of the Dominican Republic. She arrived in Canada via Mexico on September 23, 2006. She claimed refugee protection on October 3, 2006, and obtained refugee status on August 27, 2008. In 2009, she was denied admission to the United States. A comparison of her fingerprints showed that she has a criminal record there: she had been arrested by the Rhode Island police on October 11, 1991, under the name Mary Mendez, and had been detained for several days. Following her detention, the applicant had been charged with "delivery of cocaine" and "conspiracy to traffic in cocaine" on December 6, 1991, and the Rhode Island Supreme Court had issued an arrest warrant against her on September 20, 1992, for failure to appear for her trial. In fact, it seems as though the applicant left the United States in 2000 to return to the Dominican Republic.

[3] On February 18, 2013, the Minister filed an application to vacate refugee protection, alleging that the status was obtained on the basis of misrepresentation and that, by not disclosing her criminal record in the United States, the applicant prevented the initial panel from assessing whether the exclusion clause applies.

[4] Section 109 of the Act reads as follows:

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| 109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. | 109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait. |
| (2) The Refugee Protection | (2) Elle peut rejeter la |

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| Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection. | demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile. |
| (3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified. | (3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle. |

[5] Section 98 of the Act reads as follows:

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| 98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection. | 98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger. |

[6] Specifically, Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6 (Convention) reads as follows:

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| 1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: | 1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser : |
| . . . | […] |
| (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; | b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés; |
| . . . | […] |

[7] First, the panel found that the Minister established that the applicant misrepresented the facts. In her Personal Information Form (PIF), the applicant replied "no" to question 9(a), which reads as follows: "Have you ever been sought, arrested, or detained by the police or military or any other authorities in any country, including Canada?" She also replied "no" to question 10, which states the following: "Have you ever committed or been charged with or convicted of any crime in any country, including Canada?" The panel specifically examined the applicant's claim that she failed to disclose the charge in Rhode Island because, first, she thought that the relevant period was from 1996 to 2006 and her counsel committed an administrative error by blindly copying the responses into the PIF, and second, because the immigration officer apparently explicitly limited the questions [TRANSLATION] "to the past ten years". The panel found those explanations not credible. The panel also found that that misrepresentation concerns a material fact relating to a relevant matter, Article 1F(b) of the Convention, and specifically that "the effect of a finding under this article is that the refugee protection claimant is excluded from accessing the refugee determination process in Canada."

[8] Second, the panel examined whether the applicant committed a serious non-political crime while outside Canada. In light of the guidance provided in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 (*Jayasekara*), the panel considered the delivery of cocaine and conspiracy to traffic in cocaine serious crimes. If that offence was committed in Canada, it would constitute trafficking in a substance pursuant to subsection 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. According to subsection 5(3) of that same Act, that crime is liable to imprisonment for life. After considering the list of factors stated by the Court of Appeal in *Jayasekara* that could rebut the presumption of seriousness (the elements

of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances), the panel found that the exclusion clause applies.

[9] The standard of review that applies to the panel's decision regarding the vacation of refugee protection status is reasonableness. The same is true for the question of whether a person is subject to Article 1F(b) of the Convention. After carefully considering the arguments of the parties in light of the panel's reasons and the evidence in the record, this application must be dismissed. It was clearly reasonable for the panel to find that the decision allowing the applicant's refugee claim was made based on her misrepresentation, and that, were it not for her misrepresentation, the initial panel would have found that the applicant was excluded under Article 1F(b) of the Convention.

[10] The applicant, who does not challenge the second part of the panel's decision, continues to submit before this Court that she sincerely replied to the questions asked in the course of her refugee claim and in her statement given to the officer at the point of entry. According to her, the questions asked referred only to crimes committed in the past 10 years. The crime in question dated back to 1991 and therefore more than 10 years had elapsed. Thus, the applicant did not misrepresent the facts. Furthermore, the applicant notes that there is evidence in this case that justifies refugee protection in spite of the misrepresentation. I am not convinced by the applicant's arguments and they show only that the applicant disagrees with the credibility issues. This is not an appeal but a judicial review.

[11] Counsel for the applicant also argues before me that the panel's analysis was flawed from the outset because the *actus reus* was not considered. I do not agree. The panel did assess whether the applicant provided "information" before considering whether it would be considered material facts relating to a relevant matter of the refugee claim. The finding that the applicant engaged in misrepresentation seems reasonable to me. The record clearly shows that the applicant did not disclose her criminal record in the United States. The applicant admitted during the hearing before the panel that she used the alias of Mary Mendez and that she was arrested in the State of Rhode Island on October 11, 1991.

[12] Counsel for the applicant also argues before me that the panel did not take into account the presumption of good faith. That argument is irrelevant. Section 109 of the Act does not require that the applicant intended to misrepresent the facts. Instead, that provision sets out that the panel may vacate the decision " . . . if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." See *Canada (Minister of Citizenship and Immigration) v Wahab,* 2006 FC 1554 at paragraph 29 (*Wahab*); *Canada (Minister of Citizenship and Immigration) v Pearce*, 2006 FC 492 at paragraph 36; *Zheng v Canada (Minister of Citizenship and Immigration),* 2005 FC 619 at paragraph 27. Moreover, the panel determined that the applicant's explanation that the officer had asked her only about the past 10 years is not credible: for example, the PIF was signed one month after her interview with the officer; she had the benefit of an interpreter and a lawyer when she stated that the information in her PIF was complete.

[13] It was also reasonable for the panel to find that if the panel initially seized with the refugee protection claim had been aware of that misrepresentation, its determination would have been different because it would have found that she was excluded under Article 1F(b) of the Convention. Even though the applicant does not challenge that last finding, I nonetheless note that the panel did consider all of the elements listed by the Court of Appeal in *Jayasekara* in determining whether the applicant committed a serious non-political crime while outside Canada, and is therefore inadmissible. Finally, as the panel found in favour of exclusion under the Convention, it was not necessary to proceed with an analysis pursuant to subsection 109(2) of the Act, which sets out that the panel " . . . may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection." See *Wahab*, above, at paragraph 29.

[14] This application for judicial review must be dismissed. No question of law of general importance was raised by the parties.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review is dismissed. No question is certified.

"Luc Martineau"

Judge

Certified true translation
Janine Anderson, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-7186-13 |
| **STYLE OF CAUSE:** | GLADYS MEJIA FRIAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | JULY 10, 2014 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MARTINEAU J. |
| **DATED:** | JULY 28, 2014 |

**APPEARANCES:**

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| Suzanne Trudel | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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