Federal Court  Cour fédérale

Date: 20150108

Docket: IMM-1469-13

Citation: 2015 FC 26

Ottawa, Ontario, January 8, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ARLIND NARKAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2010, Mr Arlind Narkaj, a citizen of Albania, claimed refugee status in Canada. A panel of the Immigration and Refugee Board rejected Mr Narkaj's claim on the basis that he was excluded from refugee protection due to his previous convictions in the United States on several counts of home invasion.

[2] Mr Narkaj maintains that the Board's decision was unreasonable as it ignored some important factors in his favour. He asks me to overturn the Board's decision and order another panel of the Board to reconsider his claim.

[3] I agree with Mr Narkaj that the Board failed to consider certain factors that might have led to a conclusion that he should not be excluded from claiming refugee status. Accordingly, the Board's conclusion to the contrary cannot be considered reasonable. I must, therefore, allow this application for judicial review.

[4] The sole issue is whether the Board's decision was unreasonable.

II. The Board's Decision

[5] The Board noted that a person is excluded from refugee protection under Article 1F(*b*) of the Refugee Convention if there are serious reasons for considering that he or she has previously committed "a serious non-political crime outside the country of refuge". Generally speaking, a serious non-political crime is one for which a sentence of imprisonment of 10 years or more can be imposed (*Chan v Canada (MCI)*, [2000] FCJ No 1180 (CA) at para 9).

[6] The Board then considered the nature of Mr Narkaj's crimes. Mr Narkaj admitted that he had been involved in five offences of breaking and entering in Michigan. On one occasion, he entered a house in order to steal goods that could be resold for cash. He was 17 at the time. On the other occasions, he acted as a lookout. Those offences took place just after his 18th birthday. The Board found that these crimes would be punishable in Canada by a maximum sentence of

life imprisonment under s 348(1)(b) of the Criminal Code. Therefore, Mr Narkaj had committed serious non-political crimes.

[7] The Board went on to consider other relevant issues, including the mode of prosecution, the punishment imposed, and aggravating or mitigating factors (relying on *Jayeskara v Canada (MCI),* 2008 FCA 404).

[8] Regarding the mode of prosecution, the Board found that Mr Narkaj was represented by counsel and received a fair trial. There was no indication that he had been wrongfully convicted. Further, the offences he had committed were regarded as serious in the United States, and resulted in his removal from that country.

[9] In respect of the sentence imposed, the Board noted that Mr Narkaj received two concurrent terms of three years' probation with the first twelve months spent in custody. However, as a youth offender with no previous record, Mr Narkaj was offered a chance to avoid incarceration by attending three months in boot camp. Still, according to the Board, the sentence imposed on Mr Narkaj could not be considered lenient, given that it resulted in his losing his permanent resident status in the United States. Further, he never actually attended the boot camp; instead, he was held in custody pending deportation.

[10] The Board found no mitigating or aggravating circumstances as the proceedings in the United States were not unfair.

[11] Accordingly, as a person who had committed serious non-political crimes, the Board found that Mr Narkaj did not deserve refugee protection in Canada.

III. Was the Board's decision unreasonable?

[12] I can overturn the Board's application of Article 1F(*b*) to the facts before it only if its decision was unreasonable.

[13] The Minister argues that the Board properly considered the relevant factors and arrived at an intelligible, transparent, and defensible conclusion.

[14] I disagree. While the Board properly concluded that Mr Narkaj had committed a serious non-political crime, it erred in applying the other relevant factors.

[15] First, the Board did not actually consider the mode of prosecution. "Mode of prosecution" refers to the manner in which the prosecution elects to proceed. In Canada, for example, under the *Criminal Code*, RSC 1985, c C-46, some crimes are prosecuted by indictment, some by summary conviction, and in respect of so-called "hybrid" offences, either way (*eg* theft under $5,000 (s 334(*b*))). The mode of prosecution selected by the prosecutor is indicative of the seriousness of the offence; for example, a hybrid offence prosecuted by indictment may be punishable by a maximum of five years' imprisonment while, on summary conviction, by no more than six months (*eg* identify theft, s 402.2(5), s 787(1)). In addition, for some crimes or certain offenders, a prosecutor may have a discretion to divert proceedings away from the usual criminal process toward more suitable, less punitive measures (*eg* a program of

alternative measures (s 717)). Again, the prosecutor's choice would provide an indication of the seriousness of the offence.

[16] The Board did not consider the mode by which Mr Narkaj's crimes were prosecuted. It simply noted that he had been represented by counsel and had a fair trial. On the evidence, the Board should have considered that Mr Narkaj was charged with home invasion in the second degree, which attracts a maximum sentence of 15 years, less than the corresponding maximum in Canada. Further, Mr Narkaj was assigned "youthful trainee status", meaning that no conviction was actually entered against him so long as he attended boot camp and respected the terms of his probation. Finally, some charges against Mr Narkaj were dropped. In my view, these facts were relevant to the mode of prosecution pursued by United States' authorities.

[17] Second, the Board should have considered that the punishment imposed on Mr Narkaj was comparatively lenient, considering the maximum sentence available.

[18] Third, the Board did not consider the mitigating and aggravating factors reflected in the record. On the mitigating side, the following were relevant:

- Mr Narkaj's youth;his lack of a criminal record;
- his limited involvement in the crimes;
- the absence of violence;
- the absence of any use of alcohol, drugs, or paraphernalia on Mr Narkaj's part; and
- Mr Narkaj's guilty plea.

[19] On the aggravating side, the Board should have considered that Mr Narkaj committed crimes after having been given the protection of the United States. In turn, his conduct led to the loss of status in that country, forcing him to return to Albania where he faced possible persecution.

[20] Overall, therefore, I find that the Board's failure to consider numerous relevant facts led it to an unreasonable conclusion.

IV. Conclusion and Disposition

[21] The Board should have considered a number of factors before concluding that Mr Narkaj did not deserve refugee protection in Canada. Given the law and the facts before it, the Board's decision did not represent a defensible outcome. I must, therefore, allow this application for judicial review and order another panel of the Board to reconsider Mr Narkaj's claim. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is returned to another panel of the Board for reconsideration.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1469-13
STYLE OF CAUSE:	ARLIND NARKAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 25, 2014
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	JANUARY 8, 2015

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