

Federal Court



Cour fédérale

Date: 20160202

Docket: IMM-362-15

Citation: 2016 FC 116

Ottawa, Ontario, February 2, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**GOLAM MUSTAFA, TASLIMA BEGUM AND
MUHTASIM MUSTAFA ABID**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a decision by the Refugee Protection Division [RPD] which determined that the Applicants were excluded from refugee protection on account of serious non-political crimes committed in the United States.

[2] The crimes related to the use of identity documents obtained through fraudulent means.

The exclusion is pursuant to Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, 1951, [1969] CTS 6, 189 UNTS 150 [Convention].

II. Relevant Legislation

[3] For ease of reference, the most relevant provisions are set out below:

Immigration and Refugee Protection Act, SC 2001, c 27

122 (1) No person shall, in order to contravene this Act,

122 (1) Commet une infraction quiconque, en vue de contrevenir à la présente loi et s'agissant de tout document — passeport, visa ou autre, qu'il soit canadien ou étranger — pouvant ou censé établir l'identité d'une personne :

(a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;

a) l'a en sa possession;

(b) use such a document, including for the purpose of entering or remaining in Canada; or

b) l'utilise, notamment pour entrer au Canada ou y séjourner;

(c) import, export or deal in such a document.

c) l'importe ou l'exporte, ou en fait le commerce.

(2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof

(2) La preuve de tout fait visé au paragraphe (1) quant à un document laissé en blanc, incomplet, modifié, contrefait ou illégitime vaut, sauf preuve contraire, preuve de l'intention

that the person intends to contravene this Act.

123 (1) Every person who contravenes

(a) paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and

(b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.

(2) The court, in determining the penalty to be imposed, shall take into account whether

(a) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121.1(1); and

(b) the commission of the offence was for profit, whether or not any profit was realized.

...

133 A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or

de contrevenir à la présente loi.

123 (1) L'auteur de l'infraction visée :

a) à l'alinéa 122(1)a) est passible, sur déclaration de culpabilité par mise en accusation, d'un emprisonnement maximal de cinq ans;

b) aux alinéas 122(1)b) ou c) est passible, sur déclaration de culpabilité par mise en accusation, d'un emprisonnement maximal de quatorze ans.

(2) Le tribunal tient compte dans l'infliction de la peine des circonstances suivantes :

a) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle — au sens du paragraphe 121.1(1) — ou en association avec elle;

b) l'infraction a été commise en vue de tirer un profit, que celui-ci ait été ou non réalisé.

...

133 L'auteur d'une demande d'asile ne peut, tant qu'il n'est statué sur sa demande, ni une fois que l'asile lui est conféré, être accusé d'une infraction visée à l'article 122, à l'alinéa 124(1)a) ou à l'article 127 de la présente loi et à l'article 57, à l'alinéa 340c) ou aux articles 354, 366, 368, 374 ou 403 du Code criminel, dès lors qu'il

403 of the <i>Criminal Code</i> , in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.	est arrivé directement ou indirectement au Canada du pays duquel il cherche à être protégé et à la condition que l'infraction ait été commise à l'égard de son arrivée au Canada.
---	---

United Nations Convention Relating to the Status of Refugees, 1951, [1969] CTS 6, 189 UNTS 150

Article 1F. 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 the country of refuge prior to his admission to that country as a refugee;

Criminal Code of Canada, RSC 1985, c C-46

57 (1) Every one who, while in or out of Canada,	57 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, étant au Canada ou à l'étranger, selon le cas :
---	--

- | | |
|--|---|
| (a) forges a passport, or | a) fait un faux passeport; |
| (b) knowing that a passport is forged | b) sachant qu'un passeport est faux : |
| (i) uses, deals with or acts on it, or | (i) soit s'en sert, le traite ou lui donne suite, |
| (ii) causes or attempts to cause any person to use, deal with or act on it, as if the passport were genuine, | (ii) soit fait, ou tente de faire, accomplir l'un des actes visés au sous-alinéa (i). |

is guilty of an indictable

offence and liable to imprisonment for a term not exceeding fourteen years.

(2) Every one who, while in or out of Canada, for the purpose of procuring a passport for himself or any other person or for the purpose of procuring any material alteration or addition to any such passport, makes a written or an oral statement that he knows is false or misleading

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

...

(5) In this section, *passport* has the same meaning as in section 2 of the *Canadian Passport Order*.

...

366 (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

(a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or

(b) that a person should be induced, by the belief that it

(2) Quiconque au Canada ou à l'étranger, afin d'obtenir un passeport pour lui-même ou pour une autre personne ou afin d'obtenir une modification ou une addition importante à un tel passeport, fait une déclaration écrite ou orale qu'il sait être fausse ou trompeuse est coupable :

a) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

...

(5) Au présent article, *passport* s'entend au sens de l'article 2 du *Décret sur les passeports canadiens*.

...

366 (1) Commet un faux quiconque fait un faux document le sachant faux, avec l'intention, selon le cas :

a) qu'il soit employé ou qu'on y donne suite, de quelque façon, comme authentique, au préjudice de quelqu'un, soit au Canada, soit à l'étranger;

b) d'engager quelqu'un, en lui faisant croire que ce

is genuine, to do or to refrain from doing anything, whether within Canada or not.

document est authentique, à faire ou à s'abstenir de faire quelque chose, soit au Canada, soit à l'étranger.

(2) Making a false document includes

(2) Faire un faux document comprend :

(a) altering a genuine document in any material part;

a) l'altération, en quelque partie essentielle, d'un document authentique;

(b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or

b) une addition essentielle à un document authentique, ou l'addition, à un tel document, d'une fausse date, attestation, sceau ou autre chose essentielle;

(c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

c) une altération essentielle dans un document authentique, soit par rature, oblitération ou enlèvement, soit autrement.

Canadian Passport Order, SI/81-86

2 In this Order,

2 Dans le présent décret,

passport means an official Canadian document that shows the identity and nationality of a person for the purpose of facilitating travel by that person outside Canada;
(*passport*)

passeport désigne un document officiel canadien qui établit l'identité et la nationalité d'une personne afin de faciliter les déplacements de cette personne hors du Canada;
(*passport*)

Immigration Act, RSC 1985, c I-2

95.1(1) No person who claims to be a Convention refugee and has notified an immigration officer of the claim shall, pending disposition of the

95.1(1) La personne qui revendique le statut de réfugié au sens de la Convention et qui a avisé l'agent d'immigration en ce sens ne peut, tant que la

claim, be charged with or convicted of

question n'est pas tranchée, être accusée ou déclarée coupable d'aucune des infractions suivantes, si elle est arrivée directement au Canada du pays qu'elle a quitté ou hors duquel elle est demeurée de crainte d'être persécutée :

(a) an offence under paragraph 94(1)(a), (b), (k) or (l),

a) l'infraction visée aux alinéas 94(1)a), b), k) ou l);

(b) an offence under paragraph 94(1)(f), (g) or (h) in relation to an examination of that person under this Act,

b) l'infraction visée aux alinéas 94(1)f), g) ou h) et relative à l'interrogatoire dont elle a fait l'objet dans le cadre de la présente loi;

(c) an offence under section 95 or 98 in relation to the coming into Canada of that person or an examination of that person under this Act, or

c) l'infraction visée à l'article 95 ou 98 et relative à son arrivée au Canada ou à l'interrogatoire dont elle a fait l'objet dans le cadre de la présente loi;

(d) an offence under section 57, paragraph 340(c) or any of sections 354, 366, 368, 374 or 403 of the Criminal Code in relation to the coming into Canada of the person,

d) l'infraction visée à l'article 57, à l'alinéa 340c) ou aux articles 354, 366, 368, 374 ou 403 du Code criminel et relative à son arrivée au Canada.

if that person came to Canada directly from the country that the person left, or outside of which the person remains, by reason of fear of persecution.

III. Background

[4] Golam Mustafa [the Principal Claimant] (actually named Mohammed Golam Kibria), Taslima Begum [the Female Claimant] (wife of the Principal Claimant), both citizens of

Bangladesh, and their son Muhtasim Mustafa Abid [the Minor Claimant], citizen of the United States, claim refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[5] The Principal Claimant based his claim on political involvement contrary to the ruling party.

[6] The Immigration and Refugee Board [Board] found that the Principal Claimant took steps to secure a false identity, used fraudulent means to obtain a visa for the U.S. and maintained this false identity for 12 years until discovered by the U.S. authorities. He purported to be the son of his brother in a successful effort to avoid lengthy wait times for a visa.

[7] The Principal Claimant entered the U.S. on August 8, 1999, as a landed immigrant on the basis of being a dependent of his “father” – who was actually his brother.

The Principal Claimant married the Female Claimant by telephone in Bangladesh. They subsequently had a U.S. born son.

[8] The Principal Claimant had several interactions with the FBI who were determining whether he was connected with an extreme Islamic group in the U.S.

[9] The Principal Claimant also became aware, after applying for citizenship, that his DNA would be tested to confirm his identity. The Principal Claimant and Female Claimant, at some point during dealings with the FBI, claimed they felt unsafe in the U.S. and came to Canada.

Importantly, they used the passports at issue for purposes of entering Canada.

[10] On the original PIF the Principal Claimant claimed he was Golam Mustafa, later changed to Mustafa Mohammed Kibria and then to Mohammed Golam Kibria. His date of birth and relationships changed. He added a different father and mother, and two brothers and two sisters. He changed two previously-listed sisters to nieces.

[11] Not surprisingly, he filed a completely new narrative which claimed a risk because of his political involvement. He also disclosed his “true” identity.

[12] Equally not surprisingly, the RPD generally found the Principal Claimant not to be a trustworthy or credible witness. The RPD found that neither the Principal Claimant nor the Female Claimant had a well-founded fear of persecution or would be subjected personally to a risk of death or harm if they returned to Bangladesh.

In this regard, the RPD noted two instances of refolement.

[13] The Board did not accept the explanation that they were unaware of the immigration process, nor did the Board accept their reliance on the fact that they did not have counsel when preparing their PIF.

[14] The determinative issue was credibility. The “exclusion” finding was an alternative finding. The initial court hearing was adjourned to allow the parties time to make submissions in

respect of the recent decision in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 [*Febles*].

IV. Analysis

[15] The standard of review on the credibility issue is reasonableness with considerable deference owed to the advantageous position of the trier of fact (*Aguebor v (Canada) Minister of Employment and Immigration (FCA)*, [1993] FCJ No 732, 42 ACWS (3d) 886).

The standard of review regarding the exclusion finding is more nuanced and will be discussed later.

A. *Credibility*

[16] I cannot find anything unreasonable in the RPD's credibility finding. The Principal Claimant's ever changing story – without any real justification for his lies – is a sufficient basis for the finding that he cannot be trusted. There is no credible documentary evidence ignored by the RPD that would call this general finding into doubt.

The Principal Claimant's efforts to avoid detection, including failing to show up for a DNA test, undermines the suggestion that he had a real basis for fear. If so, he would not have gone to such lengths to avoid the truth.

[17] The Applicants argued that the RPD should have commented on key facts in the objective evidence. While the Board's decision could have been more fulsome, it is difficult to see how more fulsome reasons would have assisted the Applicants.

[18] The Board's finding is consistent with the record – it was clear, intelligible and reasonably open to it to make.

On this ground, the judicial review will be denied.

B. *Exclusion*

[19] As credibility is determinative, the Court's comments on exclusion are *obiter*. It is usually best to refrain from *obiter* but in this case I part from that wisdom in order to avoid any suggestion later that this Court accepted or confirmed the Board's finding and most particularly its conclusion on the criminal offence said to have been committed.

[20] As noted earlier, the Applicants were excluded pursuant to Article 1F(b) of the Convention:

Article 1F. 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 the country of refuge prior to his admission to that country as a refugee;

[21] In the present case, the Principal Claimant was not convicted of a serious non-political crime. Accordingly, the test is whether there is "serious reason for considering" that he committed such a crime.

[22] The crime that forms the basis of the allegation is s 57(1)(b) – knowing use, in or out of Canada, of a forged passport. The crime is an indictable offence punishable by up to 14 years' imprisonment.

[23] The factual basis is the Principal Claimant's admission that he obtained his Bangladesh passport fraudulently by obtaining a false date of birth document with a new birthday and new name. The document said to be forged is the passport (not the date of birth document). The passport as issued was not altered nor did he make the passport.

[24] Considering the standard of review, the Board's analysis of the facts and the application of those facts must be reasonable (*Uppal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 338, 289 FTR 196; *Kathirgamathamby v Canada (Minister of Citizenship and Immigration)*, 2013 FC 811, 437 FTR 185).

[25] However, any rebuttable presumption that the interpretation of law is also reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654) is readily rebutted. The interpretation of Article 1F(b) has been held to be correctness (*Febles*, particularly at the Court of Appeal). Further, the central issue is whether the offending act was the Principal Claimant's use of a forged document or the making of a false statement to secure his Bangladeshi passport (s 57(2) of the *Criminal Code*). This is a consideration well beyond the Board's area of expertise and is of general public importance. It must be correctly determined.

[26] The importance of the distinction between using a forged document (s 57(1)(b)) and the making of a false statement to procure a passport (s 57(2)) is the maximum sentence of 14 years versus two years, respectively.

[27] That difference in sentencing is one of the factors to be examined in considering whether the non-political crime is “serious” such that the Principal Claimant can be excluded under the Convention.

[28] In *Febles*, the Supreme Court of Canada confirmed the approaches in *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1180, [2000] 4 FC 390, and *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164. This approach dictates that the 10-year rule (a crime punishable by imprisonment for 10 or more years is presumed to be a serious offence) is a useful guideline to which other contextual factors – the actual sentencing experience, for example – are to be added for consideration.

[29] In my view, the Board erred in incorrectly interpreting s 57(1) of the *Criminal Code* to include documents which were not forged (as defined in the *Criminal Code*). From that error, the Board concludes there are serious reasons for considering that a serious offence has occurred outside Canada and the Principal Claimant is excluded by Article 1F(b).

[30] It is important to note that there was not sufficiently developed argument on the applicability of sections 122 and 123 of IRPA. Section 133 operates as a bar to the application of s 122 in the context of a refugee claim.

The purpose of Article 1F(b) is to capture those who attempt to enter Canada having potentially committed a serious non political crime outside Canada. In this case, the crime (if committed in Canada) would be the making of a false statement in Bangladesh to secure a passport there. Such a crime is subject to a maximum two-year sentence of imprisonment.

[31] Despite this error in the Board's analysis and its mechanical consideration of the 10-year rule – which would result in an invalid exclusion finding – the Board's decision stands because of the reasonable conclusion as to credibility.

V. Conclusion

[32] For these reasons, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-362-15

STYLE OF CAUSE: GOLAM MUSTAFA, TASLIMA BEGUM AND
MUHTASIM MUSTAFA ABID v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 14, 2015

JUDGMENT AND REASONS: PHELAN J.

DATED: FEBRUARY 2, 2016

APPEARANCES:

Howard C. Gilbert FOR THE APPLICANTS

Suranjana Bhattacharyya FOR THE RESPONDENT

SOLICITORS OF RECORD:

Howard C. Gilbert FOR THE APPLICANTS
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Toronto, Ontario