Federal Court  Cour fédérale

Date: 20110111

Docket: IMM-5979-09

Citation: 2011 FC 19

Ottawa, Ontario, January 11, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

VINOD KUMAR RAINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Vinod Kumar Raina (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the "Board"), dated November 4, 2009. In its decision, the Board found that the Minister of Citizenship and Immigration (the "Respondent") had discharged his burden to show that the Applicant was excluded from protection pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), on the basis of Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951,

Can. T.S. 1969 No. 6 (the "Convention"), that is for being convicted of a serious non-political crime.

[2] The Applicant is a citizen of India. He came to Canada in October 2006 and claimed protection on the basis of harassment, threats, and torture by police in the State of Jammu and Kashmir. In his Personal Information Form ("PIF"), the Applicant disclosed that he had been convicted in New Zealand in December 2001 of the offence of indecent assault. He was sentenced to serve a term of imprisonment of 2 years and 6 months. The Applicant was also charged with the more serious offence of sexual violence for the same incident. He was acquitted of that charge.

[3] The Applicant did not appeal this conviction but maintained at the hearing before the Board that he had been unjustly convicted of indecent assault because he had kissed the 14 year old girl who was related to his wife.

[4] The Minister of Citizenship and Immigration (the "Respondent") argued before the Board that indecent assault is a serious non-political crime equivalent to sexual interference. Reference was made to section 151 of the *Criminal Code*, R.S.C. 1985, c. C-46 which provides as follows:

Sexual interference	Contacts sexuels
151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years (a) is guilty of an indictable	151. Toute personne qui, à des fins d'ordre sexuel, touche directement ou indirectement, avec une partie de son corps ou avec un objet, une partie du corps d'un enfant âgé de moins de seize ans est coupable : a) soit d'un acte criminel

offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.	passible d'un emprisonnement maximal de dix ans, la peine minimale étant de quarante-cinq jours; b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois, la peine minimale étant de quatorze jours.

[5] In its decision, the Board found that the offence of which the Applicant was convicted falls into the category of child molestation. If convicted of such an offence in Canada, the Board stated without explanation that the Applicant could be punished by a maximum term of imprisonment of 10 years. The Board noted that this creates a presumption that there are serious grounds to believe that the Applicant committed a serious non-political crime outside of Canada.

[6] The Board found that the Applicant had not rebutted the presumption and rejected the Applicant's argument that the elements of the offence of indecent assault in New Zealand are not equivalent to the elements of s. 151 of the *Criminal Code*. The Board does not give its reasons for rejecting that argument.

[7] The failure to properly apply the test for determining equivalency of criminal offences for the purpose of Article 1F(b) of the Convention can constitute a reviewable error; see *Iliev v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 395.

[8] In *Hill v. Canada (Minister of Employment & Immigration)* (1987), 73 N.R. 315, the Federal Court of Appeal set out the following tests for determining the equivalency of offences:

> It seems to me that because of the presence of the words "would constitute an offence ... in Canada", the equivalency can be determined in three ways: - first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.

[9] In my opinion, the Board erred by concluding that the elements of indecent assault in New Zealand are equivalent to the elements of s. 151 of the *Criminal Code* without applying one of the three tests for determining equivalency.

[10] The Board considered the more serious charge of sexual violence to be relevant as to whether the conviction for indecent assault constituted a serious non-political crime. The Applicant argues that the Board erred in doing so.

[11] I agree. In my opinion, the fact that the Applicant was charged and acquitted of a more serious offence cannot be used to determine that a lesser charge of which the Applicant was convicted is a serious non-political crime. In similar contexts, this Court has held that references to outstanding criminal charges are inadmissible and violate the *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11; see *Bertold v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 195.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the decision is set aside and the matter is remitted to a different panel of the Board for re-determination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Krassina Kostadinov	FOR THE APPLICANT
Amy Lambiris Manuel Mendelzon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, ON	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, ON	FOR THE RESPONDENT