

Federal Court



Cour fédérale

Date: 20110531

Docket: IMM-5400-10

Citation: 2011 FC 632

Ottawa, Ontario, May 31, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JEFFREY JOSEPH ROBERTS

Applicant

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 25, 2010, wherein the Board found that there were serious reasons for considering that the applicant had committed a serious non-political crime prior to coming to Canada and was therefore excluded from seeking

refugee protection in Canada under section 98 of the Act and Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* (the Convention).

[2] The applicant requests that the decision be set aside and the claim remitted for redetermination by a different member of the Board.

Background

[3] Jeffrey Joseph Roberts (the applicant) is a citizen of the United States born on January 21, 1973.

[4] In 1998, the applicant was convicted of indecent liberties with a child in the state of Kansas and sentenced to 36 months.

[5] The applicant entered Canada in 2004 and claimed refugee protection in 2009.

Board's Decision

[6] The Board found that at age 25, the applicant was convicted of indecent liberties with a child under Kansas Statutes, KSA 21-3503(a)(1) after entering into a plea agreement. The Board found this to be the equivalent to the *Criminal Code of Canada*, RSC 1985 c C-46 section 151, sexual interference, which carries a maximum penalty of ten years imprisonment and to which consent is not a defence.

[7] In his Personal Information Form (PIF), the applicant stated that he was 22 years old when he kissed a girl at a party who he did not know was underage. The Board noted that this differed widely from the evidence of the Sherriff's Department of Cowley County which stated that the applicant admitted to having sexual intercourse with the minor. Further, the applicant admitted in oral testimony that he was in fact 25 years old at the time.

[8] The Board began its analysis by considering whether there was evidence to find that there are serious reasons for considering that the applicant committed a serious non-political offence. The Board found that the applicant was represented by counsel in Kansas, that he entered into a guilty plea before a judge and pled to the lesser included offence than the original charge of aggravated indecent liberties with a child, and that the applicant did not appeal the conviction or sentence. The Board concluded that on the burden of proof of more than a mere suspicion, there are serious reasons for considering that the applicant committed a serious non-political offence.

[9] The Board then considered whether the crime was a serious non-political crime. The Board found that the charge of indecent liberties with a child is non-political. It concluded that based on the factors in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 and *Xie v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1023, the crime was also serious and that if committed in Canada, it would carry a maximum sentence of ten years. The Board highlighted when considering the sentence, it considers the sentence that the applicant could have received upon conviction.

[10] The Board accepted that the applicant had served his sentence but found that he may still be excluded from claiming protection. The Board also noted that many years have passed and the applicant now states that he is a family man. However, the Board found there to be other factors that demonstrate that the applicant has not taken full responsibility of his criminal offence in the United States. These were:

- the delay in claiming protection in Canada;
- that he failed to report to the Kansas Sex Offender Registry 13 times; and
- that although he claims to have sent a fax indicating he was leaving for Canada to the authorities in Kansas, he presented only a fax transmission without any evidence of what information was in the fax, who it was sent to, or whether it was received.

[11] The Board concluded that the applicant committed a serious non-political crime and should be excluded under section 98 of the Act and Article 1F(B) of the *Convention*.

Issues

[12] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Board err in finding that the applicant had committed a serious non-political crime outside of Canada?

Applicant's Written Submissions

[13] The applicant submits that the Board did not properly analyze the factors in *Jayasekara* above, and of the factors it did mention, it failed to carry out any real evaluation.

[14] The applicant argues that the Board did not consider the mitigating circumstances that:

- the applicant completed his sentence;
- the applicant reported to the sex offender registry for six consecutive years;
- the applicant's failure to report was because he had left the jurisdiction out of fear;
- the applicant was unaware of the gravity of the sentence when he entered a plea bargain; and
- that ten years had elapsed since the conviction.

[15] The Board erred in concluding that the applicant has not taken responsibility for his actions as he showed remorse at the hearing and accepted a plea bargain.

[16] The applicant also argues that the Board erred in making an adverse finding that the applicant had thirteen counts of failure to report against him, since these incidents occurred because he left the jurisdiction out of fear for his life.

[17] Finally, the applicant submits that the Board failed to provide adequate reasons.

Respondent's Written Submissions

[18] The respondent submits that the Board properly considered the factors for assessing the seriousness of the crime from *Jayasekara* above. Those being: “the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction” (at paragraph 44).

[19] The Board determined the correct standard of proof to be higher than mere suspicion and lower than a balance of probabilities.

[20] The respondent submits that in assessing whether it was a serious non-political crime, the Board correctly considered that the offence would carry a maximum penalty of ten years in Canada with no defence of consent and that the test for exclusion is the penalty that could have been given to the accused under Canadian law. The Board also noted that the applicant had pled to a lesser included offence and that the applicant was required to register with the Kansas Sex Offender Registry. The Board determined that given the evidence and elements of the charge and that the applicant did not appeal the sentence or conviction, there were serious reasons for considering that the applicant committed a serious non-political offence.

[21] The respondent submits that the Board did take into account the fact that the applicant had completed his sentence in the United States, but found this to be only one of the factors to consider.

[22] Further, the respondent argues that the Board did consider the time passed and the fact that the applicant now has a family. However, the Board outlined numerous reasons for why it did not find that the applicant had taken full responsibility for the offence, including his delaying in seeking protection in Canada and his evidence on the failure to report to the sex registry.

[23] The respondent submits that it was reasonable for the Board to find that the applicant had not made attempts to notify the authorities in Kansas before coming to Canada. While the applicant had a fax transmission sent, there was no information about what was contained in the fax. The respondent submits that the applicant's evidence about not knowing he had to notify the authorities on this point and the sending of the fax, were inconsistent.

[24] The Board weighed the mitigating factors but reasonably concluded that there were serious grounds for considering that the applicant committed a serious non-political crime.

[25] Finally, the respondent submits that the Board's reasons were adequate as they inform the applicant of the reasons for the finding of exclusion and do not prejudice his ability to seek judicial review. The reasons must not be read microscopically but as a whole and as a whole, they were adequate.

Analysis and Decision

[26] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[27] The question of exclusion under Article 1F(b) is one of mixed fact and law and the reasonableness standard applies (see *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, affirmed by the Federal Court of Appeal in *Jayasekara* above).

[28] **Issue 2**

Did the Board err in finding that the applicant had committed a serious non-political crime outside of Canada?

The Board's reasons must not be read microscopically and held to the standard of perfection. Rather, they should be assessed as a whole (see *Medina v Canada (Minister of Employment and Immigration)* (1990), 120 NR 385 (FCA); *Ahmed v Canada (Minister of Employment and Immigration)* (1993), 156 NR 221 (FCA)).

[29] After reviewing the whole of the Board's decision and reasons, I find that the conclusion that the applicant is excluded from refugee protection under Article 1F(b) of the *Convention* was reasonable.

[30] The Board considered all of the evidence before it, including the applicant's PIF and oral testimony as well as police reports, court documents, the Kansas Sexual Offender Registry and a letter from the applicant's former defence attorney.

[31] The Board correctly found that the applicant was convicted of an offence in the United States of which the equivalent offence in Canada is punishable with a maximum sentence of ten years imprisonment.

[32] Contrary to the applicant's submissions, I find that the Board did fully consider the factors outlined by the Federal Court of Appeal in *Jayasekara* above, in assessing the seriousness of the crime. In determining whether the applicant was convicted of a serious crime, the Board looked at the elements of the crime of indecent liberties with a child and the fact that no defence of consent would be available in Canada. The Board considered the evidence of the facts leading up to the offence and accepted that a statement of agreed upon facts did not exist. The Board noted the sentence imposed on the applicant and highlighted that he was required to register on the Sex Offender Registry.

[33] The Board also considered that time has passed and that the applicant considers himself to be a family man. However, the Board reasonably found that these were not mitigating factors as the applicant has not taken full responsibility for the crime. This was based on the applicant's shifting testimony on his age at the time of the commission of the offence, the finding that he had not informed the authorities of leaving the jurisdiction and therefore had not reported to the Sex Offender Registry and his delay of five years in claiming protection in Canada until faced with the chance of deportation to the U.S.

[34] The Board reasonably concluded that the applicant was excluded from refugee protection under Article 1F(b) and provided adequate reasons how it reached this conclusion.

[35] The application for judicial review is therefore dismissed.

[36] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[37] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

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.
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United Nations Convention and Protocol Relating to the Status of Refugees

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 :
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...

...

(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 réfugiées ;
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Kansas Statute, KSA 21-3503(a)(1)

Statute 21-3503: Indecent liberties with a child.

(a) Indecent liberties with a child is engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:

(1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

...

(c) Indecent liberties with a child is a severity level 5, person felony.

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

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 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.

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 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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5400-10

STYLE OF CAUSE: JEFFREY JOSEPH ROBERTS
- and -
THE MINISTER OF CITIZENSHIP
& IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 24, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: May 31, 2011

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