Federal Court  Cour fédérale

Date: 20110628

Docket: IMM-6140-10

Citation: 2011 FC 789

Ottawa, Ontario, June 28, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MARCIA INES ROJAS CAMACHO
SAMANTHA CATALINA RODRIGUEZ ROJAS
(a.k.a. SAMANTHA CATALI RODRIGUEZ)
JOSE MIGUEL RODRIGUEZ ORTIZ

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") of the decision dated September 16, 2010 wherein the Refugee Protection Division of the Immigration and Refugee Board determined that Marcia Ines Rojas Camacho ("the female applicant"), Jose Miguel Rodriguez Ortiz ("the male

applicant") and the applicants' daughter (the "minor applicant") were not Convention refugees or persons in need of protection.

BACKGROUND

[2] The female applicant, also the principal applicant in this judicial review, is a dual citizen of Colombia and Venezuela. Her father was a businessman who travelled between Venezuela and Columbia and came to the attention of the National Liberation Army ("ELN") who attempted to extort him. When he refused to pay they began to threaten him, along with other members of their family.

[3] The principal applicant left Colombia for the USA in 1999 but returned to Colombia to care for her father when he became ill. She remained there, however, until November 2001 and even after her father himself moved to the USA in late 1999/early 2000. She stayed in Colombia in order to complete her university education there. At that time she was also involved in a radio show and claimed that the Revolutionary Armed Forces of Colombia ("FARC") began to threaten her due to certain statements she made on-air about their activities. She then went back to the USA and lived there illegally, although she did begin the process of applying to become a permanent resident. She became frustrated with the processing time and came to Canada with her husband and child to claim Convention refugee status in 2008. Her sister had succeeded in a refugee claim in Canada.

[4] The male applicant, a Colombian citizen, initially went to the USA in 1983. He acknowledged not having to seek protection because of problems in Columbia. In the US, he

married an American woman who sponsored his permanent residence. In 1988, he was convicted of conspiracy to distribute cocaine and unlawful possession with intent to distribute cocaine. He was sentenced to 27 months in jail. He lost his permanent resident status and was deported to Colombia in 1991. In 1993, he illegally returned to the USA and re-established his relationship with his American spouse and they had a second child. They separated in 1997. In 2001, he met the female applicant. They began a common-law relationship in 2003 and had a daughter, the minor applicant in this case. The male applicant joined his partner and daughter in Canada in August 2008.

DECISION UNDER REVIEW

[5] The Board concluded there was insufficient subjective fear or an objective basis to sustain the female applicant's claim and held that the male applicant should be excluded from the Convention refugee definition pursuant to Article 1F(b) for serious non-political crime. The Board found the minor applicant did not make an allegation of risk of harm against the USA and so rejected her claim.

ISSUES

[6] The applicants do not challenge the Board's finding with respect to the minor applicant. The determinative issues raised by the parties are whether the Board erred in excluding the male applicant and whether the Board's finding with respect to the female applicant was reasonable.

ANALYSIS

Did the Board err in excluding the male applicant?

[7] The applicants rely on *Chan v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [2000] 4 F.C. 390 for the proposition that exclusion under 1F(b) of the Convention cannot be invoked in cases where a refugee claimant has been convicted of a crime and has served his sentence outside of Canada prior to arrival. In *Chan*, the appellant was convicted of illegal use of a communication device as it had to do with offences related to drug trafficking. After serving his sentence, he was deported to China. In 1996, he claimed refugee status in Canada. The appeal was allowed and the Federal Court of Appeal at that time determined that article 1F(b) was not applicable to a refugee claimant who had been convicted for a crime committed outside Canada and has served his or her sentence prior to coming here.

[8] Since *Chan*, and with the coming into force of the new IRPA, the jurisprudence of the Federal Courts has evolved. See, for example the concurring reasons of Justice Robert Décary in *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 F.C. 761 at paragraph 128 to the effect that *Chan* should not be interpreted to mean that 1F(b) did not, under any circumstances, apply to a refugee claimant who had served his or her sentence for a crime committed outside Canada:

> In short, in *Chan* the Court was dealing with a different situation and the comments it made on Article 1F(b) of the Convention must be read with caution, as the very wording of that article indicates that it applies to more than the cases covered by Canadian law in the three aforementioned sections. There is also no question, as the Court held in *Chan*, that the country of refuge can certainly decide not to exclude the perpetrator of a serious non-political crime who has already been convicted

> and has served his sentence. However, I do not think the Court decided that the country of refuge could not decide to exclude the perpetrator of a serious non-political crime, whatever the circumstances, provided he has been convicted and has served his sentence.

[9] This issue was again considered in *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 F.C.R. 164, a case concerning an individual who was arrested in New York State on drug charges and pleaded guilty to the criminal sale of a controlled substance, namely opium, and to criminal possession of marijuana. The Federal Court of Appeal considered two certified questions, one of which is raised before this Court in the present matter: *Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(b) of the Convention relating to the Status of Refugees (Convention)*?

[10] In answering this question in the negative, Justice Gilles Létourneau, writing for a unanimous Court, said the following at paragraphs 26-27 of *Jayasekara*:

> In my respectful view, the decision in *Chan* stands for the proposition that, under the existing law at the time, which, as we will see, has now been modified by the IRPA, a claimant who was convicted of a serious non-political crime and who served his sentence was not necessarily excluded from a refugee hearing or rendered ineligible to apply for the refugee protection afforded by the Convention. He or she remained entitled to have their refugee claim determined by the Refugee Division if the Minister concluded that the claimant was rehabilitated and was not a danger to the public.
>
> While the decision in *Chan* afforded some protection to a claimant and safeguarded the Minister's discretion, it did not then, nor does it now, in my respectful view, stand for the proposition that, whatever the circumstances, a country cannot exclude an applicant who was convicted and served his sentence.

[11] Jayasekara has been followed by the Federal Court in *Noha v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 683 and *Flores v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1147. In both of these cases the Court held that sentence completion is no

longer determinative of the application of article 1F(b) of the Convention. See also Chief Justice Allan Lutfy's decision of *Chawah v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 324, 79 Imm. L.R. (3d) 262, which recognized *Jayasekara* and set aside the Board member's decision which determined that 1F(b) would not apply to the refugee claimant in that case because he had served a sentence outside of Canada for a non-political crime. As Chief Justice Lutfy put it at paragraph 6, "the issue has been clarified".

[12] At paragraph 44 of *Jayasekara* the Federal Court of Appeal pointed to a general consensus among international courts in interpreting the exclusion clause in Article 1F(b). It requires the following five factors:

1. An evaluation of the elements of the crime;
2. The mode of prosecution;
3. The penalty prescribed;
4. The facts; and
5. The mitigating/aggravating circumstances underlying the conviction.

It went on to state that "whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors".

[13] In the case at bar, the Board took into consideration these factors. First, it outlined that in Canada, trafficking a substance is an offence under subsection 5(1) of the Controlled Drugs and Substance Act ("CDSA") and possession for the purpose of trafficking is likewise and offence under subsection 5(2) of the CDSA. As the substance in question was cocaine, a Schedule 1 drug, it noted that offences under the aforementioned sections of the CDSA are liable to indictment and are

punishable under paragraph 5(3)(a) to imprisonment for life. As noted above, it further held that in the Canadian context, paragraph 465(1)(c) of the *Criminal Code* establishes that every person who conspires to commit such an offence is guilty of an indictable offence and is liable to receive the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable. The Board thus concluded that the gravity of the punishment to which the male applicant would have been liable, had he committed the same crime in Canada, is sufficient to conclude that he committed a "serious" criminal offence. The Board also noted that the male applicant admitted that he committed the crimes for which he was arrested, charged, convicted and sentenced.

[14] Second, it considered the mode of prosecution, stating that the male applicant "had committed a serious crime in the USA for which he was punished after he received a fair trial with legal representation". Thirdly, it noted the penalty, the sentence of 27 months imprisonment, finding it to be lengthy and indicative of the gravity of the drug-related offences in the USA. It addressed the fourth factor by considering other facts like his loss of permanent residency status in the USA, his deportation to Colombia, an order not to re-enter the USA for 10 years and the fact that he re-entered the USA illegally and was living there illegally until coming to Canada in 2008.

[15] At the hearing, the applicant relied on the recent decision of Justice James Russell in *Guerrero v. Canada (Minister of Citizenship and Immigration)* 2010 FC 384, 88 Imm. L.R. (3d) 258. In that case, Justice Russell set aside an exclusion decision on the ground that the Board had failed to explain why the points put forward by the applicant in mitigation were insufficient to rebut the presumption of a serious non-political crime.

[16] The applicant argued that the fifth *Jayasekara* factor implicitly calls for a balancing of the mitigating and aggravating circumstances *since* the conviction. I don't agree. The mitigating and aggravating circumstances referred to in *Jayasekara* go to the nature of the crimes committed, not to what might later be considered as factors to be taken into account in determining whether the offender/claimant has been rehabilitated. Thus, for the purpose of determining whether the exclusion applies, it is not enough for a claimant to say he now regrets his behaviour and has turned his life around if his behaviour at the time it was committed constituted a serious non-political crime.

[17] Here, there was nothing put forward by the applicant upon which the Board could have evaluated the circumstances of the offences to determine whether they were more or less serious than they appeared to be on the face of his record.

[18] It is clear from its analysis as a whole that the Board properly analyzed the male applicant's case and determined that he did not rebut the presumption of seriousness so as not to be excluded pursuant to 1F(b).

[19] Accordingly, the determination regarding exclusion was reasonable and defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47; *Flores*, above, at para. 27.

Was the board's decision with respect to the female applicant reasonable?

[20] It was reasonable for the Board to conclude that the female applicant's failure to apply for asylum in the USA in 1999, together with her return to Colombia, the country where she allegedly feared persecution, is indicative of a lack of subjective fear in Colombia. This was further reinforced, as reasonably noted by the Board, by her father's decision not to leave Colombia with her and her mother in January 1999, especially since he was the prime target. The applicant claims she returned to Colombia to care for her sick father and to continue her education but she provided no documentary evidence to show that her father was ill and needed her assistance. Moreover, even after her father left Colombia, she stayed there until October 2001, participated in university programs while being allegedly threatened by the FARC. It was reasonable for the Board to find that these actions underscored her lack of subjective fear.

[21] After having fled to the USA on November 15, 2001, the female applicant received a six-month permit which she did not renew. She lived illegally in the USA and did not seek protection in Canada even after learning of her sister's eligibility for protection here. It was open to the Board not to accept that she feared being rejected and deported, especially since she had a family member here who had been through the same process.

[22] The Board also reasonably concluded that the female applicant's claim lacked objective evidence. The Board found there to be no persuasive evidence before it to indicate that the FARC and/or the ELN have shown interest in harming the applicant after she left Colombia almost nine years ago. In considering the documentary evidence, it found that the FARC and/or the ELN

guerrillas do not operate actively beyond the Venezuelan and Colombian border, in Caracas or engage in persecuting Colombians once sought by them.

[23] It was also open to the Board to find that her fear of the FARC was not reasonable since her Personal Information Form indicated that she filed her denunciations against the ELN and not the FARC and used her Venezuelan identity to do so.

[24] No questions were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MARCIA INES ROJAS CAMACHO SAMANTHA CATALINA RODRIGUEZ ROJAS (a.k.a. SAMANTHA CATALI RODRIGUEZ) JOSE MIGUEL RODRIGUEZ ORTIZ and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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