

Federal Court



Cour fédérale

Date: 20130118

Docket: IMM-5056-12

Citation: 2013 FC 45

Ottawa, Ontario, January 18, 2013

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JI HO CHO

Applicant

and

**THE MINISTER OF CITIZENSHIP
& IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of the May 2, 2012 decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board excluding him from refugee protection on the basis of his commission of serious non-political crimes.

[2] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[3] The Applicant is a citizen of the Republic of Korea, who entered Canada on November 16, 2006 as a visitor, and stayed without further status until he submitted his application for refugee protection on September 28, 2010.

[4] The Applicant was mixed up with neighbourhood gangs in Korea in his teenage years, and became a full-fledged member of the Eagles Group gang when he was 23 years old. While a member of this gang, the Applicant testified to having committed several crimes, including violent offences causing bodily harm, charging criminal interest rates, extortion, and bribery of officers, many of which were committed on behalf of a criminal organization, namely the Eagles. The Applicant was serving a prison sentence in Korea until shortly before his arrival in Canada. He had become one of the more senior members in the gang at the time of his departure.

[5] The Board determined that these crimes were of a serious nature, carrying with them a maximum penalty in Canada of at least ten years, and that there were serious reasons for believing that the Applicant carried them out. These facts are not in dispute between the parties.

II. Issues

[6] The Applicant raises two issues in this application:

- A. Whether the RPD erred in failing to consider that the Applicant had served sentences for some of the crimes he committed; and

- B. Whether the RPD erred in failing to consider evidence of both inclusion and exclusion before making its exclusion determination.

III. Standard of Review

[7] The issue of exclusion from refugee protection raises mixed questions of fact and law and is reviewable on the standard of reasonableness (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, [2008] FCJ No 299 at para 10). The interpretation of Article 1F(b) of the UN Convention, however, is to be reviewed on the standard of correctness (*Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, [2012] FCJ No 1609 at paras 24-25).

IV. Analysis

[8] The Applicant's arguments have two strands: First, the RPD erred in excluding the Applicant from refugee protection because he is a person who has left organized crime behind, and who served sentences for crimes for which he was convicted. As such, he no longer fits within the framework set out by *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA

404, [2008] FCJ No 1740 (*Jayasekara*, FCA). Second, the RPD ought to have held a full hearing on aspects of both inclusion and exclusion.

[9] I am unable to accept either of the Applicant's arguments. The Federal Court of Appeal was clear in *Jayasekara*, above, that the factors to be considered in determining the seriousness of a crime for the purposes of Article 1F(b) are the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction (see *Jayasekara*, FCA at para 44). The Court was equally clear that there is no balancing with "factors extraneous to the facts and circumstances underlying the conviction, such as, for example, the risk of persecution in the state of origin" (*Jayasekara*, FCA, above, at para 44; *Febles*, above, at paras 29-30).

[10] I am satisfied that the RPD properly applied the *Jayasekara* factors in its assessment of the Applicant's exclusion from refugee protection. The risk of persecution in Korea -- or, stated in the Applicant's terms, the inclusion factors -- as well as rehabilitation and the serving of a sentence are extraneous factors that are not to be included in the evaluation of the seriousness of a crime for the purposes of Article 1F (b) of the Convention (*Febles*, above, at paras 34-35; *Chawah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 324, [2009] FCJ No 385 at paras 5-6). Indeed, the Court has been clear that "it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a States feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or not they have been convicted of those crimes and whether or not they have served the sentences imposed on

them in respect of those crimes” (*Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] FCJ No 565 at para 129; *Radi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 16, [2012] FCJ No 9 at para 18). As such, the application must be dismissed.

JUDGMENT

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

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5056-12

STYLE OF CAUSE: JI HO CHO v MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: JANUARY 10, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: JANUARY 18, 2013

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