Federal Court  Cour fédérale

Date: 20130409

Docket: IMM-8616-11

Citation: 2013 FC 359

Vancouver, British Columbia, April 9, 2013

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

AURELIO VALDESPINO PARTIDA
VICTORIA VALDESPINO LLOYD
ESPERANZA VALDESPINO LLOYD
ISABEL VALDESPINO LLOYD

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants, citizens of Mexico, challenge by way of judicial review the decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD), dated October 27, 2011, excluding Aurelio Valdespina Partida [the Principal Applicant] from refugee protection pursuant to Article 1F(b) of the *Refugee Convention*. The refugee claims of the Principal Applicant and his three minor daughters are based on the Principal Applicant's fear of persecution in Mexico of members of a fundamentalist Mormon group. The RPD did not evaluate these claims because,

pursuant to s. 98 of the *IRPA*, it found the Principal Applicant committed serious non-political crimes in the US and was therefore excluded from the refugee protection.

[2] The RPD determined that the Principal Applicant had committed serious non-political crimes in the US and was therefore excluded from refuge protection. It is undisputed that the Applicant committed acts in November 1988 in Utah which led to convictions for "theft from a building" and "interstate transportation of a stolen vehicle". Upon reviewing comparable Canadian criminal offences, the RPD concluded that the Applicant was party to a crime of theft of property with a value of over $5,000 being an offence for which a punishment of imprisonment could be imposed for a term with a maximum sentence of ten years.

[3] The RPD also found that the Applicant's conduct with respect to the offence was as follows:

> This disclosure leads me to conclude that at a minimum the claimant's role in the crime included the things he said in the addendum that he did: that he was a co-conspirator with his friends from the planning stages of the crime, that he played an active role in passing car keys from one person to another, that he was the one who actually asked other people to get involved in the scheme, and that he had the intention to sell the stolen goods. Statements that he made at other stages in the refugee process--either that his crime was merely failing to report what other people were doing, or that he provided only advice or a back-up role--are misrepresentations of his level of involvement and demonstrate a deliberate attempt to downplay his responsibility. His lack of credibility is evidenced in his evasiveness, his inconsistent testimony, and his attempts to minimize his role in the crime.
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> (Decision, para 24)

[4] It is well recognized that the purpose of this exclusion provision is to "ensure that the country of refuge can protect its own people by closing its borders to criminals whom it regards as

undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed" (*Zrig v Canada (Minister of Citizenship and Immigration)*, [2003] 3 FC 761 (FCA) at para 118-119.

[5] The exclusion analysis requires the RPD to make a determination with respect to the "seriousness" of an offence, an exercise in judgement and factual analysis that is of central importance. In *Jayasekara v Canada (Minister of Citizenship and Immigration)*, [2009] 4 FCR 164 at para 44, the Federal Court of Appeal set out the factors to be considered when determining the seriousness of a crime for the purposes of Article 1F(b) as follows:

- Evaluation of the elements of the crime
- The mode of prosecution
- The penalty prescribed
- The facts
- The mitigating and aggravating circumstances underlying the conviction

  [Emphasis added]

[6] This decision and others have clarified how the Court is to approach the assessment of the above factors. In *Jayasekara*, the Federal Court of Appeal stated that circumstances outside the conviction are not to be balanced against the seriousness of the offence. Most recently, in *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, the Federal Court of Appeal held that when applying Article 1F(b), the RPD is not to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue. Rather, the seriousness of the crime is to be assessed on the basis of factors that existed at the time of the crime's commission.

In *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 384, this Court determined that the RPD cannot simply list relevant mitigating/aggravating factors and then come to a conclusion without evaluating why the mitigating factors, when weighed against other aspects of the crime, did not have the weight to rebut the presumption of the seriousness of the crime.

[7] In this case, the RPD excluded the Principal Applicant on a finding that he had indeed committed a serious non-political offence in the US. The Applicant argues that the assessment of one of the essential factors of the seriousness of the crime analysis - the mitigating and aggravating circumstances - was made in reviewable error. The RPD's findings with respect to mitigating factors are found at paragraph 43 of the decision:

> The claimant's counsel advanced several points that she says are mitigating factors surrounding the crime, including the claimant's age of 24 at the time of the offense, his guilty plea and completion of his sentence, and the limiting of the offense to monetary damage with no violence or weapons involved. However, the claimant did not present any evidence to indicate that he faced any circumstances that demonstrated that he was forced to commit the crime, and he appeared to have been the one who got his friends involved in the transport of the stolen goods. Although I accept that the claimant eventually dealt with all of the sentences prescribed, he did breach his probation in attempting to return to the United States before his probation was complete. I also note that the restitution payment was subject to a civil suit, with a complaint filed on June 26, 1990, over a year after his arrest. This provides some evidence that the claimant was not immediately forthcoming with the restitution payment.

[8] The RPD did accurately state the argument put forward by Counsel for the Applicant that the following mitigating factors should be considered:

- The Principal Applicant was 24 years old when he committed the offences
- The offences were committed more than 22 years ago

- Impact on society was limited to monetary damages
- The crimes did not involve use of a weapon nor any violence

However, the RPD also included post-offence factors for consideration, such as the Applicant's failure to make restitution payments and the breach of his parole terms.

[9] In my view, the RPD's treatment of the mitigating element of the seriousness of the crime analysis reveals two reviewable errors.

[10] First, paragraph 43 reveals no actual analysis or balancing of the mitigating and aggravating factors, as required by *Guerrero*. The RPD simply identified the mitigating factors raised by Counsel for the Applicant without actually engaging with these factors and balancing them against proper aggravating factors. The RPD's failure to provide analysis as required is especially significant in the circumstances of the present case because the RPD's judgment call with respect to the seriousness of the offence committed bars the Applicant from having his refugee claim assessed.

[11] And second, the RPD's inclusion of negative post-offence factors for consideration is contrary to law. The decision in *Febles* makes it clear that the only factors to be considered are those in play at the time of the commission of the offence. While *Febles* was rendered subsequent to the RPD's decision, it confirms the earlier decision in *Jayasekura* and the view that there can be no balancing with factors extraneous to the facts and circumstances underlying the conviction.

[12] Accordingly, I find that the RPD's decision is unreasonable.

ORDER

THIS COURT ORDERS that:

1. The decision under review is set aside, and the matter of the Principal Applicant's claim for protection and those of his dependent children are referred back for redetermination by a differently constituted panel.

2. There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8616-11
STYLE OF CAUSE:	AURELIO VALDESPINO PARTIDA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	April 8, 2013
REASONS FOR ORDER AND ORDER BY:	CAMPBELL J.
DATED:	April 9, 2013

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