Federal Court Cour fédérale

Date: 20130628

Docket: IMM-7986-12

Citation: 2013 FC 717

Ottawa, Ontario, June 28, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

DENISE H. HARVEY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Following a jury trial in Florida, Denise Harvey was convicted of five counts of unlawful sexual activity with a minor for which she was sentenced to a total of 30 years in prison. Appeals from both her conviction and her sentence were subsequently rejected by two levels of appellate court. Convinced that she could not obtain justice in the United States, Ms. Harvey fled to Canada where she sought refugee protection.

[2] The Refugee Protection Division of the Immigration and Refugee Board found that Ms. Harvey was a person in need of protection within the meaning of section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). The Board was satisfied that Ms. Harvey faced cruel and unusual punishment in the United States that had been imposed upon her in disregard of accepted international standards. The Board further found that "all realistic mechanisms for redress" had been exhausted by Ms. Harvey, with the result that adequate state protection was not available to her in her own country.

[3] The Minister of Citizenship and Immigration seeks judicial review of the Board's decision. The Minister does not challenge the reasonableness of the Board's finding that the 30-year sentence imposed on Ms. Harvey constitutes "cruel and unusual punishment" by Canadian standards. The Minister does, however, assert that the Board erred in its interpretation and application of section 97(1)(b)(iii) of *IRPA*, by failing to assess whether the sentence imposed on Ms. Harvey by the Florida Court had in fact been imposed "in disregard of accepted international standards".

[4] The Minister further submits that the Board's finding that adequate state protection was not available to Ms. Harvey in the United States was unreasonable, as she had not demonstrated that she had exhausted all possible avenues of protection available to her.

[5] For the reasons that follow, I have concluded that while the Board's state protection finding was one that was reasonably open to it on the record before it, the Board erred in failing to address one of the requisite elements of the test for a person in need of protection under section 97(1)(b)(iii) of *IRPA*. Consequently, the application for judicial review will be granted.

Background

[6] Ms. Harvey is an American citizen from Vero Beach, Florida. In 2006, when Ms. Harvey was 38 years old, she was charged with five counts of unlawful sexual activity with a minor. The boy in question was a 16-year-old baseball teammate of Ms. Harvey's son.

[7] Section 794.05(1) of the Florida Statutes provides, in part, that:

> A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree …

[8] Ms. Harvey's trial was held in July of 2008. She was represented by counsel throughout the trial process, and she acknowledges that she received a full range of procedural protections during the pre-trial and trial process. Ms. Harvey was advised of the charges against her, of her right to remain silent and of her right to counsel. She further acknowledges that she was released on bail pending her trial, that she was provided with pre-trial disclosure by the District Attorney's office, and that her counsel was afforded sufficient time to prepare for her trial. At a trial held in an open and public forum, Ms. Harvey's counsel was permitted to lead evidence and to cross-examine witnesses, and the guilty verdict was arrived at by a jury of Ms. Harvey's peers.

[9] While Ms. Harvey raised concerns before the Board with respect to possible bias on the part of the trial judge and with respect to the impartiality of a member of her jury, the Board found that there was "insufficient credible evidence of any material unfairness in [Ms. Harvey's] prosecution up to the point of sentencing": Board decision at para. 68.

[10] Guided by Florida sentencing guidelines, the trial judge sentenced Ms. Harvey to 15 years imprisonment on each count. He ordered that the sentences for two of the counts be served consecutively, with the sentences on the remaining counts to be served concurrently, for a total sentence of 30 years. A motion brought by Ms. Harvey to have the trial judge reconsider the sentence was subsequently dismissed.

[11] Ms. Harvey was released on a $150,000 bond pending her appeal. Her appeal to the Florida Court of Appeal was rejected, as was her appeal to the Florida Supreme Court. No reasons were provided by either Court for rejecting Ms. Harvey's sentence appeal.

[12] On November 29, 2009, prior to her appeal being heard by the Florida Supreme Court, Ms. Harvey fled to Canada. On April 7, 2011, she was arrested by the Royal Canadian Mounted Police, whereupon she made a refugee claim.

The Board's Decision

[13] The Refugee Protection Division first considered whether Ms. Harvey was excluded from the refugee definition by virtue of Article 1F (b) of the *United Nations Convention Relating to the Status of Refugees* for having committed a serious non-political crime.

[14] While noting that Ms. Harvey insisted that she was not guilty of the offences with which she had been charged, the Board observed that she had been convicted of the crimes, and proceeded on the assumption that she had in fact committed the offences.

[15] The Board noted that the age of consent for the purposes of the Canadian *Criminal Code*, R.S.C. 1985, c-46, is 16 years of age, unless the accused is in a position of trust or authority towards the young person in question, in which case the age of consent is 18 years of age. There was no evidence before the Board that Ms. Harvey was in a position of trust or authority *vis à vis* her victim, nor was there any evidence that the offences involved "any elements of coercion or assault". According to the Board, there was also no evidence that "the alleged sexual activity was not consensual", noting that it was unlawful only because of the age difference between Ms. Harvey and her victim.

[16] In the circumstances, the Board was satisfied that the activities that led to Ms. Harvey's convictions in the United States would not have constituted a crime, let alone a serious crime, had they occurred in Canada. As a consequence, the Board found that Ms. Harvey was not excluded by Article 1F (b) of the *Refugee Convention*. The Minister does not challenge this finding.

[17] In considering Ms. Harvey's inclusion claim, the Board began by carefully reviewing the circumstances leading up to and following her convictions. These included the pre-trial and trial steps, the sentencing process and the various challenges brought by Ms. Harvey to the sentence, including her motion to have the trial judge reconsider her sentence, and her appeals to the Florida Court of Appeal and the Florida Supreme Court.

[18] The Board also noted Ms. Harvey's testimony that she would be obliged to serve 85% of her sentence in Florida before she would be eligible for parole, a claim that was supported by a Florida

Department of Corrections publication. While a petition for executive clemency had been filed with the Governor of Florida on Ms. Harvey's behalf, Ms. Harvey testified that the Governor will not ordinarily grant clemency until the offender has served the majority of his or her sentence.

[19] The Board then reviewed the law relating to state protection, including the Supreme Court of Canada's decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74, and the decision of the Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, [2006] F.C.J. No. 521, aff'd 2007 FCA 171, [2007] F.C.J. No. 584, which dealt with a refugee claim against the United States.

[20] The Board observed that there is a clear presumption that the United States will be able to protect its citizens, even in cases where the State is the alleged agent of persecution. The Board further recognized that Ms. Harvey bore "a heavy burden" to demonstrate that she should not have been required to exhaust all avenues of recourse available to her in the United States before seeking surrogate protection in Canada.

[21] Before addressing the adequacy of the state protection that was available to Ms. Harvey in the United States, the Board stated that it would first consider whether the sentence that she faced amounted to "cruel and unusual treatment or punishment imposed in disregard of accepted international standards": Board's decision at para. 56.

[22] The Board started its analysis by observing that while the acts committed by Ms. Harvey did not constitute a crime in Canada, it was open to other jurisdictions to establish different ages of consent.

[23] The Board then examined the types of sentences handed down by Canadian courts for similar offences, including those imposed in cases involving much younger children and cases where the perpetrator was in a position of trust in relation to the victim. From this, the Board determined that the sentence imposed on Ms. Harvey was at least 15 times longer than the sentence that she would have received in Canada, had her actions been criminal in nature in this country.

[24] The Board also had regard to the anecdotal evidence provided by Ms. Harvey as to the sentences handed down by other Florida courts in similar cases, noting that the sentences typically ranged from probation to two years imprisonment.

[25] The Board then considered the Canadian jurisprudence on the question of what constitutes "cruel and unusual punishment". The Board noted that the decision of the Supreme Court of Canada in *R. v. Smith*, [1987] 1 S.C.R. 1045, [1987] 1 S.C.J. No. 36, established the test to be applied in determining when a punishment will be found to have violated the protection against "cruel and unusual treatment or punishment" contained in section 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

[26] The Board held that the standard to be applied in determining whether punishment is "cruel and unusual" is whether the punishment is "so excessive as to outrage standards of decency and surpass all rational bounds of punishment". The Board noted that "the test is one of proportionality", and that it had to ask itself whether the punishment was disproportionate to the offence and the offender and whether the punishment was of such a character as to "shock general conscience or as to be intolerable in fundamental fairness": all quotes from the Board's decision at para. 63.

[27] After summarizing the evidence regarding Ms. Harvey's offence and sentence, the Board concluded that it was "beyond doubt" that the 30-year sentence imposed on Ms. Harvey was "so excessive as to outrage standards of decency and surpass all rational bounds of punishment". This led the Board to find that the sentence amounted to "cruel and unusual punishment imposed in disregard of accepted international standards": Board decision at para. 66.

[28] Returning to the question of state protection, the Board held that the 30-year sentence, coupled with the failure of multiple courts to address the excessive sentence, "are indicative of failures in the state protection mechanisms that normally exist in the USA": Board decision at para. 69.

[29] Insofar as the remaining avenues of recourse available to Ms. Harvey were concerned, the Board accepted Ms. Harvey's evidence that executive clemency would not be available to her until such time as she had served the majority of her sentence. The Board noted that "it may be possible" that Ms. Harvey could appeal her sentence to the Supreme Court of the United States, but that "[i]t is not known if such an appeal would be possible by way of right or if leave would need to be

sought, or when such an appeal would ever be heard by the US Supreme Court". From this, the Board concluded that "[t]he preponderance of the evidence is that all realistic mechanisms for redress have been exhausted" by Ms. Harvey in the United States: Board decision at para. 70.

[30] The Board recognized that because the United States is a well-developed democracy with a fully-developed system of checks and balances, it will only be in "very rare circumstances where surrogate protection mechanisms need be invoked". According to the Board, "this is one of those very rare circumstances": Board decision at para. 71. Consequently, the Board declared Ms. Harvey to be a person in need of protection in accordance with the provisions of section 97(1)(b)(iii) of *IRPA*.

The Issues

[31] The Minister raises two issues on this application. The first is whether the Board erred in its interpretation and application of section 97(1)(b)(iii) of *IRPA* by failing to consider whether the sanctions imposed on Ms. Harvey by the Florida courts had been imposed upon her "in disregard of accepted international standards".

[32] The Minister also challenges the Board's state protection finding, arguing that there were avenues of recourse still available to Ms. Harvey in the United States such that she failed to demonstrate that she had exhausted all the domestic avenues available to her, without success before claiming refugee protection in Canada.

[33] The appropriate standard of review will also have to be identified with respect to each of these issues.

The Board's Treatment of Section 97(1)(b)(iii) of *IRPA*

[34] The Minister argues that this case raises questions with respect to the Board's interpretation and application of section 97(1)(b)(iii) of *IRPA*. Relying upon the Federal Court of Appeal's decisions in *Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, [2012] F.C.J. No. 1609 and *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 32, [2012] F.C.J. No. 1610, the Minister submits that this aspect of the Board's decision is reviewable against the standard of correctness.

[35] I do not agree.

[36] *Febles* and *Feimi* both involved the interpretation of Article 1F (b) of the *Refugee Convention*, the question before the Board being whether a refugee claimant is excluded by Article 1F (b) where the person who has committed a serious crime prior to arriving in Canada is rehabilitated and poses no current danger to the public. In those cases, the Court found that the presumption that an administrative tribunal's interpretation of its home statute is to be reviewed against the reasonableness standard was rebutted by the need to interpret international conventions uniformly.

[37] In contrast, this case involves the interpretation of the complementary protection regime established in section 97 of *IRPA* – a matter of domestic law. The issue in this case is thus similar

to the issue that was before the Federal Court of Appeal in *B010 v. Canada (Minister of Citizenship and Immigration)*, [2013] F.C.J. No. 322, 2013 FCA 87 at paras. 70-71, where the reasonableness standard was applied with respect to the Board's interpretation of a provision in *IRPA*.

[38] I recognize that section 97(1)(b)(iii) does require that a determination be made by the Board as to whether the punishment in question was "imposed in disregard of accepted international standards". I leave for another day the question of the standard of review to be applied to the Board's determination of what constitutes 'accepted international standards' and the content of those standards.

[39] I would also note that, at the end of the day, nothing turns on my choice of standard of review, as I am satisfied that this aspect of the Board's decision cannot withstand scrutiny on either standard.

[40] The relevant portions of section 97(1)(b)(iii) of *IRPA* provide that:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:
[…]	[…]
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

[…]	[…]
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards…	(iii) la menace ou le risque ne résulte pas de sanctions légitimes – sauf celles infligées au mépris des normes internationales – et inhérents à cellesci ou occasionnés par elles …

[41] I understand the parties to agree that there are three elements that must be satisfied by a claimant for the individual to be found to be a person in need of protection in accordance with this provision. These are:

a. The claimant must demonstrate that he or she faces a risk to life or a risk of cruel and unusual treatment or punishment (as that term is understood in Canadian law) in their country of origin;
b. The treatment or punishment in question must not be inherent or incidental to lawful sanctions; and
c. If the treatment or punishment is inherent or incidental to lawful sanctions, the claimant must then demonstrate that it was imposed in disregard of accepted international standards.

[42] In this case, the Board had regard to the Canadian jurisprudence on the question of what constitutes "cruel and unusual punishment", concluding that the sentence imposed on Ms. Harvey was "so excessive as to outrage standards of decency and surpass all rational bounds of punishment". As noted at the outset of these reasons, the Minister does not challenge the Board's

finding that Ms. Harvey's 30-year sentence would amount to cruel and unusual punishment by Canadian standards.

[43] With respect to the second element of the test, there is no question that the punishment at issue in this case was "inherent or incidental to lawful sanctions" imposed on Ms. Harvey by the Florida courts. This being the case, the Board was then required to go on to consider whether the sentence meted out to Ms. Harvey was imposed in disregard of accepted international standards.

[44] The Board appears to have recognized that this was an element of the test that had to be addressed, as it references the issue at the outset of its analysis at paragraph 56, and concludes its analysis with the finding at paragraph 66 of its reasons that Ms. Harvey's sentence amounted to "cruel and unusual punishment imposed in disregard of accepted international standards".

[45] However, nowhere in the intervening analysis does the Board ever address this question. The Board makes no attempt to identify what the applicable "accepted international standards" are, nor does it consider whether these standards were adhered to in this case. This is an error: *Klochek v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 474, [2010] F.C.J. No. 554 at para. 10.

[46] These omissions are particularly troubling in light of the extensive written and oral submissions that were made to the Board by Ms. Harvey's counsel in relation to these questions.

[47] Indeed, the record reveals that Ms. Harvey's counsel made detailed submissions with respect to the relationship between the "fundamental justice" guarantees in sections 7 and 12 of the *Charter*, and "accepted international standards". Additional submissions were made with respect to the rights guaranteed by the *International Covenant of Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, with counsel arguing that the international law right to a trial by an independent and impartial tribunal is not respected in a judicial system made up of elected judges.

[48] Submissions were also made to the Board with respect to the sentencing principles contained in the *Rome Statute of the International Criminal Court*, 17 July 1998, [2002] Can. T.S. No. 13, and the alleged failure of the judge in Ms. Harvey's case to take into account a number of these principles in fixing her sentence.

[49] In fairness to the Board, Ms. Harvey's written submissions do suggest at paragraph 37 that once the Board was satisfied that the punishment in question constituted "cruel and unusual punishment" and was "'sufficiently shocking' to the Canadian conscience", no further analysis was required.

[50] I do not agree. To accept Ms. Harvey's interpretation of section 97(1)(b)(iii) of *IRPA* would be to conflate the first and third elements of the test, rendering the phrase "unless imposed in disregard of accepted international standards" entirely redundant. There is a presumption that every word in a statute has a meaning and that, to the extent possible, courts should avoid an interpretation

of a statute that renders any portion of a statute redundant: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 45.

[51] Clearly, by adding the phrase "unless imposed in disregard of accepted international standards" to section 97(1)(b)(iii), Parliament intended that it not be enough that a punishment constitute "cruel and unusual punishment" in Canada to make someone a person in need of protection under section 97 of *IRPA*. Regard must also be had to whether there had been compliance with international norms.

[52] In determining whether a sentence constitutes "cruel and unusual punishment" for the purposes of Canadian law, the test is one of "gross disproportionality". Canadian courts are required to consider "whether the punishment prescribed is so excessive as to outrage standards of decency". That is, "the effect of that punishment must not be grossly disproportionate to what would have been appropriate": all quotes from *Smith*, above, at paras. 53-54.

[53] It will be recalled that the Board's finding in this case was that the sentence imposed on Ms. Harvey was "so excessive as to outrage standards of decency and surpass all rational bounds of punishment". That is, the Board found Ms. Harvey's sentence to be grossly disproportionate to her crimes, making it "cruel and unusual punishment" under Canadian law, thereby satisfying the first element of the section 97(1)(b)(iii) test. If that was all that was required, then there would have been no reason for Parliament to have included the words "unless imposed in disregard of accepted international standards" in the statute.

[54] I also do not agree with Ms. Harvey that a violation of Canadian *Charter* guarantees will necessarily be contrary to accepted international standards. While there will often be considerable overlap between them, the two are not always co-extensive.

[55] For example, in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] S.C.J. No. 27, the Supreme Court of Canada observed that "the Charter should be presumed to provide *at least* as great a level of protection as is found in the international human rights documents that Canada has ratified": at para. 70 [my emphasis]. The Court's use of the phrase "*at least*" signals that Canadian *Charter* protections may in some cases actually exceed those provided by international law.

[56] Similarly, in *United States of America v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, the Supreme Court found that the death penalty has been rejected as an acceptable element of criminal justice in this country, and that in the Canadian view of fundamental justice, capital punishment is unjust: paras. 70, 84. At the same time, the Court held that it had not been established that there was an international norm against the death penalty: see para. 89.

[57] As a consequence, I am satisfied that once the Board is satisfied that a claimant has demonstrated that he or she faces a risk of cruel and unusual treatment or punishment (as that term is understood in Canadian law) in their country of origin and that the punishment in question is inherent or incidental to lawful sanctions, the Board must then go on to consider whether the punishment in question was imposed in disregard of accepted international standards. The Board failed to do so here.

[58] Before leaving this issue, I note that, relying upon the Supreme Court's decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] S.C.J. No. 62, Ms. Harvey has argued that "[a] decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion": *Newfoundland Nurses* at para. 16.

[59] While I accept this as a general proposition of law, I note that the Supreme Court went on in the same paragraph to state that it will be sufficient "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes".

[60] The Board's reasons in this case were careful and thoughtful. However, on this one issue, the Board was entirely silent. We do not know which of Ms. Harvey's arguments on the question of "accepted international standards" were or were not accepted and why that was. We do not know what the Board considered to be accepted international standards or how those standards were or were not met in this case. We simply do not know why the Board decided that the punishment in question here was imposed in disregard of accepted international standards, nor can we ascertain whether that conclusion is within the range of acceptable outcomes.

[61] This aspect of the Board's decision thus lacks justification, transparency and intelligibility and is, therefore, unreasonable: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

State Protection

[62] The Minister also challenges the Board's finding that "all realistic mechanisms for redress have been exhausted" by Ms. Harvey in the United States and that adequate state protection was thus not available to her in that country. I agree with the parties that a question as to the adequacy of state protection is a question of mixed fact and law, and is reviewable against the standard of reasonableness: *Hinzman*, above, at para. 38.

[63] The Minister notes that the Federal Court of Appeal has held that the United States "is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process". Refugee claimants thus "bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them". Claimants are therefore "required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada": all quotes from *Hinzman*, above, at para. 46.

[64] According to the Minister, there were several avenues of potential redress still available to Ms. Harvey in the United States, including an appeal to the United States Supreme Court, an application to the Florida Governor for clemency, and a motion for reconsideration of her sentence.

[65] It is apparent from a review of the Board's reasons that it understood the heavy burden on Ms. Harvey, and the exceptional nature of a claim for protection succeeding against a highly-developed first-world democratic nation such as the United States.

[66] It is also clear that the Board turned its mind to each of the potential avenues of redress identified by the Minister, explaining why, in its view, it was not reasonable to expect Ms. Harvey to pursue them.

[67] Insofar as the possibility of bringing a motion for reconsideration of her sentence was concerned, the Minister points to newspaper articles quoting lawyers in Florida suggesting that such a motion might be possible. However, it is clear from both Ms. Harvey's testimony and from the documentary record that such a motion had already been brought and was summarily rejected.

[68] With respect to a possible application to the Governor of Florida for clemency, the Board accepted Ms. Harvey's uncontroverted evidence that such applications are ordinarily only considered once an offender has served the majority of his or her sentence. In these circumstances, the Board's finding that this was not a realistic avenue of recourse for Ms. Harvey was one that was reasonably open to it on the record before it.

[69] The more difficult question relates to the availability of an appeal to the Supreme Court of the United States. The Board acknowledged the paucity of evidence on this point, noting that it was possible that such an appeal would be available to Ms. Harvey, although it was not known whether the appeal would be of right, or if leave would be required.

[70] The obligation on a refugee claimant to exhaust all domestic avenues of protection available to them prior to seeking refugee protection in Canada is not absolute. Indeed, the Supreme Court of

Canada has held that it is only in situations where state protection might *reasonably have been forthcoming* that a claimant's failure to seek protection will defeat his or her claim: *Ward*, above at para. 49.

[71] In this case, the Board noted that repeated attempts by Ms. Harvey to challenge her sentence had been met with failure. It bears repeating that not only was Ms. Harvey's motion for reconsideration of her sentence summarily dismissed by the trial judge, neither the Florida Court of Appeal nor the Florida Supreme Court felt that there was enough merit in her sentence appeal to even address it in their reasons.

[72] Also before the Board was Ms. Harvey's uncontroverted testimony that she could not pursue any further judicial remedies in the United States without first surrendering herself to the authorities, thereby exposing herself to the very sanction that the Board found to constitute cruel and unusual punishment – a finding with which the Minister does not now take issue.

[73] After weighing the evidence before it, the Board concluded that "the preponderance of the evidence is that all realistic mechanisms for redress had been exhausted" by Ms. Harvey in the United States. Considering the Board's decision as a whole in the context of the underlying record, and having regard to the deferential standard of review applicable to such a finding, I cannot say that the Board's conclusion on this point is unreasonable.

Conclusion

[74] For these reasons, the application for judicial review is granted.

[75] In light of the narrow basis upon which the application has succeeded, the Board member's evident familiarity with the case, and the absence of any allegation of bias or procedural unfairness on the part of the member, the case will be remitted to the same Board member (assuming that he is available to hear the matter) for a determination of whether Ms. Harvey's sentence was imposed upon her in disregard of accepted international standards.

Question for Certification

[76] The Minister proposes the following question for certification:

> When the Refugee Protection Division of the Immigration and Refugee Board ("RPD") determines that a claimant faces a risk of cruel and unusual treatment or punishment, and the identified risk results from, or is inherent or incidental to, lawful sanctions, is the RPD required to conduct a separate assessment of whether the treatment or punishment has been imposed in disregard of accepted international standards before finding that a refugee claimant is a person in need of protection under s.97(1) of the *Immigration and Refugee Protection Act*?

[77] In my view, this is not an appropriate question for certification. While I appreciate that this is largely a case of first impression, the wording of the statute is quite clear, and indeed, there is no disagreement between the parties as to the applicable three-part test.

[78] The real issue in this case is whether the Board member in this case properly applied the test, a question that turns on the precise language of the Board member's reasons and the content of the record before him. This is a case-specific determination and does not raise a serious question of general importance appropriate for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the case is remitted to the same Board member (if available) to determine whether Ms. Harvey's sentence was imposed upon her in disregard of accepted international standards.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7986-12
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. DENISE H. HARVEY

HEARING HELD VIA VIDEOCONFERENCE ON JUNE 13, 2013 FROM VANCOUVER, BRITISH COLUMBIA AND SASKATOON, SASKATCHEWAN

REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
DATED:	June 28, 2013

APPEARANCES:

Sharlene Telles-Langdon	FOR THE APPLICANT
Christopher G. Veeman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WILLIAM F. PENTNEY Deputy Attorney General of Canada	FOR THE APPLICANT
VEEMAN LAW Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE RESPONDENT