Federal Court  Cour fédérale

Date: 20140825

Docket: IMM-5975-13

Citation: 2014 FC 822

Ottawa, Ontario, August 25, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MAYKEL GONZALEZ SALCEDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, an employee of the Cuban Embassy in Ottawa, defected and made a refugee claim. The Refugee Protection Division [RPD] decided that he was not a refugee or a person in need of protection. This is the judicial review of that RPD decision in which the substantive issue is the question of whether Article 135 of the Cuban Penal Code is persecutory.

II. Background

[2] Article 135 of the Cuban Penal Code reads:

> 1. An official or employee charged with a mission in a foreign country who quits, or, having completed the mission, or being asked at any time to return, expressly or implicitly refuses to return is liable to a penalty of three to eight years in prison;
>
> 2. The same penalty applied to officials or employees who, having completed a mission abroad and against the express order of the Government, move to another country.

[3] The Applicant arrived in Canada in November 2009 to begin working at the Cuban Embassy [Embassy] in Ottawa. In December 2010 he left his job at the Embassy, and travelled to Winnipeg where he made his refugee claim.

[4] The Applicant is a student of languages with a post-graduate degree. For a time he taught French at the Higher Institute of Foreign Relations [Institute] to future Cuban diplomats.

[5] The Applicant claims that the government's persecutory actions began when he refused to join the Union of Young Communists [UYC]. This brought him under scrutiny, his name was posted as a non-member and he was excluded from selected foreign travel. He was also non-exempt from a military mobilization in 2007 when the Director spoke in favour of exemption for all other teachers at the Institute.

[6] In 2009, the Applicant was asked to work at the Embassy in Ottawa which he did until December 2010. At the Embassy, the Applicant says, he was subjected to further persecution –

pay cut, restrictions on movements in Canada including a curfew, unpleasant living quarters, and mistreatment and humiliation from the Ambassador who questioned his sexuality.

[7] In December 2010, the Applicant returned to Cuba to visit his family but he returned to Canada for fear of losing his employment. He defected shortly after arriving back in Canada.

[8] The RPD, in assessing the refugee claim, found the Applicant to be credible but concluded that his treatment prior to making his claim was not persecutory.

[9] The RPD found that his refusal to join the UYC may have resulted in some shame and humiliation; however, he was not reprimanded, did not lose his job, was not subject to increased monitoring nor to interrogation or arrest.

[10] The RPD noted that despite his claim of persecution at the Institute, the Applicant was selected to work in Ottawa and that he was not perceived as a political dissident. The documentary evidence confirms that dissidents are routinely denied passports to travel outside Cuba.

[11] The RPD had some difficulty with the Applicant's claim that his working conditions at the Embassy were persecutory. While noting less than positive working conditions, those conditions were not exclusive to the Applicant and there was no medical evidence of any psychological problems.

[12] The RPD then turned to the matter of whether the Applicant faces a serious possibility of persecution or a substantial risk to his life if he returned to Cuba as a failed asylum seeker.

[13] In this regard, the RPD found that evidence that the Applicant's brother was dropped from a military academy, where he failed an exam, was speculative as to its link to the Applicant.

[14] However, the RPD did find that the Applicant was exposed, by virtue of his dereliction of duty in defecting, to a penalty of 3-8 years imprisonment should he return to Cuba or an eight-year bar from returning to Cuba.

[15] The RPD found the penal sanction for dereliction of duty is a law of general application that applies to all diplomats equally. It found the penalty to be harsh but not persecutory. The objective of the penalty, to keep diplomats at their posts, was reasonable given the embarrassment that desertions cause the Cuban government and the harm to Cuba's international relations.

[16] The RPD found that the likelihood that the Applicant could not return to his job was not persecutory. The RPD recognized that the Applicant may have some difficulties upon return to Cuba but that there was insufficient credible and trustworthy evidence to establish that the Applicant would be denied any employment or social services.

[17] The RPD also noted the 2012 change in Cuban policy which made the issuance of passports to perceived dissidents more likely. There appears to be a good relationship toward

dissidents and even if the Applicant is considered a dissident now, treatment is currently much less harsh and does not amount to persecution.

[18] On the basis of all these factors, the RPD concluded that the Applicant had not established a serious risk of persecution. Enhanced scrutiny upon return does not amount to persecution and the possibility of a 3-8 year jail term for dereliction of duty, although severe, does not shock the conscience of Canadians.

III. Analysis

[19] The issues in this judicial review are:

- Was the RPD's conclusion that Article 135 of the Cuban Penal Code is not persecutory legally sustainable?
- Is the decision otherwise reasonable?

A. *Standard of Review*

[20] A determination that Article 135 is or is not persecutory is reviewable on a standard of correctness. As I held in *Rosales v Canada (Minister of Citizenship and Immigration)*, 2012 FC 323, 215 ACWS (3d) 467 [*Rosales*], at paragraph 16:

> While the parties appear to consider "reasonableness" as the standard in respect of the persecuting nature of Cuban law, I disagree. Whether the Cuban exit laws which contemplate prosecution and possible imprisonment amount to "persecution" under s. 96 of the *Immigration and Refugee Protection Act* (IRPA) or "cruel and unusual punishment" under s. 97 of IRPA is a matter of a law of general application, and involves considerations of

> domestic and international law. As such, the Board's conclusion should be assessed on a correctness standard.

[21] The decision that the fear of persecution is not well-founded is reviewable on a standard of reasonableness (*Tindungan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 115, 426 FTR 200).

B. *Article 135 – Persecution*

[22] The question of whether laws concerning unauthorized exits or overstays amount to persecution was determined in the negative by the Federal Court of Appeal in *Valentin v Canada (Minister of Employment and Immigration) (F.C.A.)*, [1991] 3 FC 390, 28 ACWS (3d) [*Valentin*], at paragraphs 8-9 (which has not been reversed):

> 8 I will say, first, that while in humanitarian terms I am very much inclined to sympathize with the idea of granting refugee status to everyone who faces criminal sanctions such as those imposed by section 109 of the Czech Criminal Code, in practical and legal terms the idea seems to me to be illogical and without any rational basis. Neither the international Convention nor our Act, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application. I would add, with due respect for the very widely held contrary opinion, that the idea does not appear to me even to be supported by the fact that the transgression was motivated by some dissatisfaction of a political nature (on this point, see, *inter alia*, Goodwin-Gill, *op. cit.*, pages 32 *et seq.*; James C. Hathaway, *The Law of Refugee Status*, pages 40 *et seq.*), because it seems to me, first, that an isolated sentence can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heart of persecution (cf. *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129 (F.C.A.)), but particularly because the direct relationship that is required between the

> sentence incurred and imposed and the offender's political opinion does not exist.
>
> 9 In my opinion, a provision such as section 109 of the Czech Criminal Code can have a determining effect on the granting of refugee status only in an appropriate context. This will occur in cases where the provision, either in itself or in the manner in which it is applied, is likely to add to the series of discriminatory measures to which a claimant has been subjected for a reason provided in the Convention, so that persecution may be found in the general way in which he is treated by his country.1 I noted earlier that counsel for the appellants had in effect attempted to connect his clients' fear of criminal sanction to the difficulties they had experienced in the past. The problem is that such a connection is not possible here, since there is no reason to believe that the claimants' membership in the Catholic religion, a major cause of the difficulties they had experienced, or even their disagreement with the government, if we assume that this had some unfortunate consequence for them in the past, could have any influence at all on the manner in which section 109 would be applied to them.

[23] *Valentin* has been followed in such decisions as *Rosales* and *Del Carmen Marrero Nodarse v Canada (Minister of Citizenship and Immigration)*, 2011 FC 289, 199 ACWS (3d) 562. In *Rosales*, I wrote at paragraphs 22-26 on the matter of persecution for breach of exit permits.

> 22 As to the issue of whether prosecution for a breach of an exit permit is persecutory, the Applicants have at least two difficulties – firstly, the Applicants created the breach; secondly, Cuban exit laws have not been found to be persecutory.
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> 23 In *Valentin v Canada (Minister of Employment and Immigration) (F.C.A.)*, [1991] 3 FC 390, the Federal Court of Appeal held that an applicant cannot self-induce a positive claim for refugee status. This principle was followed in *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 833, with respect to overstaying a Cuban exit visa in relation to both IRPA ss. 96 and 97.
>
> 24 In the present case, the Board noted the Applicants' failure to seek an extension of their exit visas even though it is normal to

> be able to extend such a visa for 11 months and possibly even longer.
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> 25 In *Galvez v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1690, this Court upheld the Board's conclusion that Cuban exit laws themselves were not persecutory. In the present case, there is no evidence that the law would be applied to the Applicants in a persecutory manner.
>
> 26 Therefore, the Board was correct in its conclusions that the exit laws were not persecutory and that the Applicants cannot self-induce their refugee claim. The Board's conclusion that there was no evidence that the Applicants would be subject to persecutory application of the laws is reasonable.

[24] While there are no cases which consider Article 135 in the context of Cuban diplomats, the decisions regarding exit permits are analogous. There may be greater justification for sanctions against diplomats who desert their posts because of the consequences to Cuban government operations.

[25] However, a finding that the law is not persecutory does not end the inquiry. As Justice Noël held in *Castaneda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1090, 69 FTR 133, the RPD is required to consider evidence of extra-judicial persecution upon return to the home country. This determination is assessed on the reasonableness standard of review.

[26] In conclusion, the potential punishment under Article 135 is not persecutory. It cannot be characterized as solely to punish political dissent as it applies to diplomats who fail to return to Cuba for whatever reason. It would be naïve to think that political opinions do not play a role but there are other motives possible for refusal to return (i.e. economic advantage, lifestyles) which

are also captured by the law. There is no evidence in this case of disproportionate application of that law to political dissidents.

C. *Reasonableness of Decision*

[27] I can find no basis for concluding that the RPD's decision is otherwise unreasonable, either as to past persecution or the likelihood of extra-judicial persecution if returned to Cuba.

[28] The conclusion that the Applicant was not considered a political dissident before filing his refugee claim is reasonable, particularly considering that he was sent on a diplomatic posting to Canada.

[29] There is no basis for the assertion that the RPD failed to consider cumulative grounds of persecution. A fair reading of the decision shows that the RPD continually made "summary" statements on the matter of alleged persecution at various times.

[30] The only remaining issue, given that Article 135 is not persecutory, is whether the Applicant has a sur place claim based on a possible eight-year ban on return to Cuba or denial of employment and other services if he is returned to Cuba.

[31] There is no evidence of extra-judicial punishment to the Applicant or his family as a result of his refugee claim. The incident involving the brother, even if the Applicant believes it was politically motivated, could reasonably be rejected as extra-judicial punishment in the absence of any corroborative evidence.

[32] It was reasonable for the RPD to reject the Applicant's fear of extra-judicial punishment. The RPD considered all the risks raised, balanced them against the objective evidence and reached a conclusion which was reasonable, both on its individual aspects and cumulatively.

IV. Conclusion

[33] Therefore, this judicial review will be dismissed.

[34] While the Applicant has proposed questions for certification, the key legal issue as to the nature of Article 135 has been decided. There is nothing in the facts of this case which would justify certification of a question.

JUDGMENT

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

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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