Federal Court  Cour fédérale

Date: 20110621

Docket: IMM-4878-10

Citation: 2011 FC 738

Ottawa, Ontario, June 21, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

PAOLA ANDREA PULIDO DIAZ
aka Paola Andrea Pulido-Diaz

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Minister of Citizenship and Immigration (Minister) seeks judicial review of a decision that Ms. Diaz (the Respondent) was a Convention refugee and was not "excluded" from admission to Canada despite her lengthy record of criminal convictions in the United States.

II. BACKGROUND

[2] The Respondent, a citizen of Colombia, claims a fear of persecution by FARC. She says that she was raped by 15 FARC members because her mother refused to give FARC money.

[3] Ms. Diaz fled to the U.S. While there, she says that her mother and grandmother continued to be threatened by FARC. When they finally fled to the U.S. as well, Ms. Diaz was in jail on one of her numerous convictions.

[4] Ms. Diaz was deported from the U.S. to Colombia in 2002 but quickly returned to the U.S. illegally. She remained there until 2007, when she was once again deported to Colombia.

[5] This time Ms. Diaz left Colombia for Canada in 2008, again under a false passport.

[6] In the course of Ms. Diaz's time in the U.S. she was convicted seven times. The details of which are:

	Date	**Arrested by**	**Charge**	**Conviction**	**Sentence**
1	Oct 12, 1996	NYPD	petit larceny; criminal possession of stolen property	petit larceny	6 months confinement
2	Nov 19, 1998	Bayonville (NJ) PD	theft	dismissed	-
3	Jan 26, 2001	NYPD	robbery; criminal possession of a weapon in the 4th degree	pleaded guilty to attempted robbery in the 3rd degree	6 months 4 days confinement
4	Feb 12, 2001	NYPD	robbery; attempted grand larceny	attempted grand larceny	6 months confinement
5	Sept 3, 2004	Doraville (GA) PD	criminal conspiracy; forgery	unknown	-

6	Oct 9, 2004	Gwinnet Cty (GA) PD	theft by shoplifting	theft by shoplifting	3 years probation
7	Feb 19, 2007	Dekalb City (GA) PD	financial transaction card theft	no disposition yet reached	-

[7] The Immigration and Refugee Board (Board) found that there was a reasonable chance that Ms. Diaz (and her mother and grandmother) would be persecuted by FARC upon return to Colombia. The Board found that there was neither state protection nor a reasonable IFA.

[8] The Board then went on to determine whether Ms. Diaz was excluded by operation of s. 98 and Article 1F(b) for having committed serious non-political crime(s).

> **98.** A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.
>
> **98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
>
> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> …
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> United Nations Convention Relating to the Status of Refugees, Article 1

[9] The Board explained away the seriousness of some convictions by reference to mitigating factors, such as that Ms. Diaz had been a minor or had been raped. The Board explained away other

offences on the grounds that they did not meet the “threshold penalty” of 10 years – a reference to s. 36(1)*(b)* of the Act.

III. ANALYSIS

[10] The interpretation of s. 98 and Article 1F(b) of the Refugee Convention is a pure issue of law to which the correctness standard applies (*Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454). The same standard applies to “adequacy of reasons”. The application of the facts to these provisions is a matter of mixed law and fact for which reasonableness is the standard of review (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404).

[11] There are a number of problems with the Board’s decision. The most fundamental is that the Board failed to apply the principles set out in *Jayasekara*, above, which is the leading authority on exclusions under Article 1F(b).

[12] In this regard the Board failed to apply the facts in the crime to Canadian criminal law. It did not ask what would be the result if those facts were heard by a Canadian court. Instead the Board looked for equivalent criminal provisions to those of the U.S. offences. That involved the Board probing into the legal elements of each U.S. provision rather than focusing on what Canadian criminal provision(s) would apply to the facts of each U.S. case.

[13] The Board erred in respect of the “10 year threshold” by considering the length of sentence actually imposed in the U.S. rather than the length of sentences that could be imposed in Canada.

The Board misapplied or misunderstood *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No. 47, as supporting this threshold analysis. In *Hill*, above, the Federal Court of Appeal did not deal with Article 1F(b).

[14] The Board further erred in its consideration of contextual matters. *Jayasekara*, above, specifically rejects inclusion of personal circumstances in the serious crime analysis. Factors such as age, economic condition or tragedy (such as rape) may have been relevant to sentencing in the U.S. but they do not address the seriousness of the offence itself. Taking these factors into account in balancing the seriousness of the offence distorts the picture of the offences themselves (*Jayasekara*, above).

[15] While it is unnecessary to make a finding on the issue of well-founded fear – there being other grounds for quashing the decision – the Court has serious reservations with this finding. The finding is unduly brief and does not touch on credibility even in the face of discrepancies between the POE Notes and the Respondent's two PIFs.

[16] Lastly, the reasons in this case are not adequate. It is not only difficult but impossible to divine the logic applied in respect of Article 1F(b). It is unclear whether the conclusion on "seriousness" was based on the length of sentence imposed, the lack of equivalent Canadian law or the overriding impact of hardship suffered by Ms. Diaz.

IV. CONCLUSION

[17] For these reasons, this judicial review is granted, the decision is quashed and the matter remitted back for a new consideration before a different panel.

[18] The Applicant had proposed a question for certification to which the Respondent did not object. Given these reasons, the proposed question is academic and I see no other question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is to be remitted back for a new consideration before a different panel.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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