Federal Court Cour fédérale

Date: 20110923

Docket: IMM-7546-10

Citation: 2011 FC 1094

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, September 23, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HASSAN AMMAR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Minister of Citizenship and Immigration (the Minister) is asking the Court to review the decision dated September 14, 2010, (the decision) by the Immigration and Refugee Board of Canada, Refugee Protection Division (the Board), which determined that Mr. Hassan Hammar (the

respondent) is not a Convention refugee or a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA] or an excluded person under section 98 of the Act.

[2] The Minister of Public Safety and Emergency Preparedness intervened in this refugee protection claim. The Minister took the position that the sexual conduct charge laid against the respondent in the United States constitutes a serious non-political crime committed before his arrival on Canadian soil. As a result, the respondent is a person referred to in Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees* (the Convention); therefore, he is not a Convention refugee or a person in need of protection under section 98 of the Act.

[3] For the following reasons, the Court dismisses this application for judicial review.

II. The facts

[4] The respondent is a citizen of Lebanon and is 38 years old. He had lived in the United States for a number of years when, in April 2007, he travelled to Windsor, Ontario, and filed a refugee claim. He alleged that he feared persecution at the hands of Lebanese Shi'ites and Hezbollah, which prevented him from living in Lebanon or the United States.

[5] In November 2006, the Michigan authorities laid sexual conduct charges against him following events that transpired in a gas station in Summit Township. The night of the attack, the respondent waited for Ms. Klahn, a dancer at the Odyssey Show Girls Lounge, to leave the bar. He

followed her to a convenience store. In a room at the back of the store, the respondent tried to force Ms. Klahn to fellate him. He took hold of her with both hands, then grabbed one of her breasts and her buttocks. He forced her to kneel in front of him, and with his hands he repeatedly brought his victim's head towards his crotch. He then removed one hand and pretended to open his zipper. Finally, he seized the back of Ms. Klahn's pants, grabbing her buttocks as if he were trying to take her from below and penetrate her with his fingers. Throughout the attack, the victim refused to consent to what he was doing. She managed to escape, went to a friend's house and filed a complaint with the police.

[6] On December 11, 2006, the respondent was charged with "criminal sexual conduct in the fourth degree", an offence punishable by imprisonment for not more than two years or a fine of not more than $500 or both under section 750.520e(1) of *The Michigan Penal Code*, which reads as follows:

> (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> . . .
>
> (*b*) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> (i) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.
>
> (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute

> that threat. As used in this subparagraph, “to retaliate” includes threats of physical punishment, kidnapping, or extortion.
>
> (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
>
> (v) When the actor achieves the sexual contact through concealment or by the element of surprise.
>
> …
>
> (2) Criminal sexual conduct in the fourth degree is a misdemeanour punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both.
> [Emphasis added.]

[7] At the conclusion of the preliminary inquiry held on March 19, 2007, the judge of the Fourth District Court of Jackson, Michigan, committed the respondent to trial. The hearing was scheduled for May 11 and 30, 2007. In the meantime, the respondent sought refugee protection in Canada. Since he was not present on the date of the trial, a warrant was issued for his arrest.

[8] The Minister of Public Safety and Emergency Preparedness intervened in this refugee protection claim. He took the position that the sexual assault committed in the United States was a serious non-political crime committed before the respondent arrived in Canada. Since the respondent is therefore a person referred to in Article 1F(*b*) of the Convention, he is not a Convention refugee or a person in need of protection under section 98 of the Act. The Refugee Protection Division determined that the sexual assault committed by the respondent was not a serious crime under Article 1F(*b*) and dismissed the Minister’s arguments. It also found that the respondent was not a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

III. The Act

[9] Section 98 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) reads as follows:

> 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.

[10] Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees* (the Convention) reads as follows:

> 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;

IV. Issue and standard of review

[11] This proceeding raises only one issue. Did the Board err in law when it found that the sexual assault committed by the respondent was not a "serious" crime under Article 1F(*b*) of the Convention?

[12] Since a question of law is involved, the appropriate standard of review in this case is correctness (*Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 50, 60 [*Dunsmuir*]

and *Canada* (*Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 44) while the application of Article 1F(*b*) of the Convention to the facts of the case is assessed against the reasonableness standard (*Dunsmuir*, above, and *Ivanov v. Canada* (*Minister of Citizenship and Immigration)*, 2004 FC 1210 at paragraph 6).

A. Position of the Minister

[13] The Minister maintains that the Board erred by not finding that there were serious reasons for considering that the respondent had committed a serious crime.

[14] In the Minister's view, the Court should allow the application for judicial review because the decision has a determinative effect on whether the respondent remains in Canada. The Court should therefore rule on the merits of the application for judicial review and decide whether the respondent is a person referred to in Article 1F(*b*).

[15] The Minister also maintains that the applicable burden of proof under Article 1F(*b*) is a degree of proof that goes beyond mere suspicion but falls below the balance of probabilities standard in civil matters. There must be an objective basis for the Board's finding that is based on compelling and credible information (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paragraph 114.

[16] The Minister points out that, for the purposes of Article 1F(*b*), with the exception of trumped-up allegations, a valid warrant issued by a country, whether considered in isolation or with

other evidence, fully satisfies the "serious reasons for considering" requirement. In this regard, the Minister relies on *Betancour v. Canada (Minister of Citizenship and Immigration),* 2009 FC 767 at paragraphs 20, 21 and 52.

[17] Moreover, the Minister notes that the accused was committed to trial following a preliminary inquiry in the United States. This committal establishes that the accused is probably guilty.

[18] In paragraph 44 of *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*], the Federal Court of Appeal sets out the seriousness factors that must be examined in applying Article 1F(*b*) of the Convention. With respect to the seriousness of a crime, the following factors must be evaluated: the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction.

[19] The Minister submits that the Board erred in its analysis of the seriousness of the crime because it did not correctly apply the factors identified in *Jayasekara,* above.

[20] In its decision, the Board noted at the outset that the charge against the respondent in the United States is comparable to section 271 of the *Criminal Code* of Canada (R.S.C. 1985, c. C-46), sexual assault, but that this crime is not serious enough to justify excluding the respondent from protection against persecution and torture. The Board took judicial notice of the fact that summary

conviction offences are not serious, and they therefore limit serious crimes to offences punishable by a maximum of 10 years in prison. The Minister believes that this analysis is flawed.

[21] The Minister also criticizes the Board for making an erroneous finding. In support, he cites authors Guy S. Goodwill-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edition, Oxford, Oxford University Press, 2007, page 177, who maintain that serious crimes are those against physical integrity, life and liberty. International law assumes the seriousness of rape and, in some circumstances, of assault. The state of the law in Canada reflects this view because in Canadian criminal law the offence of rape is included in the more global offence of sexual assault. In Canada, sexual assault consists of assault committed in circumstances of a sexual nature in a manner that violates the victim's sexual integrity. The sexual offence is therefore, according to the Minister, a hybrid offence punishable, depending on the mode of prosecution chosen, by a maximum term of imprisonment of 10 years or 18 months. The maximum term of imprisonment imposed following a prosecution by way of summary conviction, although much shorter, is still three times longer than a sentence for other offences prosecuted in the same way. In the Minister's view, this difference indicates the degree of seriousness of this offence in Canadian criminal law because Parliament treated it this way.

B. Position of the respondent

[22] The respondent replies that the Board's findings are well founded and supported by the evidence in the record.

[23] The respondent points out the wording of subsection 750.520e(2) of *The Michigan Penal Code*, the relevant parts of which read as follows:

> 750.520e. Criminal sexual conduct in the fourth degree; misdemeanor.
>
> . . .
>
> (2) Criminal sexual conduct in the fourth degree is a misdemeanour punishable by imprisonment for not more than 2 years, or, by a fine of not more than $ 500.00 or both.

[24] In his view, this is therefore a penal offence, which leads to the conclusion that we are not dealing with a criminal act but with an act sanctioned by a penal offence. The respondent also points out that the Minister may not rely on the alleged victim's testimony to dissect the circumstances of the sexual contact without the benefit of concrete evidence on the alleged facts.

[25] Finally, the respondent relies on *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 FC 761, and specifically on Justice Décary's statement, which requires that three conditions be met. There must be a crime; the crime must be a non-political one, and the crime must be serious. The respondent says that the last branch of the test has not been satisfied in this case.

V. Analysis

[26] The proceeding raises only one issue. Did the Board correctly apply the principles laid down by the Federal Court of Appeal in *Jayasekara*, above, at paragraph 44:

> [44] I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(b) of the

> Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction . . .

[27] A careful review of the decision, particularly of paragraph 15, leads us to find that the panel took into account the factors set out by the Court of Appeal. The panel wrote:

> . . . I also carefully read what the Minister's representative was referring to, namely, that there were grounds for an arrest, a charge was laid, and a trial was to begin but was not finished because the claimant left the United States. I am aware that an arrest warrant has been issued for the claimant, but when I look at the elements of the crime, even in light of the victim's statement—yes, the claimant demonstrated the behaviour of a sex offender (his actions could undoubtedly fall within the definition in section 271 of the Canadian *Criminal Code*)—I am not ready to conclude that it is a serious crime for the following reason. To be considered sexual assault in Canada, it is sufficient that there be touching; the contact must be sexual in nature, and there must be a lack of consent from the victim. The fact remains that in Canada, it can be prosecuted as an indictable offence or as a summary conviction offence. If the approach chosen is prosecution as an indictable offence, the person becomes liable to a maximum of 10 years in prison. If the approach chosen is prosecution as a summary conviction offence, the person may be liable to a maximum of 18 months in prison. It is clear that in prosecution by summary proceeding, according to the case law, the case did not involve a serious crime.

[28] The decision considered the factors set out by the Court of Appeal. The panel evaluated the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating circumstances. In paragraph 16, it addressed the indictment in Michigan, and in paragraph 17 it examined the facts, i.e., the lack of a weapon but the use of force. This approach appears to us to be completely consistent with the Federal Court of Appeal's teachings. Furthermore, it is the methodology that the Federal Court applied in *Canada (Minister of Citizenship and Immigration) v. Diaz*, 2011 FC 738 at paragraph 14.

[29] Moreover, the Court's reasoning was similar in *Canada (Minister of Citizenship and Immigration) v. Lopez Velasco*, 2011 FC 627 [*Lopez Velasco*]. At paragraph 46, the judge stated:

> [46] Nor do I consider that the RPD erred in canvassing the range of penalty in section 151of the *Criminal Code,* given that Justice Letourneau also spoke of keeping in mind the perspective of the receiving state. The RPD was entitled to consider the hybrid nature of section 151of the *Criminal Code*. In so doing, the RPD focused on the Court's qualification 'if there is substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence'.

[30] The Minister submits that the panel should have come to a completely different conclusion. The Court cannot concur with this position. The panel examined the facts correctly. It took into consideration the factors set out by the Court of Appeal at paragraph 44 of *Jayasekara,* above, and the statement in paragraph 46 that, in the case of hybrid offences, the choice of the mode of prosecution becomes relevant in evaluating the seriousness of the crime if there is substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence. In this case, as the panel noted, this difference is 18 months versus 10 years.

[31] The Minister maintains that the panel should have considered each element of the crime as well as how such offences are dealt with in other countries. The Court notes, as the Federal Court of Appeal wrote, that these are factors that can be rebutted, as they were in this case.

VI. Question for certification

[32] The Minister (the applicant) is asking the Court to certify the following question under paragraph 74(*d*) of the Act:

> • In determining the seriousness of a crime for the purposes of applying Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees* [the Convention], where the identical, equivalent or similar crime in Canada is a hybrid offence punishable by summary conviction or by indictment, can the decision-maker properly assume that the refugee claimant would have been prosecuted summarily in Canada for committing the crime in question?

Applicant's arguments

[33] The Minister states that the panel did not consider the fact that in Canada the offence of sexual assault is punishable by a maximum term of imprisonment of at least 10 years. In the applicant's view, this is a relevant factor in determining the seriousness of the crime as the Federal Court of Appeal found in *Jayasekara* above, at paragraph 55.

[34] Again, according to the Minister, the panel in this case relied solely on the mode of prosecution chosen in Michigan and on the corresponding mode of prosecution in Canada. The Minister states that the offences in Canada must be considered as punishable by way of indictment unless the prosecutor is deemed to have elected to proceed by summary conviction. He cites three cases in support of his position: *R. v. Dudley*, 2009 SCC 58, [2009] 3 S.C.R. 570 at paragraphs 18 and 21; *Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 672, [2010] 1 F.C.R. 255 at paragraphs 28-34 and 36-37 [*Ahmed*]; and *Trinidad and Tobago (Republic of) v. Davis*, 2008 ABCA 275, [2008] A.J. No. 829 at paragraphs 14, 17 and 19 [*Davis*].

[35] The Minister questions whether a maximum sentence of ten years could have been imposed on the respondent had the crime been committed in Canada. He cites the *Davis* decision of the Alberta Court of Appeal. Paragraph 19 of this judgment states:

> . . . The requirement that the Attorney General provide evidence as to whether the Crown [in Canada] would elect to prosecute a hybrid offence by summary conviction or indictment is a task that borders on the impossible. Prosecutorial discretion is not decided on a hypothetical basis . . .

[36] In his letter of August 22, 2011, the Minister wrote that [TRANSLATION] "the panel could not properly speculate on how the Crown would have prosecuted Mr. Ammar [the respondent] had he committed his crime in Canada. The Immigration and Refugee Board [IRB] should therefore have found *that the comparable offence in Canada retained its character as an offence punishable by indictment*" (page 4).

[37] With respect to the criteria for certifying a question, the Minister maintains that the requirements have been met in this case. He states that the proposed question transcends the interests of the immediate parties to the litigation and contemplates a legal issue of general application. He is asking, for the benefit of IRB panel members, Federal Court judges and counsel for the parties, that the Federal Court of Appeal rule on whether the Alberta Court of Appeal decision in *Davis* applies by analogy.

[38] For the reasons stated above, the applicant believes that the IRB could not properly assume that the respondent would have been prosecuted summarily in Canada. In his view, this error is determinative in this case, and the response to the proposed question would be determinative of an appeal.

Respondent's arguments

[39] Counsel for the respondent made no representations on the question for certification.

Analysis

[40] For the following reasons, the question should not be certified.

[41] The question proposed by the applicant does not transcend the interests of the immediate parties to the litigation. The *Lopez Velasco* and *Jayasekara* cases fully respond to the issue raised.

[42] In *Jayasekara*, Létourneau J.A. of the Court of Appeal wrote that “[i]n countries where [hybrid offences exist], the choice of the mode of prosecution is relevant to the assessment of the seriousness of a crime if there is a substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence.” He also stated that the perspective of the receiving state cannot be ignored.

[43] In *Lopez Velasco*, Mandamin J. stated that when Justice Létourneau spoke of the choice of the mode of prosecution, “he was referring to the choice made in prosecuting a hybrid offence in a jurisdiction other than Canada.”

[44] The panel correctly applied the criteria in *Jayasekara*.

[45] In the Court’s view, the panel properly found that the Canadian perspective relevant to the seriousness of an offence includes a range of offences from serious (an indictable offence) to less serious (a summary conviction offence). The panel could determine that the offence here was not a

serious crime under Article 1F(*b*) of the Convention, and this question does not warrant certification because it has been disposed of.

[46] The Court would have agreed to certify a question of general application had the facts of the case supported framing the question as follows:

> • In determining the seriousness of a crime for the purposes of applying Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees* [the Convention], where the identical, equivalent or similar crime in Canada is a hybrid offence punishable by summary conviction or by indictment and the foreign offence is not, can the decision-maker properly assume that the refugee claimant would have been prosecuted summarily in Canada for committing the crime in question?
> [Emphasis added.]

[47] The circumstances of the case provide no basis for the Court to certify this question.

JUDGMENT

THE COURT RULES as follows:

1. The application for judicial review is dismissed.

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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