Date: 20080221

Docket: IMM-1603-07

Citation: 2008 FC 238

Ottawa, Ontario, February 21, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

RUWAN CHANDIMA JAYASEKARA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) of March 22, 2007 concluding that the Applicant is not a Convention refugee and not a person in need of protection, and that the Applicant is excluded from protection pursuant to Article 1F(b) of the Convention.

Facts

[2] The Applicant is a citizen of Sri Lanka of Sinhalese ethnicity. He says that between 1994 and about 1998 he and his father were targeted by the Sri Lankan army as alleged sympathisers of the Tamil Tigers, the Tamil seperatist militia. He left Sri Lanka and arrived in the United States in 1998 without status. In October, 2003 he married a United States citizen who then applied to sponsor him. In January, 2004 he was arrested in Orange County, New York on drug charges. He pleaded guilty to charges of criminal sale of the controlled substance opium in the third degree and criminal possession of marihuana. He was sentenced to 29 days in jail and to probation for a period of five years. One month after completing his jail term, he was called to an immigration hearing and was issued a voluntary departure order to leave the United States by October, 2004. Prior to that, on July 5, 2004 the Applicant entered Canada and claimed refugee status.

[3] After a hearing by the Board, it concluded that he had not shown that he met the criteria for either Convention refugee status or as a person requiring protection. The Applicant does not contest this decision of the Board.

[4] The Board also concluded that the Applicant should be excluded from the status of Convention refugee or person requiring protection by virtue of Article 1F(b) of the Convention and section 98 of the *Immigration and Refugee Protection Act* (Act). Article 1F of the covenant provides as follows:

F. The provisions of this convention shall not apply to	F.Les dispositions de cette Convention ne seront pas

any person with respect to whom there are serious reasons for considering that:	applicables aux personnes dont on aura des raisons sérieuses de penser :
***	***
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.	*b.* qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés ;

Section 98 of the Act provides 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.	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.

[5] The Board concluded that the Applicant was such a person as defined in Article 1F(b). It determined that the offence for which he was convicted in the United States was a non-political offence and that the equivalent offence in Canada would make the Applicant liable to imprisonment for life. Therefore it concluded the Applicant had committed a "serious non-political crime" in the United States as referred to in Article 1F(b), thus excluding him from refugee status and status of a person in need of protection by virtue of section 98 of the Act.

[6] The Applicant challenges two aspects of this decision. First, it is said that it was wrong for the Board to consider this a "serious" crime because it only involved the sale of $40 worth of cocaine and the possession of about 5 grams of marihuana. Second, the Applicant says that an

offender cannot be excluded under Article 1F(b) if he has served his sentence for the crime, and that although the Applicant completed his imprisonment term, he only involuntarily failed to complete his probation by virtue of the fact that he was deported before its expiry. In effect, the Applicant argues that he had constructively served his sentence in the United States.

[7] In its Memorandum of Fact and Law, the Respondent contended that I should not entertain arguments based on the validity of the exclusion finding because in any event the Board had found the Applicant not to be a Convention refugee or a person in need of protection on the facts of the case and the Applicant does not dispute these findings. Therefore, there would be no point in sending the matter back to the Board for reconsideration: whether or not he was properly excluded from any possibility of a successful refugee or protection claim by virtue of the exclusion order, he was disentitled on the facts of his own case to succeed with these claims. At the hearing, counsel for the Respondent withdrew this objection and submitted that I should decide the exclusion matter because, while it could make no difference to the outcome of this case and these refugee and protection claims, if the exclusion order stands it could have an effect on the Applicant in other proceedings. For example, if the Applicant successfully applied under section 112 of the Act for protection, he could not by virtue of paragraph 112(3)(*c*) thereby obtain refugee protection if he is deemed excluded on the basis of Article 1 F(b) of the Convention.

[8] Counsel also pointed out to me that there were other decisions of this Court in which an exclusion order has been reviewed even though the Applicant has been found to be ineligible for

refugee or protection status: see e.g. *Antonio v. Minister of Citizenship and Immigration* 2005 FC 1700. I will do the same.

[9] The Respondent, however, while urging the Court to decide the matter, contends that the Board was right in its conclusion that the Applicant had committed a "serious non-political crime" and that in the application of Article 1 F(b) it is irrelevant whether the Applicant has completed his sentence abroad. However, if that is relevant, in this case the Applicant did not complete his sentence as he had not served his probation period in the United States.

Analysis

[10] In the matter of the standard of review, I respectfully concur with other judges of this Court in the view that on a question of exclusion under Article 1F, the standard should be that of reasonableness. The decision which the Board must make is as to whether "there are serious reasons for considering that … he has committed a serious non-political crime outside the country … ." This is a mixed question of fact and law and involves some discretion in assessing what is a "serious" reason: see *Médina v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 86 at paragraph 9, and other cases referred to therein.

[11] On the first issue raised by the Applicant, I am satisfied that it was reasonable for the Board to conclude that the Applicant's conviction in the United States for an offence which would carry a maximum of life imprisonment in Canada gave it a "serious reason" for concluding that he had

"committed a serious non-political crime outside the country". See *Medina, supra,* para. 23 and cases referred to therein. It was perfectly reasonable for the Board to use as a measurement of a "serious" crime the view which Canadian law takes of that offence, not the seriousness of the penalty imposed in the United States. In the Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 1180, Justice Robertson at para. 9 assumed, without deciding, that any offence for which a maximum sentence of ten years could be imposed under Canadian law is a "serious" crime. I make the same assumption.

[12] The second issue involves two aspects: can a person who is otherwise within the language of Article 1F(b) be excluded if he has already served his sentence? If not, should the Applicant here be treated as having served his sentence?

[13] Taking the second question first, because if I am right in respect to it this disposes of the matter, I am satisfied that the Applicant did not complete his sentence in the United States. He was sentenced to 29 days and five years probation. Within a few weeks of his release, he was issued a "voluntary departure order" to leave the United States with a deadline of October, 2004. In fact, he left in July to go to Canada, thus leaving unserved most of his five years probation. Counsel for the Applicant now argues, in effect, that the Applicant constructively served his sentence because he was prevented from being available for probation surveillance in the United States because he had accepted a "voluntary departure order" and left for Canada. I adopt the reasoning of Justice Noël in *Médina, supra,* who was dealing with a similar case of an applicant sentenced to 60 months imprisonment and four months probation in the United States. After 52 months of imprisonment he

was expelled to Mexico and did not serve any probation in the United States. Justice Noël concluded that he could not be considered to have completed his sentence, that probation involved surveillance which had not been conducted and that surveillance would resume if he should return to the United States where he might then complete his sentence (paras. 25, 26). I am satisfied that the same is true in this present case. See also *Rodriguez v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 601.

[14] If I am wrong as to whether the Applicant served his sentence in the United States I must then address the other issue raised by the Applicant; namely, is Article 1F(b) inapplicable to persons who have served their sentence abroad before coming to Canada. Counsel for the Applicant relies heavily on the decision of the Federal Court of Appeal in *Chan*, *supra*. That case involved a Chinese citizen who had been convicted in the United States for involvement with drug trafficking, was sentenced to 14 months, served that sentence, was deported to China, but claimed refugee status in Canada. A board had found him to be within Article 1F(b) and thus excluded from refugee status in Canada. The Federal Court of Appeal set aside that decision on the ground that Article 1F(b) applies only to those who have not completed their sentence abroad. That Court regarded Article 1F(b) as confined to excluding only fugitive offenders. There is of course no language in 1F(b) to support that qualification. The Court's interpretation would in effect add the following qualification to that paragraph: "… unless he has been charged, convicted, and sentenced for such a crime and has fully served his sentence before coming to Canada". This generous interpolation was based on what other sections of the *Immigration Act* then said. In effect the Court held that the Immigration Act would not make sense unless Article 1F(b) of the Convention was so interpreted. This reasoning has subsequently been questioned by the Federal Court of Appeal in *Zrig v. Canada (Minister of*

Citizenship and Immigration), [2003] F.C.J. No. 565. In that case, the applicant who had been involved in a terrorist organization in Tunisia was tried in absentia in Tunisia for numerous crimes, many of them not political. He sought refugee status in Canada. The Board held him to be excluded from such status by virtue of Article 1F(b). It based its finding not on the convictions made in absentia in Tunisia but on its own conclusions that he had committed at least 12 serious non-political crimes. This conclusion was upheld by the applications judge and the Federal Court of Appeal. The Applicant had argued that the purpose of Article 1F(b) was only to ensure that fugitives from justice could not avoid extradition proceedings, but the board had applied the Article to him for crimes for which he had not been convicted and in respect of which no extradition was being sought. Justice Nadon with whom Justice Letourneau agreed, found that Article 1F(b) could not be confined to excluding extraditable people: this would make no sense where the two countries involved had no extradition treaty, for example. They cited British and Australian decisions. In particular, they quoted the decision of the Federal Court of Australia (on Appeal) in *Ovcharuk v. Minister for Immigration and Multicultural Affairs* (1998), 158 A.L.R. 289. That Court found no obvious reason for confining Article 1F(b) to fugitives from justice or to people who had not served their sentences. They laid stress on the words “has committed”, meaning paragraph (b) is not confined to those who have been convicted and sentenced, but potentially covers anyone whom there are serious reasons for considering that he has *committed* a serious crime.

[15] Justice Décary, who wrote a separate but concurring opinion in *Zrig* (differing only on questions of what constitutes complicity in such a crime) also disagreed with the interpretation of Article 1F(b) in the *Chan* case. After a careful review of several authors, and of the *travaux préparatoires* for the Convention, he expressed the following views:

118. My reading of precedent, academic commentary and of course, though it has often been neglected, the actual wording of Article 1F of the Convention, leads me to conclude that the purpose of this section is to reconcile various objectives which I would summarize as follows: ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum; ensuring that the perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country; ensuring that the right of asylum is not used by the perpetrators of serious ordinary crimes in order to escape the ordinary course of local justice; and ensuring 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*. It is this fourth purpose which is really at issue in this case. (Emphasis added)

119. These purposes are complementary. The first indicates that the international community did not wish persons responsible for persecution to profit from a convention designed to protect the victims of their crimes. The second indicates that the signatories of the Convention accepted the fundamental rule of international law that the perpetrator of a political crime, even one of extreme seriousness, is entitled to elude the authorities of the State in which he committed his crime, the premise being that such a person would not be tried fairly in that State and would be persecuted. The third indicates that the signatories did not wish the right of asylum to be transformed into a guarantee of impunity for ordinary criminals whose real fear was not being persecuted, but being tried, by the countries they were seeking to escape. The fourth indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This fourth purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, *who might be in danger*

of having to live with especially dangerous individuals under the cover of a right of asylum. (Emphasis added)

…

127. With respect, I am not sure that this Court's judgment in *Chan* can be given the meaning suggested by counsel for the appellant. First, that judgment relies on *Ward* and *Pushpanathan* and on *Hathaway* as a basis, for all practical purposes, for the premise, which to me seems questionable, that Article 1F(b) applies essentially to cases of extradition. Second, it relies on ss. 19, 46 and 53 of the *Immigration Act* as a basis for concluding that Article 1F(b) does not apply to claimants who have been convicted of a crime abroad and have served their sentences before coming to Canada. Those sections do not cover the situation in which the appellant finds himself. He was not convicted of a serious offence before coming to Canada (the Minister did not argue that the trial and conviction of the appellant in absentia after his departure from Tunisia on a series of charges, which moreover were not laid in connection with the crimes here attributed to the organization of which the appellant was a member, constituted a conviction of a serious offence).

128. In short, in *Chan* the Court was dealing with a different situation and the comments it made on Article 1F(b) of the Convention must be read with caution, as the very wording of that article indicates that it applies to more than the cases covered by Canadian law in the three aforementioned sections. There is also no question, as the Court held in *Chan*, that the country of refuge can certainly decide not to exclude the perpetrator of a serious non-political crime who has already been convicted and has served his sentence. *However, I do not think the Court decided that the country of refuge could not decide to exclude the perpetrator of a serious non-political crime, whatever the circumstances, provided he has been convicted and has served his sentence*. (Emphasis added)

> 129. It is thus easy to understand why, in dealing with "non-political crimes", the courts of the signatory countries have tended to refer to extradition treaties in defining the seriousness of such crimes, and why those courts have tended to limit these "political crimes" to crimes in which the political aspect transcended everything else. It is a sort of compromise, which allows States to leave their borders open to genuine political criminals and close them to persons who have committed non-political crimes the seriousness of which, for example, approximates to crimes generally covered by extradition treaties. *It follows that under Article 1F(b) it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a State feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or not they have been convicted of those crimes and whether or not they have served the sentences imposed on them in respect of those crimes*. (Emphasis added)

With respect, I find this analysis based on the history and context of the Convention to be more relevant for present purposes than the analysis in *Chan* based on internal evidence within the *Immigration Act*. The *Chan* analysis, apart from requiring the reading in of several words into Article 1F(b) to narrow its plain meaning, was based on the premise that the Convention should be interpreted so as to make sense of Canada's *Immigration Act*, a questionable proposition.

[16] I therefore conclude that even if the Applicant were deemed to have constructively served his sentence in the United States the Board was still correct to have excluded him under Article 1F(b). In so concluding I have recognized that there are conflicting views both in this Court and in

the Federal Court of Appeal on this matter and will address this in respect of the certification of questions.

Disposition

[17] I am therefore going to dismiss the application for judicial review. I do this first because the Applicant does not contest the findings of the Board that he is not a refugee or a person in need of protection. I can therefore not set aside that part of the decision nor would there be any point in sending the matter to the Board for reconsideration. With respect to the exclusion decision of the Board, for the reasons stated I consider this to have been reasonable and, indeed, if the standard of review were correctness, I would find it to be correct as well.

[18] At the end of the argument counsel for the Applicant asked that I certify the same questions which were certified in *Husin v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1823, questions which were not answered because the matter did not proceed to appeal. Those questions were as follows:

1. Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F of the Convention?

2. If the answer to question 1 is affirmative, when and in what circumstances is a sentence deemed served, specifically does a deportation have the effect of deeming a sentence served?

Counsel for the Respondent said that if I found the Applicant had not completed his sentence, it was unnecessary to have the questions certified. He further submitted that the Applicant's departure

from the United States was voluntary and was not a “deportation”. Unfortunately, the record is not clear as to the precise circumstances of his departure. In its decision the Board said that after he had completed his jail term “he was called to an immigration hearing and issued a voluntary departure order to leave the U.S. by October, 2004. The claimant entered Canada at Windsor, Ontario, on July 5, 2004 … .” According to the memorandum of fact and law of the Applicant “less than two months into his probation, US immigration authorities ordered the applicant to leave the United States knowing that he was on probation”. It appears to me from the record that he was given the opportunity to leave voluntarily but that if he did not leave by October, 2004, he would be deported. So his departure from the United States before the completion of his probation must be regarded as involuntary. I am going to narrow the questions somewhat to confine them to the circumstances of this case. I will therefore certify the following questions:

1. Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(b) of the Convention?

2. If the answer to question one is affirmative, if a person is forced to leave the country where the crime was committed prior to the completion of his sentence does this have the effect of deeming the sentence to have been served?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review of the decision of the Immigration Refugee Board (Refugee Protection Division) of March 22, 2007 be dismissed;

2. The following questions be certified:

    1. **Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(b) of the Convention?**

    2. **If the answer to question one is affirmative, if a person is forced to leave the country where the crime was committed prior to the completion of his sentence does this have the effect of deeming the sentence to have been served?**

"B.L. Strayer"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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