Federal Court Cour fédérale

Date: 20250516

Docket: IMM-8304-23

Citation: 2025 FC 906

Ottawa, Ontario, May 16, 2025

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

GABRIEL ALVARADO PAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Gabriel Alvarado Paz, was excluded from having the merits of his refugee claim determined by the Immigration and Refugee Board ("IRB"). Both the Refugee Protection Division ("RPD") and the Refugee Appeal Division ("RAD") found that because there were serious reasons for considering that Mr. Alvarado committed a "serious non-political crime"

prior to coming to Canada, the IRB could not consider the merits of his refugee claim. Both the RPD and the RAD excluded Mr. Alvarado from refugee protection on the basis of the combined effect of Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*], and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] Mr. Alvarado challenges the substance of the RAD's exclusion finding on judicial review. The parties agree, as do I, that I ought to review the RAD's decision on the basis of a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10).

[3] Mr. Alvarado argues that the RAD's finding that his conviction for impaired driving is "serious" for the purposes of Article 1F(b) exclusion is unreasonable.

[4] I agree.

[5] The RAD's assessment of the seriousness of the crime at issue is challenging to follow. The RAD's reasoning is circular and fails to treat the "wide Canadian sentencing range and the fact that the crime for which the Applicant was convicted would fall at the less serious end of the range" as a critical factor, as is required (*Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 [*Jung*] at para 48; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*] at para 62). Accordingly, the decision is set aside and must be redetermined.

II. Procedural History

[6] Mr. Alvarado is a citizen of Mexico. He left Mexico when he was 13 years old and went to live in the United States. He did not attend school, began working, and developed an addiction to alcohol. While he was in the United States, Mr. Alvarado was convicted of a number of offences, mostly relating to driving while being impaired. He was deported from the United States several times and re-entered soon after. Eventually, in 2016, he was deported to Mexico and remained there until coming to Canada.

[7] In 2018 while at his autobody shop in Mexico, Mr. Alvarado claims that a group of armed individuals extorted him and threatened him with death when he would not comply with their demands for more money or assistance with a drug trafficking operation. He fled, remained hidden, and was eventually able to enter Canada in 2019, where he made a claim for refugee protection.

[8] The Minister intervened in Mr. Alvarado's refugee claim, arguing he should be excluded because he had committed a serious non-political crime in the United States. The Minister had the burden of demonstrating that there are serious reasons to believe that Mr. Alvarado had committed serious crimes within the meaning of Article 1F(b) of the *Refugee Convention*. The Minister relied in particular on a 2011 Driving under the Influence conviction where Mr. Alvarado received a 3-year custodial sentence, a 12-month jail suspended sentence, and a fine. The RPD agreed with the Minister and in a decision dated April 20, 2022 excluded Mr. Alvarado on this basis. The merits of his refugee claim were not assessed.

[9] Mr. Alvarado appealed the RPD decision. The only issue before the RAD was the RPD's determination that Mr. Alvarado's 2011 conviction for Driving under the Influence should be considered "serious" for the purposes of Article 1F(b) exclusion. In a decision dated June 10, 2023, the RAD confirmed the RPD's decision, and found Mr. Alvarado excluded under Article 1F(b).

III. Analysis

[10] The Supreme Court of Canada in *Febles* confirmed that the purpose of the Article 1F(b) exclusion is to exclude from refugee protection those who have committed "serious" non-political crimes (*Febles* at para 35). Two key issues often arise in these cases: i) whether the claimant committed the crime and the nature of that crime; and ii) whether the crime is "serious" within the meaning of Article 1F(b).

[11] There is no dispute between the parties as to whether Mr. Alvarado committed the crime at issue based on the 2011 impaired driving conviction in the United States. They also agree that no one was injured as a result of his offence. Mr. Alvarado's challenge is centred on the RAD's assessment of whether this crime is "serious" for the purposes of Article 1F(b) exclusion.

[12] The RAD found the equivalent offence for impaired driving in Canada to be subsection 320.14 (1) of the *Criminal Code of Canada*, RSC 1985, c C-46 [Criminal Code of Canada] which carries with it a maximum term of imprisonment of ten years. As noted by the RAD, the Criminal Code of Canada was only recently amended to raise the maximum term of imprisonment from five to ten years for this offence. Given this maximum term, following the

Supreme Court's guidance in *Febles*, the RAD found that the crime was presumptively serious. This finding is also not being challenged.

[13] The real issue is whether the RAD was reasonable in its evaluation of whether the presumption could be rebutted in Mr. Alvarado's circumstances. In *Febles*, the Supreme Court explained that the "generalization" equating a possible maximum term of imprisonment with a crime being serious, "should not be understood as a rigid presumption that is impossible to rebut." And further, that "the ten-year rule should not be applied in a mechanistic, decontextualized or unjust manner" (*Febles* at para 62).

[14] The Supreme Court confirmed the relevant factors for this evaluation set out by the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at para 44: (i) elements of the crime; (ii) the mode of prosecution; (iii) the penalty prescribed;(iv) the facts and (v) the mitigating and aggravating circumstances underlying the conviction. The Supreme Court added that where a provision in the Criminal Code of Canada "has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canda <u>should not</u> be presumptively excluded" (*Febles* at para 62; emphasis added). Justice de Montigny (as he then was) described this addition – the Canadian sentencing range and where the claimant fit in that range – a "critical factor" in the evaluation of whether the presumption is rebutted (*Jung* at para 48).

[15] In this case, unlike in *Jung*, the Member considered the Canadian sentencing range for Mr. Alvarado's impaired driving conviction. After considering Canadian caselaw on impaired driving, the Member came to the following conclusion: "I find that the likely penalty prescribed to the Appellant in Canada would likely be on the lower end of the sentencing range given that there is no evidence that any person was seriously injured or died." Despite finding that it would at the low end of a large sentencing range – the very circumstance that the Supreme Court of Canada identified as when a claimant "should not be presumptively excluded" – the Member found this factor should be given "less weight overall".

[16] The Member stated that they are giving the sentencing range factor "less weight overall" because "Canadian law allows for a maximum sentence of ten years; is viewed extremely seriously in Canadian law and increasingly so in society in general; and given the Appellant's significant history of impaired driving which would likely be an aggravating factor weighing towards a more punitive sentence."

[17] I have concerns with the justification the Member provided for assigning less weight to this critical factor. First, of the three justifications the RAD raised, two essentially repeat the rationales for why the presumption itself exists: that Canadian law allows for a maximum sentence of ten years, and that impaired driving is "viewed extremely seriously and increasingly so in Canadian society" because Canada has increased the punishment to ten years.

[18] The RAD uses the existence of the presumption as part of their chain of reasoning to find that the presumption is not rebutted. This is circular reasoning. The RAD finds that because there

is a ten-year maximum (the presumption), the fact that Mr. Alvarado would likely have received a penalty at the low end of the range should be given less weight in rebutting the presumption. This type of reasoning runs the risk of treating the ten-year rule as a "rigid presumption that is impossible to rebut", the very concern identified by the Supreme Court (*Febles* at para 62).

[19] The RAD's treatment of Mr. Alvarado's previous convictions for impaired driving also suffers from an unreasonable chain of reasoning. The RAD already found, presumably accounting for Mr. Alvarado's previous convictions of the same offence, that the sentence Mr. Alvarado would receive in Canada would likely fall at "the lower end of the sentencing range". Yet, the RAD continued to then find that this should be given "less weight" because his previous impaired driving sentence would mean he would likely receive a "more punitive sentence." This latter proposition, that the previous sentence would likely mean a more punitive sentence in Canada, appears to contradict the RAD's own conclusion that the sentence would fall at the lower end of the range. I cannot follow the Member's reasoning on this point.

[20] The RAD's decision is difficult to follow and the reasoning is circular on a key factor. Taking into account the stakes at issue – the ability to have the merits of his refugee claim considered – I find the RAD's reasons are not transparent, intelligible or justified. I am not satisfied that the RAD reasonably considered a "critical factor" in its evaluation of the seriousness of Mr. Alvarado's crime for the purposes of exclusion. Accordingly, the decision must be set aside and redetermined.

[21] Neither party raised a question for certification and I agree none arises.

JUDGMENT in IMM-8304-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision dated June 10, 2023 is set aside and sent back to a different decision-maker to be redetermined; and
3. No serious question for certification is certified.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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